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4

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FROM THE

EARLIEST PERIOD TO THE YEAR 1783,

WITH NOTES AND OTHER ILLUSTRATIONS:

COMPILED BY

T. B. HOWELL, Esq. F.R.S. F.S.A.

INCLUDING,

IN ADDITION TO THE WHOLE OF THE MATTER CONTAINED IN THE

FOLIO EDITION OF HARGRAVE,

UPWARDS OF TWO HUNDRED CASES NEVER BEFORE COLLECTED;

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467. The Trial of JOHN GRAHAM, ALEXANDER CRAWFOORD, and WILLIAM HOGG, for drinking the Pretender's Health: 1 GEORGE I. A. D. 1715. [Now first printed from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIA, S. D. N. Regis, tenta in Prætorio Burgi de Edinburgh, trigesimo primo die mensis Januarij millesimo septingentesimo decimo quinto, Per Honorabiles viros, Adam Cockburne of Ormistoun Justiciarium Clericum, Dominos Gilbertum Eliot de Minto, Jacobum Mackenzie de Roystoun et Gulielmum Calderwood de Poltoun, Magistros Jacobum Hamilton de Pancaitland et Davidem Erskine de Dun, Commissionarios Justiciarij dict. S. D. N. Regis.

Curia legittime affirmata.

Intran' John Graham, younger, of Newtoun; *Alexander Crawfoord*, younger, of Mannualmiln; and Mr. *William Hogg*, designed burges of Edinburgh, professor of philosophy.

INDICTED and accused at the instance of sir David Dalrymple of Hailes, baronet, his majesty's advocate for his majesty's interest, for drinking the Pretender's health, in manner mentioned in the criminal letters raised against them thereanent. Makeing mention, that where, by the laws of Scotland made before the Union, particularly, the 4th act of the first session of her late majestie queen Anne of blessed memory, her first parliament, intituled, Act against Leasing Makers and Slanderers, and the acts therein recited. And by the laws of all well governed nations, leasing makeing, and the uttering of slandrous speeches, tending to excite sedition, and alienat the affection of the people from his majesty's person and government, or to sett up and encourage the false and scandalous pretensions of any person to the prejudice of his majesty, his estate, and his just and lawfull title to the crown of these realms, stirring up thereby his subjects to mislikings, sedition, unquietness, and to cast off their due obedience to his majestie, to their evident peril, tinsell and destruction, are crimes of a high nature and severely punishable. And more especially, whereas by an act of the parliament of Great Britain, made in the sixth year of the reign of her said late majestie queen Anne, intituled, An Act for the Security of her majesty's person and government, and of the Succession to the crown of Britain in the Protestant line; It is amongst other things enacted, That if any person or persons shall maliciously and directly, by preaching, teaching, or advysed speaking, declare maintain and affirm, that the pretended prince of Wales, who now stiles himself king of Great Britain or king of England by the name of James the third, or king of Scotland by the name of James the eight, has any right or title to the crown of these realms, every such person or persons shall incurr the danger and penalty of Premunire made in England, in the 16th year of the reigne of Richard the second. Yet nevertheless it was of verity, that the saids John Grahame, Alexander Crawfurd and Mr. William Hogg, and each of them were guilty actors art and part of the foresaid crimes, in so far as, upon the 15th or 16th days of the moneth of December last 1714 years, a stoup with ale in it, or some other liquor, being brought to the street of Edinburgh, near to the Tron church and to the main guard, by a woman to them, and a cup filled up and delivered to the said John Grahame, he proposed the king's health, and one having asked what king? the said Alexander Crawfurd cried out, King James the eight; whereupon the said John Grahame drank to the health of king James the eight, and the cup being filled up again twice to the said Alexander Crawfurd and Mr. William Hogg, each of them did likewise drink and spoke these words, To the health of king James the eight, and not contented with their thus direct open affirming of the pretended and

usurped title by the words foresaid uttered by them, each of them the saids John Graham, Alexander Crawfurd and Mr. William Hogg, did drink to the happy resturation of the said Pretender, under the name of king James the eight; which words, To the health of king James the eight, and to the happy resturation of king James the eight, or words to that effect, they and each of them did pronounce alloud, and huzza'd at each health, dancing at the same time, and having hautboys playing to them in demonstration of their joy and affection to what they were doing, in open defiance and contempt of the laws generally and particularly above mentioned, and they were seized in the very act, or incontinent thereafter being pursued by the city guards, and the stoup and cup found in the place to which they had fled, and where they were taken, and the saids John Graham, Alexander Crawfurd, and Mr. William Hogg were immediately thereafter brought prisoners into the guard. By all which, they and each of them, were guilty actors art and part of the breach of the said laws, which, or any part thereof, being found proven by the verdict of an assize, before the lords justice general, justice clerk and commissioners of justiciary, they and each of them ought to be punished with the pains of law. And particularly, they and each of them ought to be putt out of his majesty's protection, and each of their lands, tenements, goods, chattells or moveables forfaulted to his majestie, and otherwise punished conform to the said statute of Præmunire made in England in the sixteenth year of the reigne of Richard the second, to the example and terror of others, to committ the like in time coming.

Alexander Crawfurd's Confession.

The above named Alexander Crawfurd, one of the pannels judicially, in presence of the lords and assysers, acknowledges and confesses the lybell, in so far as relates to him, and humbly throws himself in the king's mercy.

Subscribitur, ALEX. CRAWFURD.
AD. COCKBURNE, I. P. D.

Pr'ors.—Sir *David Dalrymple* of Hailes, baronet, his majesty's advocate for his highness interest; sir *James Stewart*, his majesty's solicitor.

Pr'ors in Defence.—Mr. *James Graham* and Mr. *John Falconer*, advocates.

The Lybel being read and fully debate vive voce, in presence of the said lords, pannells, and assysers, the lords justice clerk and commissioners of justiciary, ordain both parties to give in their informations, the pursuer to give in his, betwixt and Wednesday's night next, and the pannells to give in theirs, betwixt and Friday's night thereafter in order to be recorded; and continued the dyet of the said cause till Monday next at nyne o'clock, and ordained assysers and witnesses to attend then, each under the pain of one hundred merks.

INFORMATION for his *Majesty's Advocate* for his highness interest,

AGAINST

John Grahame, younger, of Newton, and Mr. *William Hogg.*

The *King's Advocate* has raised a Lybel before the lords of justiciary against the said John Grahame and William Hogg, founded upon the fourth act first session of her late majestie queen Anne's parliament in Scotland, intituled, Act against Leasing Makers and Slanderers, and the acts therein recited, more especially reciting the words of the 134 act, parliament 8th James 6th, and also founded upon the late statute made in the parliament of Great Britain, in the 6th year of her said late majesty, intituled, Act for the Security of her majesty's person and government, &c. Wherein it is amongst other things provided, That if any person or persons shall maliciously and directly, by preaching, teaching, or advysed speaking, declair, maintain, and affirm, that the pretended prince of Wales, who now styles himself king of Great Britain, or king of England by the name of James the 3rd, or king of Scotland by the name of James the 8th, has any right to the crown of these realms, every such person shall incurr the penalty of Præmunire, conform to the act made in England in the 16th of Richard the 2d.

The Lybel subsumes, that the defenders are guilty of the saids crimes, having upon the 15th, or 16th of December last, drink to the Pretender's health, under the name of king James the 8th, and also drunk to his happie resturation; and the libel mentions, that the words were pronounced loud with huzzas, having hautboys playing, and the defenders showing other marks of joy, in open contempt and defyance of the laws generally and particularly above mentioned. And that the defenders being surprised in the act by the city guards, fled, but being incontinent pursued they were made prisoners. And concludes, by all which, they and each of them are guilty actors art and part of the breach of the said laws, and ought to be punished with the pains of law. And particularly with the pains of Præmunire, viz. To be putt out of the king's protection, and each of their lands, tenements, goods, chattels or moveables, forfaulted to his majestie.

The defender premised to his debate, that the facts lybelled being denyed, he thought himself bound nevertheless to declare, that if they could be proved, they amounted to a very high imprudence, and indiscretion very blameworthy, but that every act of imprudence did not amount to a crime punishable by law.

And therefore, the first defence was that the defender John Grahame was in drink to that degree, as not to know or remember what he did.

It was answered for the pursuer in the first place, that by the common opinion of lawiers, the guilt of criminal facts is increased by the quality of the persons against whom they are

committed, and other circumstances. Therefore the same fact, which done against a person of low condition, would import but a small contempt or imprudence not punishable; yet being done against a magistrate or person in dignity, would be criminal and punishable. The same act which at one time might be innocent and inoffensive, as the drinking of a health, yet at another time may be criminal and punishable, when it is the notted badge and symbole of people that are disaffected. The same facts which would inferr but a light dignity in the cause of a private person, when they come to be applyed to the state and dignity of a king, if they be imprudent and blameworthy, are criminal. But more particularly, as to the defence, it is answered, First, That drunkenness is not properly a defence exclusive of the lybel, the only effect it can have is to make an alleviation of the sentence or punishment; drunkenness does not deny the crimes, but only excuses or seeks to lessen the guilt: Ffor, if the fact of drunkenness did afford an exemption to eleid the lybel, it would invite men to commit crimes, for it were easy for a man that is embittered with any rooted malice to get himself drunk, and in that state to perpetrate the greater wickedness.

2dly, Drunkenness is not relevant even to obtain an alleviation of the sentence, for drinking to excess is not only an imorality, but drunkenness is a crime, and he that is drunk 'versatur in re illicità,' which certainly can never affoord him a legal exemption, either against the lybel, nor for alleviating the punishment.

3dly, The drunkenness has by the custome of almost all nations, been admitted as an alleviation in cases capitall, that can take no place here, for none of the acts lybelled on inflict the pain of death. But,

4thly, Drunkenness is not relevantly proponed even for alleviation, because it is then only relevant, when it is alledged to have been to that degree, as to deprive the defender of his judgement and senses. But the lybel mentions facts that exclude the possibility of that defence, viz: The defender came with hautboys to the place, and drink being brought to him, the said John Grahame called out The kings' health, Crawford another of the company, cryed out What king, King James the 8th? upon which the said Grahame and Hogg, as well as Crawfurd, drunk to the health of king James the 8th, and after that proceeded to drink to his happy resturation. And when the guards came up, he had his senses fresh enough to run, and endeavour to make his escape. If these facts or the substance of them be proven, as they are lybelled, it were in vain, or indeed to lay a snare for perjury, to allow the defender to prove that he was dead or stupid drunk. And therefore the first defence ought to be repelled.

And whereas the defender excuses his not confessing the crime, laying the blame upon his being drunk, and having forgote; the pursuer cannot but observe, that this excuse is but an aggravation or mark of obstinacy, for the defender had never time to forget, he was taken 'in flagranti delicto,' and keept prisoner till next day that he was examined upon the facts in his presence, after which he was committed and remained prisoner till he was indicted. Where then was there time for him to forgett? He was certainly sensible of his guilt when he fled, he was taken in his flight, and has still been keept in remembrance of it.

But since the defender thinks, that his insulting of the government may be evaded or excused, it remains now, that the lords of justiciary do convince him of the contrary, by maintaining the vigour of public discipline, for indeed otherwise his tryal might have this bad effect, viz. To shew how cheap and easy the like offence may be committed in time coming, which might grow into more incurable disorders.

The 2d deffence proponed was, that the lybel is founded upon the acts of parliament of Scotland against leasing making, &c. And also upon the statute of Great Britain the 6th of the late queen, but the judges cannot proceed upon these laws joyntly, because the punishments are different. And also because, where any new penal law is made for punishing any fact punishable by a former law, the former law is superseded *eo ipso*, and since a man cannot be twice punished for the same crime, he must be punished on the last.

And to confirm this more, it was urged for the defender, that by the late act Anno 6to Reginæ, there are several things introduced for the benefite of the subject, whereof the subject would be deprived if they were to be tryed on the old acts concerning leasing makeing. As for instance the new act requires a malicious direct deed, by advised speaking, declairing, maintaining, and affirming. And it provides, that no person shall be prosecuted upon that act for any words spoken, unless information be given upon oath, within three days after the words spoken, and the prosecution be within three months after such information. A[illegible] it is against reason, that upon the same fact there should be temporary actions and perpetual actions.

It was answered for the pursuer, First, that he cannot but observe, that the crime in question being a contempt of the king's authority and title, the very defence founded upon the merciful statutes past since the Revolution, is an aggravation of the crime. There have been times when the least offence has been strained to be the highest treason, or drawn within the compass of severest laws, the constant character of tyrranie. But now by God's good providence we are under a gentler administration, the government and the people are in the same interest, and the laws demonstrate mutual confidence, the first consequence of so happy a statute.

But this gentleness of the laws is not to expose them to elusion, the laws are the more

particularly to be observed, because the punishments have been softened both in the case of leasing making, and in that of the statute of the 6th of the queen, and the same fact must be a more attrocious crime, when committed against so gentle a government, than it would be in the statute of rigour and terrour.

This being premised, it is more particularly answered, that the defence is irrelevant, ffor, First, it is no new thing, that several acts of parliament should be made for restraining one and the same delict, and that these several acts should be made the major proposition of a lybel against offenders, a matter so nottour, that it needs no particular instance to clear it.

2dly. The general rules of law in that case are against the defence, for though it be a maxime that 'posteriores leges derogant priores,' yet that is only where the posterior law abrogates or is directly contrary to the former, for otherwise a law made, or a law in possession is more favourable than a new law; the law is jealous of alterations, and admitts of them only in cases of necessity, and so far as the necessity requires. And therefore the civil law has excellently defined, that prior laws are drawn to the posterior, yet it subjoins the general caveat, 'Sed et posteriores leges ad priores pertinent nisi contrariæ sint. L. 26, 27, 28 ff. de Legibus.' And very agreeable to this and to the present case, Hermogenianus and Paulus the lawiers have said, 'Cum ex uno delicto plures nascuntur actiones, sicut evenit cum arbores furtim cæsæ dicuntur omnibus experiri permitti post magnas varietates obtinuit. L. 32 sect. de oblig. & act Quotiens Lex obligationem introducit nisi si nominatim caverit, ut sola ea actione utamur, Etiam veteres eo nomine actiones competere si ex eodem facto duæ competant actiones, postea Judicis potius partes esse, ut quo plus ea sit in reliqua actione id actor ferat. Si tantum idem ut minus id consequatur L. 4 eod.' And so the same Paulus,' Si furtim arbores cæsæ sint et ex Lege Aquiliâ et ex duodecim tabularum dandam actionem Labro ait. Sed Trebatius, ita utramque dandam ut judex in posteriore deducat, id quod ex prima consecuta sit et reliqua condemnet,' and it is observable, that the actio arborum furtim cæsarum,' and the action 'ex lege Aquilia' were both penal, and had different penalties. That if the 'Lex Aquilia' was to repair the damnage, according as the thing had been of greatest value for a moneth before the thing happened, which very often was much more than the real value, and the action 'arborum furtim cæsarum' was given in 'Duplum deductâ prius arboris cæsæ estimatione.' Nay, besides these actions, there was yet a further punishment upon a separate fundation, 'secundum est autem eos qui arbores et maxime vites ceciderint, etiam tanquam latrones puniri. L. 2d eod.'

To apply this to the present case, whereas the defender pretends, that the former laws concerned leasing making are superseded by the new law, Anno 6to Reginæ, if the said statute Anno 6to Reginæ does extend to the punishment of the same facts:

It is answered, First, that the defender's proposition is contrair to the authority of the foresaid laws and reason itself.

2ndly. If the facts shall be found to fall within the statute Anno 6to Reginæ, Then according to the principles of the Civil Law above mentioned, the defenders being punished conform to the statute Præmunire, there will be no occasion for the judges to apply the punishment of the laws made against leasing making, unless the circumstances being proven so attrocious, shall deserve a further correction, and in that case upon the fundation of the laws above cited, the judge is to proceed.

And 3dly. It was necessary to found the lybel upon both laws, because the act of the 6th of the queen being a new statute, it was easily forseen, the defenders would endeavour anxiously to alledge that the facts lybelled do not fall under the compass of that statute, as indeed they have done, tho without any solid foundation.

And whereas it was further alledged, that the statute of the 6th of the queen, contains a benefite to the subject, which cannot be eleided by trying the crime on the old statutes against leasing making:

It is answered, that the defender mistakes, for first as to the words, 'maliciously directly by speaking, shall maintain, declare, and affirm;' these contain no new benefit to the subject, for all laws imposing pains upon any fact or offence, do expressly or tacitly require malice, 'deliberatum propositum,' and where the offence consists in words, it must be by maintaining, declaring and affirming, which contains denying in the sense of the statute, as appears by the words that immediately follow, 'and affirm that our soveraign lady the queen is not, &c.' and therefore these words contain nothing new.

2dly. As to the provision, that no person shall be prosecuted but upon sworn information of words within three dayes after they are spoken, and prosecuted within three moneths after information:

It is answered (1mo) that the words of the statute are, 'that none be prosecuted by vertue of this act, and that none be convicted by vertue of this act.'—And therefore indeed, if the pursuit were founded upon a sworn information, and only upon that act, something might be said, why the defender should not incurr the penalty of Premunire, unless the sworn information had been within three days, and the prosecution within three months.

But the case is, the defender was taken *in flagranti delicto*, brought prisoner in to the guard, where he was keept till he was brought before a magistrate, and there the witnesses were brought face to face to declare the facts, in order to the question, whether he should be set at liberty or committed. The facts appearing nottour, as far as in that case was necessary, in order to the question of imprisonment;

they were imprisoned, where he remained till he was indicted. If the committment was legal of a person thus seased *flagranti delicto*, then the prosecution must certainly be legal, because being committed for that crime, he cannot be delivered but by due course of law.

And the case of the statute is, where words were spoke, and are not presently challenged, the challenge must begin by a sworn information within three dayes, for these kinds of insults being of the nature of injuries by the civil law, and in good reason the action ceased if there 'dissimulatio injuriæ.' That is, 'si quis 'injuriam ad animum non revocaverit.'—The statute thinks, that running of three days, without any sworn information against the offender, or three months without prosecution, is sufficient evidence that the government passes over the injury, so far as not to insist upon the statute of Præmunire. But the defender being taken *in flagranti delicto*, is not within the cage of the provision; the government instantly 'revocat ad animum injuriam,' the offender was taken in the offence, and there needed no information to be sworn against him, but if there had, the same fact being punishable by the law of England, as a misdemanour, as undoubtedly it is, the criminal pursuit for such misdemanour still remains, but must be prosecuted according to the laws of Scotland, and that indeed can only be upon the foundation of the acts against leasing making.

To shutt up then what concerns the Answer to this Defence, it is plain, that the lybel as it is conceived, is very regular and well founded, and that the laws of leasing making are not superseded by the act of the 6th of the queen: And that therefore it was necessary to lybel both: as also, that the defender being tryed upon the statutes of leasing making, suffers no imaginable damage.

And whereas, it was further alledged, that the lybel does only conclude the pains of the British statute.

It is answered, that the lybel is expressly founded on the acts of leasing making, and in the subsumption says, 'it is of verity, that the said defenders are guilty actors art and part of the foresaid crimes,' and after the narration of a great part of the facts, follows these words 'in open defyance and contempt of the laws generally and particularly above mentioned' and a little lower, 'they and each of them are guilty of the breach of the said laws which or any part thereof being found proven, they ought to be punished with the pains of law.'

And the reason why the pains of Premunire are more particularly expressed, is because the statute being new and less known, and referring to a statute in the time of Richard the 2nd, It was thought a favour to the defenders to transcribe out of that statute the words which concern the punishment. But from thence to restrain the lybel to the case of the statute of the 6th of the queen, is so manifestly against the tenor of the lybel, that the defenders must be put in mind of what the lawyer says, "L. 19 sect. ad exhibendum non oportere. Jus civile calumniari, neq. verba captari, sed qua mente quid diceretur anima advertere convenire."

The third defence propouned was, that the lybel is founded on the acts of leasing making, and the foresaid statute of the 6th of the late queen. And *ita est*, that the facts lybelled, fall not within any of these statutes.

And first, the statute Anno Sexto Reginæ is in these words, that if any person or persons, shall maliciously and directly by preaching, teaching or advysed speaking, declare, maintain and affirm, that the pretended prince of Wales hath any right or title to the crown; it is agreed, say the defenders, that here is no preaching or teaching, the question is as to advysed speaking 'nuda emissio verborum,' and there the benignity of the lawgiver, knowing how much men are liable to escapes without malice or premeditation;

2do. How apt witnesses are to mistake words or to forget when things are not recently brought to prosecution. Therefore the law requires these qualities, First, that the words be spoken maliciously. 2ndly, Directly. 3dly, Advisedly, and 4thly, That this may the more clearly appear, the words are "by advysed speaking, declare, maintain and affirm," declare, that is, openly and publicly, maintain, in the sense of the English law, is by argument to defend or to support, affirm, is to conclude and plainly to assert, and all these must concurr.

3tio. The information must be given within three dayes, and the prosecution must be within three months.

4to. The case of advysed speaking is separated in the law from that of preaching and teaching, for as to speaking, the information must be sworn, and the prosecution within the time above mentioned. And in the first words 'shall by preaching, teaching, or advysed speaking' there is a disjunctive particle (or) to separate the case of speaking from the former two, which confirms also, that the three qualities (declare, maintain and affirm) are to be taken conjointly; ffor the lawgiver having used the disjunctive particle so immediately before, would certainly have repeated it there, if it had not been intended that those three must concurr joyntly.

And thus the defenders imagining, that they have established the sense of the law, for application pretend, that there was no malicious speaking, nor is malice so much as lybelled, nor any fact to qualifie it.

2ndo. There was no advysed speaking, the defender being young, came to the street in the heat of drink, and uttered the words lybelled.

3tio. There is no declaring, maintaining or affirming, what is lybelled are transient words.

And as to the substance of the fact,

1st. The drinking of a health to any body is forbid by no law, and it is of itself innocent.

2do. The drinking a health to the king, not adding of Great Britain, does not imply the drinking of the Pretender's health.

3tio. The drinking to king James the 8th,

without the addition of Scotland, does not come within the statute, where the title is repeated in these words, (or king of Scotland by the name of James the 8th.)

4to. Even the drinking to king James the eight, is *demonstratio personæ*, but no asserting of a right, for thereby could not be meant an assertion of his title to the crown of Great Britain, seeing there can be no title to the crown of Great Britain under that name, nor could thereby be meant the crown of Scotland, because since the Union, the distinction and name of England and Scotland faill.

5to. Neither will the drinking to king James the eight, joyned with what follows 'and to his happy restoration,' import an affirming of his right to these realms, on the contrary, it implyes, that at present the Pretender has no right, and can only have a right by a law to be made for his restoration, for when a person is forfaulted and restored *per modum gratiæ*, that in the sense of the laws of Scotland is called a restoration, and seeing the word 'restoration' is capable of a safe interpretation, it is according to the maxims of all laws to be taken in that sense, that shall not inferr a crime.

And the defenders did especially insist upon that, that here were no words directly affirming the right of the Pretender, it is but an affirmation by implication, which in matter criminal is not to be allowed.

Before the pursuer make answer to this way of arguing, he must not only put the defenders in mind of the words just now cited, "non oportet jus civile calumniari neque verba captari, sed quâ mente quid diceretur animadvertendum." But further of another maxim, "contra legem facit, qui id facit quod lex prohibet, in fraudem vero qui salvis verbis leges sententiam ejus circumvenit," Lex 29; Sect. de Legibus; this in another part of the law is so expressed, "Non dubium est in legem committere eum, qui verba legis amplexus contra legis nititur voluntatem: nec pœnas incertas legibus evitabit, qui se contra juris sententiam sævâ prærogativâ verborum fraudulenter excusat," L. 5, Cod. eod.; and that this was agreeable to our law, may be seen in the act 108, parliament 7th James the 1st, and others made against the depravers of the acts of parliament.

It is then more particularly answered, to all the refined observations upon the words of the acts of parliament,

First, that never was there a more plain, open, malicious, direct, advysed, maintaining, declaring and affirming the title of the Pretender.

And first, as to the quality of the malice, *dolus* or *malitia* being *actus animi*, it is in law presumed from the facts, and is not by itself the object of probation.

2do. The defender mistakes the meaning of the law, for these several words of malicious, direct and advysed speaking, maintaining, declaring and affirming, are no otherwise to be taken separately, than as they contain a description of an odious fact with exaggerations that belong to it; as for instance, can the asserting of the usurped title advysedly, be different from doing it maliciously? Or can the asserting advysedly and maliciously be different from doing it directly? Can one maintain and declare what he does not affirm.

It is then certain, that the words of the law are to be taken in this sense, viz. The affirming of the title of the Pretender inferrs the punishment of the law, and because this affirming may be done by wryting or speaking, and that speaking may be done by preaching, teaching, or any other way, whereby in words the intention of the offenders is plainly signified, the law has made use of variety of words, to express one and the same crime, for the crime does not consist in any form of pronouncing of certain words; it consists in the asserting of the title of the Pretender, which whoever does in whatever form, does maliciously, directly and advysedly, declare, maintain and affirm his right.

3dly. That the circumstances lybelled is such an affirming, will appear to any who considers,

First, there are certain facts to which custome hath affixed a determined sense, and there is none whereof the use and meaning is more incontestedly understood, than that of drinking healths; is any man so ignorant as not to know that the going to a publick place and drinking the king's health, is a publick acknowledgement of his authority, as well as a wish for his long life? Is not the common form of "Long live the king," a formula of homage known both in sacred and prophane history? And is it any more than the drinking of a health? Peers do their homage by swearing directly, those that have offices by taking the oaths; but the body of the people have no other way of expressing their homage, but that acclamation, "God save the king;" it were fruitless to bring more reasons in a plain case.

2dly. As the drinking of the health under that designation and style, is in the common acceptance an acknowledgement of the Pretender's title as king James, so the assuming of that title is the cause of his attainder; the title of king James the eight, is one of the usurpations whereof the act complains, and the words are, "He takes the title of king of Scotland, by the name of James the eight," and therefore the drinking of a health to any person under that name by a Scotsman upon the street of Edinburgh, though he did not add the words "of Scotland," can import nothing else, but the drinking to his prosperity as having that right, which is directly and maliciously to affirm his title.

3dly. The circumstances likewise confirm this, it was not affirming for argument sake, there was no dispute in the case, it was not affirming *ex calore iracundiæ*, there was no quarrel nor contradiction, it was a deed deliberately done. The defender came with his accomplices to a certain place of the street, where he thought fitt to halt, he came with musick, least the unusual time in the morning might conceal

his intention, liquor being brought, the health is first in general terms proposed, but proposed aloud, the health is explained, and then and not till then it is drunk by the company with huzzas, musick and dancing.

What can be malicious, direct and advysed, if this is not so? What can a private man do to show his maintaining, declaring and affirming the right of the Pretender more open? If he had gone a step or two further, he had gone into another *species criminis*, but he has no further intention but to affirm it, in a way to insult the government, and in a manner to provoke it, in that view he has done enough to satisfie his malice and incurr the punishment of the law, though he had not added what follows.

But 4thly, the defender did not only drink to the health, or cryed, Long live king James the eight, but he drank to his resturation, nay to his happy resturation, which in the sense of the defender, joyned to his owning him under the style of king James, was a further assertion of his right, and an evidence that the title of king was not given by him as the bare demonstration of a person, but as a declaration of his assent and affection to that title, and desire to have it restored.

The poor equivocation upon the words "restored" and "restoration," ought not really to have been offered in Court. It is a maxim in grammar, law, and common sense, *verba valent usu*, "happy resturation" is an expression which came in fashion in the year 1660, to signifie a resturation *per modum justitiæ* of a lawful prince against usurpations; in which sense it has been constantly taken, and therefore to apply the same words of happy resturation to the case of the Pretender under the name of king James the eight, what is it else but to describe his majestie's title as an usurpation, and the title of the Pretender as a matter of right? Can there be a happy resturation in prejudice of a lawful title? Certainly no, and therefore he who drinks first to the Pretender under the name of king, and then drinks to his happy resturation, does as far as it is possible (men without coming to an open rebellion, can or dare) most ungratefully deny his majestie's undoubted just and lawful title, and most falsly and openly declare for an usurped title.

And to pretend, that this is to make up crimes by innuendoes or implications, is so poor a shift that one can hardly think it worth the noticing. Is the paying respect to any person under a title or dignity, an innuendo only of the acknowledgement of that title? Or is it a direct acknowledgement? It is not a constitution of a title indeed, but an acknowledgement of a title it must be. The king of France when the war broke out, had done no more but owned the Pretender under that title as amongst the rest, under which this health was drunk, and that time at most he had only wished his resturation. The king of Spain was in the like case, they did no more as being kings to own him, than the defender had done, as being a privat man, and yet this owning the title, has been constructed a declaring of his right, and one of the causes of a bloody war. What the king of France did some years afterwards to restore, was but a consequence of his owning him, and to the defender's power as a privat man, there is no doubt he would do the same; if this insolence be not checked by a process, as that was by a successful warr, and so "si magnis componere parva licet;" if the injustice done by a great prince was punishable by warr, which is a kind of process *jure gentium*, the insolence done by the defender should be vindicated by this process, the proper way of proceeding against ungrateful citizens. And here, by the bye, let it be observed how triffling the excuses for defender are, having medled with such edge tools, and titles as have already set the world a fyre, and now pretend to turn his offence into a jest.

The second branch of the defence is, that the defender falls not under the laws for leasing-making, because these concern only the case where subjects are belyed to the prince, or the prince to the subjects, but there can be no such thing pretended here, unless it be by innuendo, which the defender by no means will admitt, seeing there was nothing said directly of the prince nor of the people.

It is answered as to this poynt, that leasing making in its original, was nothing but the telling of falsehoods to engender discord between the king and his people. It is the general name of every injury tending to sedition or discord, as misdemannours is in the customes of England. And *stellionatus* is the common name of private crimes in the Roman law; but now the facts in question are leasings made, viz. that there is such a person as can be called king James the eight, by a Scotsman. That his resturation will be happyness. What can more properly be said to fall under these words, That all leasing makers and tellers of them, whilk may engender discord between the king and his people, &c; the essence of the crime consists in the telling of lyes that may engender discord; and therefore it was the same crime to belye the people to the king, as to belye the king to the people, Ja. 5th, parliat. 6th, cap. 83. It was not matter of what nature the falsehoods were, if they were intended to promote discord, and so the spreading of evil bruit or fame against the king of France or his subjects, was found leasing making, by the 60 act, 6 parlt. Q. Mary, and speeches in prejudice of his majestie's parents and progenitors, was understood to be leasing making, in the sense of the act of parliament, 134 act, parliat. 8th, James 6th. By all which it is plain, that the essence of the crime does not consist in speaking against the king, but in speaking falsely to engender sedition to the contempt of the king's authority, state and dignity, as may further appear by the 10th act, parliat. 18th, Ja. 6th, and by 9th act, parl. 20th, Ja. 6th. Where the uttering of slanderous speeches or wrytings of the estate, people, or

country of England or councellors thereof, tending to the remembrance of ancient grudges, whereby hatred may be fostered, and mislikeing raised between his majestie's subjects of this island, is made criminal under the name of leasing making. So that there can be nothing more evident, than that the crime of leasing making consists in uttering false and scandalous speeches, tending to stirr up his majesties subjects thereby, to mislikeing, sedition, unquietness, and to cast off their due obedience to their king, to their peril and tinsel.

2dly, The facts lybelled are such, for what speech or deed can shew more contempt to the majestie of the king, or what can more endanger his estate than the publickly owning the title of another, and wishing his happy resturation? What can more stirr up the people against his lawful authority, than the disputing of his title? Or what can more clearly invite an unnatural invasion, whereby this country should be made the scene of blood, cruelty and vastation at the hands of people whose religion divest them of all faith, mercy and pity, to those whom they falsely reckon hereticks, than the publick profession of a desire to have a declared enemy to our religion and our happy constitution, upon which our laws and liberties depend, restored?

It scarce deserves mentioning what the defender so often observed, That the acts against leasing making were odious, for so they were indeed, as all powers in the hands of enemies, or the hands of a government engaged by religion and mistaken principles, against the interest sacred and civil of the people, then indeed the acts of leasing making were strained. But since the happy Revolution that grivance amongst many others has been removed. What was useful in the acts of leasing making, and indeed all that concerns the present question, is preserved by the act 4th parl. 1703, the bitterness of the punishment is restrained, and so the odiousness of the law taken off. Nor can these laws be said to be old and obsolete, which have been so lately under the consideration of the legislature and approven.

To conclude then in the words of the forcited 134 act of the 8th parl. Ja. 6th, tho' his majestie continues in love and clemencie towards all his good subjects, and most willingly seeks the safety and preservation of them all, and his servants in his name proceed with the same regret against the guilty, yet seeing the law and authority must be vindicated against open insults obstinately justified, there can be no doubt but the Court will sustain the lybel, and find that the drinking a health to king James the eight in the open streets with huzzas, and the drinking of the said health, or to his happy resturation, relevant to make the defenders guilty of the crimes and according to laws libelled.

This debate being as to Mr. Graham for whom compearance only was made, and Mr. Hogg the other defender having for himself craved the benefite of the same defences which the Court allowed, the Lord Advocate repeated the same answers.

Sic Subscribitur, DAVID DALRYMPLE.

February 5th, 1715.

INFORMATION for John Grahame, son to Mr. James Grahame of Newtoun

AGAINST

His Majestie's Advocate.

His *Majestie's Advocate* has been pleased to raise and for his highness interest, to insist in a criminal process before the lords commissioners of justiciary, lybelling upon the acts of the parliament of Scotland, made against leasing makers and slanderers; but more especially, upon the statute made in the parliament of Great Britain in the 6th year of the late queen, intituled, "Act for the Security of her Majestie's Person and Government." Wherein it is amongst other things enacted, That if any person or persons, shall maliciously and directly by preaching, teaching or advysed speaking, declare, maintain and affirm, that the pretended prince of Wales, who now styles himself king of Great Britain, or king of England by the name of James the third, or king of Scotland by the name of James the eight, has any right or title to the crown of these realms, every such person shall incurr the penalty of Præmunire. And subsuming that the pannel is guilty of these crimes, in so far as he drank to the health of king James the eight, and to the happy resturation of the said Pretender, under the name of James the eight. Which words, to the health of king James the eight, and to the happy resturation of king James the eight, he did pronounce aloud and huzza'd at each health, dancing at the same time, and having hautboys playing. And concluding the pannel is guilty of the breach of the said laws, and therefore ought to be punished with the pains of law, and particularly, that he ought to be put out of his majestie's protection and his lands, tenements, goods, chattells, or other moveables forfaulted.

It may appear even from the lybel, that whatever was done by the pannel the time therein mentioned, was the consequence of a debauch by too much drinking, and no deliberate act. So that the pannel not remembring what had passed, denyed the lybel; and in his defence, it was alledged, That however the fact charged upon him, was a very great folly and indecency, yet he could not for it be convict, upon the laws generally or specially mentioned in the libel.

For 1mo. As to the act made in the parliament of Great Britain, entituled, "Act for the Security of her Majestie's Person and Government," the necessary requisites for prosecuting any person upon that law, for words spoken, were not in this observed, there having been no information of such words given upon oath, to one or more justice or justices of the peace, within three dayes after such words spoken.

2do. The words said to be spoken by the pannel, do not fall under the description of that act, which enacts, That if any person shall maliciously and directly, by advysed speaking, declare, maintain and affirm, that the pretended prince of Wales, who now styles himself king of Great Britain, or king of England by the name of James the 3d, or king of Scotland by the name of James the 8, hath any right or title to the crown of these realms, shall incurr the penalty of Præmunire. And the drinking of king James 8th's health, and the drinking to his happy resturation, is neither a malicious nor direct declaration, maintainance or affirmation of his right and title to the crown of Great Britain, and the lybel does not bear, that these words were maliciously spoken, or that the pannel did thereby declare and maintain the pretended prince of Wales had any right.

3tio. The act requires, that the words whereby the right in the Pretender is affirmed, be advysedly spoke. But the pursuer has laid no qualification in his lybel, from whence it might be inferred, that these words were advysedly spoke; on the contrary, the pannel is brought in drinking, huzzaing, dancing on the streets and the like, all which circumstances are inconsistent with deliberate and advysed speaking.

And as to the other acts against leasing makers and slanderers lybelled upon, it was alledged for the pannel, That these acts were superceeded and innovate by the foresaid statute of the parliament of Great Britain, in consequence of the 18th Article of the treaty of Union, whereby it was agreed, That the laws which concern publick right, policy and civil government (as the old Scots acts certainly do) might be made the same throughout the whole United Kingdome. And supposing that the Scots acts were still in force, which cannot well be admitted off, for the reasons that shall afterwards be more fully explained, yet the facts charged upon the pannel, are nether slandering the king to his subjects, nor the subjects to the king, which is the description our law gives of leasing making, and whereby such slanderers do incurr the penalties mentioned in these acts.

This is the sum of the defence, and therein the pannel humbly conceives he is much supported by the great length to which this argument is drawn, in the pleadings and informations on the other side in civil cases, which cannot all be comprehended under the express words of positive law; there is place for inferences and conjecture, but it is the happiness of our constitution that such facts as are criminal are plainly and clearly forbid by our statutes, and therefore need little argument to make them plainer. The law speaks for itself, and if this is the case of our criminal laws in general, it is more particularly to be noticed, where the law concerns words said to be spoken, and requires that such words be direct and advysedly emitted.

Whither this fact charged on the pannel be so or not, will appear from a more particular examination of the answers made to his defences in the method as they are set down in the pursuer's information.

The pannel then in the first place having alledged, that he was in drink the time when he is said to have spoke the words lybelled; the pursuer premises to the answer a general observation, that crimes are aggravated or lessned with respect to the quality of the persons against whom they are committed, and the observation is certainly just, but then the law upon which the party offending is to be convict, must first make the fact a crime, and that is the poynt which the pursuer is to make out; and here the pannel would not be understood, as if he meant that the fact charged against him was not an offence, but what he concludes is, that it is not an offence falling under the description of the laws mentioned in the lybel, and even though it were, the defence of drunkenness is relevant totally to exclude the lybel, and not as an alleviation only.

For tho' as the pursuer observes, drunkenness does not take off the fact, yet it takes off the greatest crimes as much as fury of fatuity, because such persons are incapable to consent or to adhibite a free act of the will, but there can be no doubt in this matter if the nature of the libel is considered, which is laid against the pannel upon a statute requiring malicious and advysed speaking. And therefore it is, that our famous lawier sir George M'Kenzie, in his observations upon the act 2, sess. parl. 1st Charles 2d, entitled, Act for Preservation of his Majestie's person, where the same words of preaching and malicious and advysed speaking, whereby a party expressed or declared his treasonable intentions in the matters by that law forbid is declared treason, says, that such as were drunk when they spoke those words, are not punishable by this act.

But the pursuer says, drunkenness is not relevantly proponed, because the pannel does not alledge he was drunk to that degree, as to be deprived of his judgement and senses.

It is answered, that the Defence needs not be so qualified, because the fact objected against him is malicious and advysed speaking, which any degree of drunkenness is sufficient to exclude, so as to save the defender from being convict upon the laws lybelled upon. And the insinuation, that the pannel could not be drunk, because he was able to go off when the city guards appeared, is not concluding, unless the pursuer subsume, that every party who walks is not drunk, and is capable of deliberate thinking and speaking, which the pannel cannot admitt.

The order of the Defence and pleading leads the pannel in the next place to take notice of the Answer, to what was objected against the defect of the pursuer's lybel, in so far as it is founded upon the British statute, which bears that no person shall be prosecute by vertue of that act for any words spoken, unless the information of such words be given upon

oath, to one or more justices of the peace, within three dayes after such words spoken. And the fact being acknowledged, that no such information was given within the time limited, the pursuer endeavours to eleid the objection by a distinction, which is no where to be found in the law, and seems to be obviously against the intent of it.

For the law says, no person shall be prosecuted for any word spoken, unless the information of such words be given upon oath within three dayes, and the pursuer says, a person may be prosecute without such information if he is taken 'in flagranti delicto,' but where this exception or distinction is founded, the pursuer has not shown. And therefore the rule takes place, 'ubi lex non distinguit 'neque nos.' And this serves likewise to clear what the pursuer further urged, that the statute only concerned the case where words were spoken and not presently challenged. In which case there is need for an information upon oath within three dayes. And if such information is not taken, the crime, which is of the nature of an injury, is presumed 'sospite dissimula-'tione.' Which presumption is eleided by the immediat attachment and committment of the criminal, from which he cannot be dismissed without order of law, and therefore is bound to answer to the fact for which he is attached and committed.

But still all this is offered *sine lege*, and if the pannell is bound to dip into the reason, upon which the law is statute, it will appear to be no more than this, that words spoken are lyable to many misconstructions. And the omitting or inserting or misplaceing of a small particle, may alter the whole sense and meaning of what was spoken, which the hearers may *ex intervallo* make up, according to their apprehension at the time, and thereby involve a party very innocent in the heavy penalties of Præmunire. Which the law-giver has endeavoured to prevent, by requiring that an information upon oath be taken before a judge within three dayes, otherwayes that no prosecution be made by virtue of that act, for words spoken; the pannel does not indeed well comprehend the force of the argument, drawn from the laws about dissimulation of injuries: this were to put a very unnaturall explication upon the act of parliament, and a reflection upon the legialature, to think that the not prosecuting a crime for the space of three days, should inferr a dissimulation of the injury upon the government's part, nor does the pursuer advert that there can be no dissimulation of any injury, but where the injury is known to the party who is said to dissimulate; yet the act of parliament makes no distinction, whither the crime be nottour or known to the government or not, but simply statutes without distinction of circumstances, that the information must be upon oath within three dayes. The second part of the provision of the act does indeed seem to be founded somewhat upon the pursuer's reasoning, that if the prosecution be not within three moneths after information made to the government, a dissimulation is inferred. But it is plain, the first part about the information upon oath within three dayes, is mainly if not allenarly insert, to prevent wavering or uncertainty in the evidence that may be adduced against the party informed upon, as is clear from the first part of the statute concerning writing, to which no proviso is added, and this meaning so evidently founded in the letter of the law, has obliged the pursuer to go to another argument, that supposing such information within three dayes were requisite, yet the same being punishable by the law of England as a misdemannour, the criminal pursuit for such misdemannour still remains, must be prosecuted according to the laws of Scotland, that is upon the acts against leasing making, which the pursuer has lybelled.

This the lords will perceive seems to be a giving up of the British statute, and restriction of the lybel to the law against leasing making and slanderers; which shall be examined in its due place; but the pursuer did notwithstanding proceed to impugne the other reasons offered for the pannel, why the fact lybelled does not fall under the description of this statute. The pannel to evidence that he is equally founded in all his defences, shall like proceed to reply, which that he may do the more clearly, he begs leave to resume the substance of his Defence.

The law requires, for founding an inditement upon this act, that the person indited for words spoken do thereby maliciously and directly declare, maintain, and affirm, that the pretended prince of Wales, &c. hath a right or title to the crown of these realms. The pursuer has not lybelled, that the pannel did maliciously emitt or pronounce the words lybelled, or that he thereby did declare and maintain, that the pretended prince of Wales, who styles himself, &c. had any right or title to the crown of these realms, and therefore this lybel must fall, and the pursuer must argue, that these words which are omitted in the lybel, were not necessary to have been in the statute. But to sustain this argument, were of very dangerous consequence, for at this rate the law would be rendered altogether uncertain, and if one word be omitted why may not another? Or why may not an equipolent word be substitute? And so by degrees the whole tenor of the act may at length come to be changed.

2do. As the lybel is thus deficient, so these words of the act, which are subsumed upon, are not relevant. Because although the pursuer has said that the pannel advysedly spoke, yet he adds no qualification, save such as do manifestly exclude advysed speaking, and if this was advysed speaking, the pursuer is desired to say what is unadvysed speaking.

3tio. The words subsumed upon, are not a malicious direct declaring, maintaining, nor so much as affirming, that the pretended prince of Wales, who now styles, &c. had any right to

the crown of these realms, and this can no better appear, than by setting down such words as the fact lybelled would have been a direct contravention of, that is, if the law had enacted that no person should drink to any man's health under the name of king James the eight, or that no person should drink the happy resturation of king James the eight, under the penalty of Premunire, but there is no such prohibition found in this law. And therefore, however the fact may be culpable, yet it is no direct affirmation, that the pretended prince of Wales has any right to the crown of Great Britain. And therefore the pannel cannot be subjected to the penalty of a Præmunire by that statute.

This will further appear if it is considered, First, that the crime is not laid in drinking of the health, but in the pronouncing of the words king James the eight, and to the happy resturation of king James the eight, which properly speaking is no affirmation, but only a compellation. And therefore

2do, The only argument that can be offered for supporting this part of the lybel, is that the designation of any person by the name of king James the eight, implyes an affirmation, that the person so designed has right to the crown of these realms. But then this is only an innuendo or inference, which does not come up to the words of the law, even as the pursuer has defectively lybelled them, that is, a direct affirmation, that the pretended prince of Wales has right.

3dly, The words lybelled cannot so much as imply this affirmation, because there is no *demonstratio personæ* in the words lybelled, to whom this designation is applyed,

And 4thly, The happy resturation of king James the eight, supposing it to be meant of the pretended prince of Wales, does rather imply a want of right, than that he hath any; for so the usual law phrase is in the case of resturation of the heir of a forfeit person, 'per modum gratiæ' against his father's forfeiture, and yet no man will say, that the affirming that this appearand heir is restored, is the affirming that he had a right before such resturation 'per modum gratiæ.'

The pursuer before he answered to these defences, putts the pannell in mind of what the law sayes, 'contra Legem facit, qui id facit 'quod Lex prohibet, in fraudem vero qui salvis 'verbis sententiam ejus circumvenit.' L. 29, Sect. 'de Legibus, and in another part, non dubium 'est in Legem committere eum, qui verba 'Legis amplexus contra Legis nititur voluntatem, nec pœnas incertas Legibus evitabit, qui 'ac contra juris sententiam sævâ prærogativâ 'verborum fraudulenter excusat.'

But to what purpose is the pannel minded of these rules, if the pursuer himself forgets them? Is the pannel to be tried upon the direct words of the law? If this is the case, there was no occasion for adducing such rules, but if leaving the words of the law, the pursuer intends, that the pannel shall be tryed upon the meaning, as the pursuer is pleased to gather it from inferences and innuendos, then the words of the statute do manifestly reclaim, since he is only guilty of what is therein forbid, who directly by advysed speaking, declares, maintains and affirms, that the pretended prince of Wales, &c. has right to the crown of these realms.

But more particularly, the pursuer answers, that there was no need of taking notice of the word maliciously in the lybel, because *dolus* or *malitia* being *actus animi*, is in law presumed from the facts, and is not of itself the object of probation.

But the pursuer in this place mistakes the argument, for the question is not how far, if the speaking maliciously had been subsumed upon the facts lybelled, it would have been relevant to inferr the malice, but the objection is, that the pursuer has not in his lybel said, that the pannel did maliciously affirm. And therefore this malice can neither be qualified by a positive proof, nor from any thing that is inferred from the facts, and yet without this qualification, the subsumption can never come up to the terms of the law. But 2do. There is indeed nothing that can be inferred from the fact as it is lybelled, that there is any propense malice in what was said; for these circumstances, which the pursuer brings to make out this malicious designe, that it was done upon the high street, that it was done with huzzas, drinking, dancing and musick, are of no import, the words are said to be spoke in the quietest time in the night, in the street indeed, but when no body was to hear; with drinking, but this was the cause of the folly; with dancing to musick, which might heighten the spirits already so much raised by drink; and the musick the city waits that were occasionally mett, while going their round. If these be circumstances which infer malice, or if they rather exclude malice, the pannel humbly submitts to the lords.

But the pursuer further excepts against the meaning of the several words anxiously sett down and conjoined in the law, namely, malicious, direct, advysed speaking, maintaining, and affirming, are no otherways to be taken, than as they contain a description of an odious fact with aggravations belonging to it, ffrom whence this consequence is endeavoured to be drawn, that a direct affirming is the same thing with a malicious declaring, and that again equipolent to be advysed speaking, so that if any of these be in the libel, it is the same as if the whole qualifications of the act were insert. But then the pannel would know why all these words are expressed jointly in the law?

2dly, The pannel does deny, that these several words are of the same import. A simple affirming of a position is far different from a maintaining it, which the law of England, as my lord Cook remarks, defines to be the supporting by argument or money.

3dly, A man may directly affirm a proposition, as he does, that is in drink or fatuous, or in the heat of anger, and yet it cannot be said,

going debate thereupon, They find the said pannells or each of them, their drinking of king James the eight his health, or drinking to king James the eight his happy resturation, at the time lybelled, separatim, relevant to inferr an arbitrary punishment. And repell the defences proponed for the said pannells against the said lybel as restricted, and remitt the pannells and lybell as found relevant to the knowledge of an Assize.

Sic Subscribitur, AD. COCKBURNE. I. P. D.

Sir David Dalrymple of Hailes, his majestie's advocat for his majestie's interest, judicially restricts his lybel and conclusion thereof to an arbitrary punishment.

Sic Subscribitur, DAVID DALRYMPLE.

Diet continued till next day at 9 o'clock.

February 11, 1715.

Intran'

John Grahame, *Alexander Crawfurd*, and Mr. *William Hogg*, indicted and accused at the instance of his majestie's advocate for his highnes' interest *ut in diebus præcedentibus*.

ASSIZE.

Sir William Menzies, of Glaidstaines.
George Lind, of Georgie.
Thomas Fairholm, of Greenhill.
Patrick M'Dowal, merchant in Edinburgh.
John Bell, merchant there.
John Thomson, merchant in Edinburgh.
John Colquhoun, of Tillichewn.
John Martine, of Littleaires.
Alexander Waddel of Hollasburn.
James M'Millan, merchant in Edinburgh.
Patrick Gibson, merchant in Edinburgh.
Alexander Clark, of Glendarock.
—— Pringle, of Symingtoun.
John Hutton, merchant in Edinburgh.
John Lessly, merchant there.

The above Assize being all lawfully sworn and no objection of the law in the contrair:

Her Majestie's Advocat and solicitor for Probation adduced Mr. Crawfurd's Confession.

As also adduced the witnesses after deponing, viz.

David Smith, indweller in Edinburgh, and chair-carrier there, aged fourty three years or thereby, married, solemnly sworn, purged of malice, prejudice, and partial council, examined and interrogate, depones, That the month of December last, in a morning betwixt four and five a'clock, he did see the pannells Mr. Grahame and Mr. Hogg by the street, dancing to the hautboys, and when they had done dancing, the deponent saw a woman come out of a cellar with a stoup, and saw Mr. Grahame take the stoup and a cap, and fill a drink, and heard him utter these words, Here is the king's health, and some other of the company asked what king? But the deponent cannot be positive by whom, king James the eights' health. And being interrogate if or not before Mr. Grahame or Mr. Hogg put the cap to their heads, they repeated the words, To king James the eights' health, depones he cannot say he heard them repeat the words, but say Mr. Grahame put the cap to his head, and drink out the drink. Depones, that he say no more persons dancing but the pannells, but that there were others looking on. *Causa scientiæ patet*. And this is the truth as he shall answer to God, and depones he cannot write.

Sic Subscribitur, AD. COCKBURNE, I. P. D.

Alexander Work, souldier in the city guard of Edinburgh, aged twenty seven years, or thereby, married, solemnly sworn, purged and interrogate *ut supra*. Depones, That upon the sixteenth day of December last, betwixt four and five a'clock in the morning, he did see Mr. Grahame and Mr. Hogg, two of the pannells, dancing upon the street with Mr. Crawfurd whyle the hautboys were playing, and did see Mr. Crawfurd with a dish in his hand, Mr. Cranfurd say, This is the king's health, and Mr. Grahame answered, God damn you, what king? and heard Mr. Crawfurd reply, King James the eight, and saw him drink the liquor in the dish, but did not hear Mr. Grahame name the health of king James the eight, neither heard any of the pannells name a health to the happy resturation of king James the eight. And immediately the deponent went away and left the company. *Causa scientiæ*, the deponent being upon the guard that night, happened to be on the street, and heard and saw as he has deponed. And this is the truth as he shall answer to God. And depones he cannot write. And furder depones that he saw Mr. Grahame have the stoup in his hand, and fill the drink in the dish, which Mr. Crawfurd had in his hand. And this is also the truth as he shall answer to God.

Sic Subscribitur, GILB. ELIOT.

James Malcolm, souldier in the city guard, aged fourty four years, or thereby, married, solemnly sworn, purged of malice and prejudice, interrogate, depones, That some time in the month of December last, about four or five a'clock in the morning, The deponent saw the three pannells standing on the high street of Edinburgh, near the Tron, and the said pannells had a chopine stoup and a cap amongst them, and the deponent heard Mr. Grahame the pannel drink to the health of king James the eight, but cannot particularly tell whether any of the other pannels repeated these words, and the deponent being desired to point at the gentleman who had uttered these words, he pointed at Mr. Grahame. *Causa scientiæ*, the deponent was on the guard that night, and was going down with a watch coat to one of his comorades that stood centry near the place where the pannells were. And this is the truth as he shall answer to God.

Sic Subscribitur, JAMES MALCOLM.
JA. M'KENZIE.

Andrew Castlelaw, serjeant in the city guard, aged fifty years, or thereby, married, solemnly

sworn, purged and interrogate, depons, that betwixt four and five in the morning of some day in December last, the deponent was called by a centinell in the guard door to go down to Milns square, where there were some gentlemen drinking to the health of king James the eight, and as the deponent was at the guard door, he heard some persons crying, To the health, to the happy resturation, and immeddiately the deponent went in to bring out a party of the guard with their arms, and with the party went towards Milns square, and the company fled, and the deponent and the party pursued them, and seized the pannells in a stair. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, ANDREW CASTLELAW. W. CALDERWOOD.

The Assize ordained to enclose and return their verdict next day at 9 o'clock.

February 12, 1715.

Intran'

John Grahame, Alexander Craufurd, and Mr. *William Hogg.*

The said day the persons who past upon the Assyse of the said pannells returned their Verdict, in presence of the said lords, whereof the tenor follows,

EDINBURGH, *February* 11, 1715.

The above Assyse having inclosed, did choyse sir William Menzies, of Glaidstains, to be their chancellor, and Thomas Fairholm, of Greenhill, their clerk. And having considered the lybel at the instance of sir David Dalrymple, of Hailes, his majesties advocat for his highness interest, against John Grahame, Alexander Craufurd, and Mr. William Hogg, pannells, the Lords Justice Clerk and Commissioners of Justiciary, their interloquitor thereon, and depositions of the witnesses adduced against the said John Grahame and Mr. William Hogg with the judicial Confession emitted judicially by Alexander Craufurd, all in one voice find it not proven, that John Grahame or Mr. William Hogg, pannells, did drink king James the eight his health, nor did drink to king James the eight his happy restoration. And find the lybel proven against Alexander Crawfurd, pannel, by his judicial Confession. In witness whereof thir presents are subscribed by our said chancellour and clerk.

Sic Subscribitur, W. MENZIES, Chancellor. T. FAIRHOLME, Clerk.

After oppening and reading of which Verdict of Assyze, the Lords Justice Clerk and Commissioners of Justiciary, in respect whereof, assoilzie the said John Grahame and Mr. William Hogg, pannells, and dismiss them from the barr.

Sic Subscribitur, AD. COCKBURNE, I. P. D.

February 21, 1715.

Intran'

Alexander Crawfurd younger, of Manualmilne.

The Lords Justice Clerk and Commissioners of Justiciary, having considered the Verdict of Assyse returned upon the 12th day of February instant, against the said Alexander Crawfurd, pannel; they in respect thereof, by the mouth of Charles Kinross, macer of court, fyne and amerciate the said Alexander Crawfurd, in the sum of 50*l.* sterling, to be payed to his majestie's receiver general for his majestie's use, betwixt and the 1st day of July next to come, and ordain him to be carried to prison until he give bond and sufficient caution that he shall make payment of the said sum in manner forsaid.—*Sic Subscribitur,*

AD. COCKBURN.	W. CALDERWOOD.
GILB. ELIOT.	J. HAMILTON.
JA. M'KENZIE.	D. ERSKINE.

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468. The Trial of Major JOHN ONEBY,* at the Sessions-House in the Old-Bailey, before the Right Hon. Sir Francis Forbes, knt. Lord-Mayor of London, Mr. Baron Hale, Sir William Thompson, knt. Recorder of London, and others his Majesty's Justices, for the Murder of Wm. Gower, esq.: 12 GEORGE I. A. D. 1726.

"JOHN Oneby, of St. Martin's in the Fields, gent. was indicted, for that he, on the 2nd day of February, 12 Geo. at the said parish, feloniously, voluntarily, and of his malice forethought, made an assault upon one William Gower, esq. and that he the said John Oneby, with a sword which he then and there held drawn in his right hand, the said William Gower in and upon the left part of his belly, near the navel, feloniously, voluntarily, and of his malice forethought, did strike and thrust, giving the said William Gower, then and there, with the said drawn sword, in and upon his said left part of his belly, near the navel, a mortal wound of the length of one inch and a half, and of the depth of ten inches; of which mortal wound the said William Gower lived in a

* See 2 Stra. 766. 2 Lord Raym. 1485. 1 Barr. 17.

languishing condition, from the 2nd day of February to the 3rd day of the said February; on which 3rd day of February, the said William Gower, at the parish aforesaid, of the said mortal wound did die; and that the said John Oneby, the said William Gower feloniously, voluntarily, and of his malice forethought, did kill and murder."

He was a second time indicted, on the coroner's inquisition, for the said murder.

Thomas Hawkins. On the 2nd of February, between nine and ten at night, Mr. Blunt, the deceased, the prisoner and myself, went from Will's coffee-house to the Castle tavern in Drury-lane, where, in about half an hour, Mr. Rich came to us. After the fourth bottle, the prisoner called for a box and dice; the drawer said, they had none in the house; "Why then," says the prisoner, "bring the pepper-box." The drawer brought it, and dice were laid upon the table: but I don't know by whom. We played low, nobody setting above half a guinea, and yet I had no great inclination to game, and especially to set the prisoner; and therefore, after a trifling loss I declined the play. The prisoner appeared disgusted at it, and asked me why I refused? I told him I should use my own pleasure, whether it was agreeable to his humour or not. The rest continued playing. The deceased lost 30*s.* Mr. Rich said, "Who will set me three half crowns?" Upon which the deceased took something out of his pocket, and laid it on the table, but concealed it with his hand, and said, "I'll set ye three pieces;" and then taking his hand away, we saw three half-pence. This was not offered to the prisoner; but he appeared to be much affronted. He said, "That is very impertinent to set three half-pence." The deceased said, "What do you mean by impertinent?" And the prisoner replied, "You are an impertinent puppy;" and presently snatched up a bottle, and threw it at the deceased's head, and it beat some powder out of his wig, but did him no hurt. He, in return, tossed a glass or a candlestick, I can't tell which, at the prisoner; but it did not reach him. They both rose up together, and went to their swords, which hung up in the room. The deceased being quickest, got his sword first, and drew it, and stood still in a posture of defence, at a good distance from the prisoner, who was advancing, and was drawing his sword to meet him; but Mr. Rich stepped in between, and prevented him. Then the deceased threw away his sword, and they all sat down again, and drank for about half an hour; when the deceased offering his hand to the prisoner, said, "We have had words, major, and you was the aggressor; but let us agree." The prisoner answered, "No, damn ye! I'll have your blood!" And then turning to me, he said, "Hawkins, you was the occasion of this." "Why then," says I, "if ye have done with him, and have any thing to say to me, I am your man, and I'll see you out." "No," says he, "I have another chap first." In about half an hour after this, which was near three in the morning, the company broke up. I went out of the room first, and Mr. Blunt, and Mr. Rich were next after me. When I came into the street it rained, and I run under a penthouse, where I stood a little while; but not having a chair ready, and seeing none of the company come out, I returned to the room, where I found the deceased wounded, and leaning on a chair in a languishing condition. He died the next morning. I knew him intimately, and I don't believe that there was a sweeter tempered man in the world.

John Rich. I, the prisoner, the deceased, and some others, went together to see the new tragedy of Hecuba; we sat in the pit. The deceased and the prisoner appeared to be good friends all the time of the play; and as soon as it was done I left them; but met them again at the Castle tavern in about half an hour. The prisoner and I called for a box and dice; which not being to be had, he called for a pepper-box, and it was brought; I saw dice lying upon the table, but don't know how they came there. I said, Let us play low. Some words past between the prisoner and Mr. Hawkins. I laid down three half crowns. The major set me. I threw. Seven was the main, and six the chance. The deceased put down three half-pence against me, and said, Here, I'll set ye three pieces. The prisoner damned him, and called him an impertinent puppy. Sir, said the deceased, I am not afraid of ye, and he that calls me a puppy is a scoundrel. At these words, the prisoner threw a bottle at him. It brushed his wig as it passed, and he in return tossed a glass. They both got up together; but the deceased being nimblest, jumped on the table, and reached his sword first; and then stepping down, he drew, and stood ready to defend himself, but made no offer to push. In the mean time, the prisoner took down his sword and cane, which hung together; and there being the table and a chair between them, he came round the table, and was going to engage with the deceased; but I stepped between them, told the prisoner, who was drawing his sword, if he made a longe, it must be through my body, which, as I was unarmed, would be wilful murder. The deceased then threw away his sword, and they both sat down again. The deceased put his hand forward, and said, Come, major, let us be reconciled, words in heat may be forgot and forgiven. The prisoner answered, God damn you, you lie—I'll have your blood, by God! And then, turning to Mr. Hawkins, he said, This is all along of you. Mr. Hawkins answered, Then I am your man; and the prisoner replied, No, I have another chap to deal with first. When we all got up to go, the prisoner hung his great rug-coat upon his shoulders, and I think buttoned it in one or two places. Mr. Hawkins went out first, Mr. Blunt next, the deceased followed him; I, the deceased, and the prisoner came last: but he was hardly out of the room, when

he called to the deceased, Hark ye, young gentleman, a word wi' ye. The deceased turned back, they both re-entered the room. The door was immediately shut fast. I heard a clashing of swords, and a loud stamp on the floor, which I guessed was made by the prisoner, he being a very heavy man. Mr. Blunt and I stepped back, and endeavoured to get in; we could not readily open the door; but the drawer coming to our assistance, we made an entrance, Mr. Blunt first, and I close behind him. The prisoner was then next to the door, and standing with his sword drawn in his right hand, the point of it being towards the deceased, whom he held by the shoulder with his left hand. I think the deceased had then no sword in his hand, at least I saw none; and I soon afterwards found it close to the wainscot, behind the folding of the great oval table. It was bloody and greasy four or five inches from the point. The deceased closed with the prisoner; but in such a manner, as if he rather fell towards him through weakness, than otherwise, which makes me think the wound was given him before we came in. We put him into a chair, and sent for a surgeon. As I held up my hand to part them, I felt a little prick through my coat, by the prisoner's sword; but I believe it was done accidentally. Mr. Blunt at the same time clapped his hand on his belly, and said he was dangerously wounded; but I am ignorant by what means. I told the prisoner, when we came out of the room, that I was afraid he had killed the deceased; No, says he, I might have done it, if I would; but I have only frighted him. But suppose I had killed him, I know what I do in those affairs; for if I had killed him to-night, in the heat of passion, I should have had the law on my side; but if I had done it at any other time, it would have looked like a set meeting, and not a rencounter. I advised him, however, to make off, for fear of the worst. I asked the deceased on his death-bed, if he received the wound fairly? He answered, faintly, "I think I did—but—I don't know—what might have happened—if you—had not—come in."

Michael Blunt. From the play we went to Will's, and thence to the Castle, where we were very merry and friendly, till the dice were called for. We played low, but Mr. Hawkins soon declined; upon which the prisoner said to him, Why do you come into company, when you won't do as others do? Mr. Hawkins answered, Don't trouble yourself about me, I'll do as I please. The deceased set three half-pence: the prisoner said it was damned impertinent; and some other words passing, he flung a flask at the deceased, who in return tossed a glass or a candlestick. They took their swords, but were prevented from engaging, and so they sat down again; the deceased offered his hand to be reconciled, upon which the prisoner gave him very ill language, and swore he would have his blood. As this made me apprehensive that their quarrel would break out again the next day, I invited the company to dine with me, in hopes to bring on a reconciliation, and prevent future mischief. The prisoner answered my offer with, No, God damn ye, I'll dine with none of ye. Are ye angry, Sir, says I, Have ye any thing to say to me? Or me? says Mr. Hawkins. Or me? says Mr. Rich. No, he had nothing to say to any of us. This was about two or three in the morning. And after we were all come out of the room, I heard the prisoner call the deceased back; and they were no sooner got into the room again, but the door was flung to, with great violence, and I heard the clashing of swords. When I got in, which was with much difficulty, I did not see that the deceased had any sword in his hand, but he was sinking forward; and I, by going to assist him, received a wound in my belly, which I was afraid was mortal; but I cannot tell how, or by whom it was given, though I think it could not be by the deceased, because he had no sword; and besides, was not in a condition to do it. A surgeon being in the house, gave me his immediate assistance.

Mr. *Shaw*, the surgeon. I found the deceased languishing in a chair. His intestines appeared at the wound, and by being exposed to the air began to mortify. When I had dressed him I sent him home; but the next day I found a second rupture of the intestines. He died soon after; and that wound was the cause of his death.

Prisoner. A wager was laid betwixt Mr. Rich and Mr. Blunt, concerning Mr. Mills's acting the part of Cæsar in the play of Julius Cæsar, and it was lost by Mr. Blunt. After this a box and dice were called for, but not by me; the drawer said he had dice, but no box; upon which somebody called for a pepper-box. I flung a main at 12*d.* and passed it about. Mr. Hawkins refusing, I said, I thought there was as good fellowship in a little play, as in altogether drinking: then we played for half-a-crown or 3*s.*; and when the box came round again, the rest likewise refused to play; at last, the deceased offered to set three half-pence, which I said was very impertinent. He called me rascal; "You impertinent puppy," says I, "what do you mean by that?" Upon which, he threw a glass at my head, and drew upon me. I told him, he acted basely in drawing upon me, when it was he that gave the affront. After this I put on my great coat, and was going out. Mr. Hawkins had slipt away, and the rest being gone out of the room, the deceased pushed the door to, and drew upon me, and wounded me in the knee, and cut my fingers. I parried and closed with him; he endeavoured to stab me in the back; at which time Mr. Blunt came in, and received a wound in his belly, which must have been by the deceased's sword.

John Barnes, the drawer. I threw the prisoner's great coat over his shoulders, as he was going out. Mr. Hawkins came out first, and asked if his chair was at the door? I said, Yes. Mr. Blunt followed, and I went down to unbar

the door; the rest of the company not coming, I went back and met Mr. Rich; he bid me open the door; I thought he meant the street-door, and was turning that way again; but he swore at me, and told me the other door: I opened it, and went in first, and the deceased and the prisoner were both with their swords in their hands, pointing towards each other. The deceased closed with the prisoner in a manner as if he was rather falling than pushing; and the prisoner with his left hand had hold of the deceased, who, as soon as we parted them, was so weak that he could not stand. I did not see him bleeding when I came into the room, though I cried out to the prisoner, For God's sake what are ye doing?

Prisoner. Did not you see the deceased offer to stab me in the back?—*Barnes.* No.

Mr. *Burdet*, a surgeon. The next day in the evening, the prisoner sent a coach to my house with a letter for me, informing me that he had been wounded in a rencounter, and desiring me to come to him. I went, and found him in bed at the house of Mrs. Gardiner, in Dean-street, near Red-Lion-square, where he had concealed himself. He had one wound below his knee an inch and half long, another on his buttock, two of his fingers were cut in the first joint, and he shewed me three or four holes in his breeches; but none of his wounds were above a quarter of an inch deep, and that in his leg had but just raised the skin.

Mrs. *Gardiner.* The prisoner came to my house about two o'clock in the morning: he was bloody, and upon searching him, I found a wound in his buttock as deep as my finger, and I dressed it for him.

Court. The evidence is plain, that the prisoner gave the first provocation; and it is not denied, that he afterwards killed the deceased. The question is, Whether from the time the prisoner threw the bottle, to the time the deceased received the wound, there was any reconciliation? If there was not, I think it can be no less than murder.

The jury found there was no reconciliation; but not being satisfied as to the murder, they agreed upon a special verdict.

The counsel on both sides attending, they stated the principal points of the evidence for the consideration of the judges.

What the prisoner's counsel drew up, was to this effect:

"We find that the prisoner, the deceased, and three more met at the tavern, where they all appeared very friendly.—A box and dice were called for,—they played some time together, till Mr. Rich said, Who will set me three half-crowns?—The deceased put down three half-pence, and said, I'll set ye three pieces.—The prisoner said, That's impertinent—the deceased answered, He that says I am impertinent, is a rascal.—The prisoner threw a bottle, and the deceased threw a glass.—They both got up, and took their swords; but one of the company stepped in, and prevented their engaging.—They sat down again to drink,—staid about an hour, and then the company broke up.—The prisoner put on his great coat—They all went out of the room.—The prisoner and the deceased returned, the door was shut, and the clashing of swords was heard."

The counsel for the king stated the evidence to the following purpose:

"We find, that on the 2d of February the prisoner, the deceased, and three others were in company at the Castle-tavern, and continued in a peaceable manner for about two hours.—The prisoner then called for a box and dice; but none being to be had, he called for the pepper-box, which was brought.—Dice were found upon the table;—they played at hazard.—Mr. Rich asked, who would set him three half-crowns? The deceased in a jocular manner laid down three half-pence, and said, There's three pieces—the prisoner called him an impertinent puppy, and threw a bottle at him, which missed him, but brushed his wig.—The deceased tossed a glass or candlestick at the prisoner, which did not hit him.—They both rose up, and took their swords; but were prevented from fighting.—They sat down again.—The deceased offered to be friends with the prisoner; but the prisoner answered, No, God damn ye! I'll have your blood, by God!—In about an hour after this, the company all went out of the room; but the prisoner called to the deceased, and said, Young gentleman, a word with ye.—They both returned into the room,—the door was shut with violence, and the clashing of swords was heard.—We find that from the time that the bottle was flung, to the time of the breaking up of the company, there was no reconciliation."

These two rough draughts being compared, and some alterations being made, a third was drawn up, which was agreed to and signed by the jury, and was to this tenor.

SPECIAL VERDICT.

"That upon the 2d day of February, 1725, the prisoner and the deceased were in company, together with John Rich, Thomas Hawkins and Michael Blunt, in a room at the Castle-tavern in Drury-lane, in the county of Middlesex, in a friendly manner. That after they had continued thus for two hours, box and dice were called for; the drawer said, he had dice but no box; and thereupon the prisoner bid the drawer bring the pepper-box, which he immediately did: and then the company began to play at hazard; and after they had played some time, the said Rich asked, If any one would set him three half-crowns? Whereupon the deceased in a jocular manner laid down three half-penny pieces, and then said to the said Rich, I have set you three pieces, and the prisoner at the same time set the said Rich three half-crowns, which the said Rich won: and immediately, after the prisoner in an angry manner, turned about to the deceased, and said, It was an impertinent thing to set half-pence, and that the deceased was an impertinent

puppy for so doing; to which the deceased answered, Whoever called him so was a rascal. That thereupon the said John Oneby took up a bottle, and with great force threw it 'ergo prædict' Willielmum Gower;' which bottle did not hit the said Gower, but brushed his perriwig, as it passed by his head, and beat out some of the powder; whereupon, the deceased immediately after tossed a candlestick or bottle 'ergo prædict' Johannem Oneby,' but did not hit him with the same: upon which the deceased and the prisoner both rose up to fetch their swords, which then hung up in the room; and the deceased drew his sword, but the prisoner was prevented from drawing his by the company; and the deceased thereupon threw away his sword, and the company interposing, they sat down again for the space of an hour. That at the expiration of an hour, the deceased said to the prisoner, We have had hot words, but you was the aggressor; but I think we may pass it over; and at the same time offered his hand to the said John Oneby, to which the said John Oneby answered, No, damn you, I will have your blood. They further find, that afterwards the reckoning was paid by the deceased, the prisoner, Rich, Hawkins and Blunt; and all the company, except the prisoner, went out of the room to go home; and the prisoner remaining alone in the room, called to the deceased in these words, Young man, come back, I have something to say to you; whereupon the deceased returned into the room, and immediately the door was flung to and shut, and thereby the rest of the company were excluded: and then a clashing of swords was heard, and the prisoner, with his sword, gave the deceased the mortal wound mentioned in the indictment, of which he died the next day. They further find, that at the breaking up of the company, the prisoner had his great coat thrown over his shoulders; and that he received three slight wounds in the engagement; and that the deceased being asked, upon his death-bed, whether he received his wound in a manner, amongst swordsmen, called fair, answered, I think I did. That from the time of throwing the bottle, there was no reconciliation between the prisoner and the deceased. And whether this be murder or manslaughter, the jury pray the advice of the Court, and find accordingly."

The prisoner being carried back to Newgate, remained very easy, for about a twelve-month, having no irons on, and lodged in a commodious room; and as the prosecutor had taken no steps towards bringing on the hearing of the Special Verdict, he grew pretty confident it would be determined manslaughter, and feed counsel to move the Court of King's-bench for a *Concilium*, to be made for arguing the special verdict before the Court; which being ordered, a *Certiorari pro Rege* was brought,* and the prisoner being at the bar, it was made a *Concilium*, the Court being of opinion that it could not be made a *Concilium* in his absence; and in Hillary Term, 13 Geo. 1, it was argued by serjeant Darnall for the king, and serjeant Eyre for the defendant.

Serj. *Darnall.* In order to consider whether this be murder or manslaughter, I shall premise that which is not to be disputed, that every malicious killing is murder, and that malice may be either express or implied. This is malice implied in the act itself, because there was no reasonable provocation; there was nothing but words passed between them, till the prisoner threw the bottle at the deceased; and it has been often resolved, that, in point of law, words are no provocation. But if words were a sufficient provocation; yet it appears, the prisoner began with words as well as acts. The calling Mr. Gower an impertinent puppy was previous to the saying or doing of any thing by Mr. Gower, that could give offence to the prisoner: if the setting of half-pence was a thing to be resented, the affront was to Mr. Rich, and not to Mr. Oneby, whose bett to Rich was not at all affected by what was done by Mr. Gower. And that it is murder in this defendant, I think cannot be disputed, after the judgment of the Court in Mawgridge's case; there the bottle thrown by Cope hit Mawgridge, and broke his head; here, the candlestick or bottle tossed by Gower, did not hit the prisoner at the bar: that was a sudden conflict; this a deliberate act, after a disposition to peace manifested by Mr. Gower, and a continuance of malice in the prisoner for above an hour after the first conflict. What was done here by Mr. Gower would have been justifiable in him, even if the candlestick had hit the prisoner: and so it was resolved in Mawgridge's case; for there the bottle returned by Mr. Cope did hit the defendant, and broke his head. And as the act done by Mr. Gower was justifiable in him, it follows, that it can be no foundation to excuse or mitigate the subsequent killing by Mr. Oneby. The case put in Mawgridge's case of an assault by A upon B. B draws his sword, and pursues A to the wall, where A in his own defence kills B; this is held murder in A, though it has many strong circumstances in favour of A, which are not in this case. But I apprehend, it is not necessary to rely barely on this point, that there is malice implied in the act; since it plainly appears, upon the state of the case, that here is express malice. When the deceased was desirous to end the matter amicably, the prisoner replies, "No, damn you, I will have your blood:" this explains and goes through the whole fact, and proves the subsequent killing to be malicious.

I do therefore insist, that taking it either way, either as a killing out of malice implied, or malice express, it is murder; and that this upon the fact is a killing of malice implied, and upon the prisoner's own words coupled

* Sir John Strange's Reports, vol. 2, p. 766, 767, 768.

with the fact, it is malice express, and consequently murder.

Serjeant *Eyre*, for the defendant. The question is, what degree of homicide this is; and I apprehend it to be but manslaughter: the distinction is, that if the killing be of malice forethought, it is murder; if on a sudden occasion, it is but manslaughter; and that I take to be this case: in 3 Instit. 51 malice prepensed is defined to be, when one compasseth to kill another, and doth it *sedato animo*: on the other hand, manslaughter is the doing it without premeditation, upon a sudden brawl, shuffling, or contention. 3 Instit. 57.

The law has ever been indulgent to the passions of men; 'ira furor brevis est,' and therefore as a madman, the party is excused for what he does in a sudden transport of passion. I do admit, that bare words are no provocation; but yet they will serve to explain the nature of the combat, and shew whether it was sudden or not. The calling the prisoner a rascal, was what no man of honour could put up; and as this was the beginning of the quarrel, the fighting was as sudden as the reproachful words. If the prisoner had stabbed Mr. Gower, upon speaking the words, and Gower had done nothing, I believe it would have been murder; but here was a regular fight, an interchange of blows, and so it comes up to the case put in Kelyng 55, of a combat between two of a sudden heat; where if one kills the other, it is but manslaughter.

The law has fixed no certain time, when it shall be presumed the passions of men are cooled. The case in 12 Co. 87, must take up a longer time than this; for there the boy ran three quarters of a mile to his father, and told his story, and after that the father provided himself with a cudgel, and had as far to go in pursuit of the other boy; and there is this difference between that case and the case at bar; that there the adversary was out of sight, but here he continued in presence, which must rather inflame than abate the passion.

The words made use of by Mr. Gower carry an imputation on Mr. Oneby, which might provoke him afresh; the telling him, he was the aggressor, was not likely to make an end of the quarrel: and that is plain, from the manner in which Mr. Oneby understood them, who would never have said so harsh a thing to his friend Mr. Gower, if he had been at that time in any degree master of himself.

It is not found by the verdict who began, after Mr. Gower returned into the room: it is not likely the prisoner began, because he had his great coat thrown over his shoulders; and as to the shutting the door, it is stated to be done immediately on Mr. Gower's returning, and is likelier to be done by him that came into the room. When the first conflict happened, it appears Mr. Gower was the readiest to draw his sword; it was actually drawn, and the prisoner's was not; and since it is not stated, who drew first the second time, I think it ought to be explained by the first.

To make it murder in the first instance, it must be done with a weapon that would endanger life. The bottle in Mawgridge's case was full of wine, and it hit him (Cope) so violently, that he never spoke more. But for any thing appearing upon the verdict, this might be only a small oil-bottle, usually set upon tables in public-houses; and might perhaps be empty before it was flung. The case of Mr. Turner, which is taken notice of in Comb. 407, was held manslaughter upon this reason, because the clog was not such an instrument, from a blow with which it was likely death should ensue. But supposing the bottle to be as big and as full as Mawgridge's bottle, yet no harm was done by it here, as there was in Mawgridge's case. Here was no drawing the sword *eo instante*, as Mawgridge did; which occasioned the judges to lay the returning the bottle by Mr. Cope out of the case, and construe the immediate drawing the sword, as an intent to supply the mischief, which the bottle might fall short of; and even, in that case, one great man differed from the rest of his brethren.—So that Mawgridge's case is materially different from this. There the intention from the first throwing the bottle was to commit murder, here it was otherwise. There the first bottle hit, here it missed. There the murderer's intent was immediately carried into execution, here was a long interruption. The deceased needed not have returned, if he had not been equally disposed to combat; and he himself said it was a fair combat, which there was no pretence to say in Mawgridge's case.

Serjeant *Darnall* replied. The words on both sides must certainly be laid out of the case; if not, puppy was worse than rascal, because it is the name of a beast. If Mr. Gower took Oneby to be the aggressor, the condescension was greater in him; it is no more than saying, I, who have been injured, am ready to pass it by. I do not find it was at all relied upon in Mawgridge's case, that the bottle was full; and as to the case in Comberbatch, Turner's servant there had committed a fault, for which he was liable to be corrected: the deceased's declaration was only that he received the wound by a fair push.

The Court said nothing upon this argument; but appointed another to be before all the judges of England. And in Easter term following (May 6), it was accordingly argued by Mr. Lee for the king, and Mr. Kettleby (serjeant Baynes, who was retained, being ill) for the prisoner, to the same effect as the former argument. Str. vol. 2, 770. The prisoner not being present in Serjeants-inn (Chancery-lane), as he was in court upon the first argument; this last being only to have the advice of the other judges.

Trinity Term, 13 Geo. 1, and 1 Geo. 2, 1727.

Monday, June 12.

Mr. Oneby being brought to the bar from Newgate to hear the resolution of the Court, the chief justice Raymond* delivered the opinion of the judges, in the following manner.

THE KING *vers.* JOHN ONEBY.

At the general sessions of the peace, held at Hickes-hall, for the county of Middlesex, 28th day of February, in the 12th year of his majesty's reign, John Oneby, of St. Martin's in the fields, gent. was indicted, for that he, the 2nd day of February, 12 Geo. at the said parish, feloniously, voluntarily, and of his malice aforethought, made an assault upon one William Gower, esq. and that he the said John Oneby, with a sword, which he then and there held drawn in his right hand, the said William Gower, in and upon the left part of his belly, near the navel, feloniously, voluntarily, and of his malice fore-thought, did strike and thrust, giving the said William Gower, then and there, with the said drawn sword, in and upon his said left part of his belly, near the navel, a mortal wound; of which mortal wound, the said William Gower lived in a languishing condition, from the said 2nd day of February, to the 3rd day of the said February; on which 3rd day of February, the said William Gower, at the parish aforesaid, of the said mortal wound, did die; and so the jurors find, that the said Oneby, the said William Gower feloniously, voluntarily, and of his malice fore-thought, did kill and murder. Which indictment being delivered to the justices of gaol-delivery for Newgate, the said John Oneby was arraigned thereupon, and pleaded Not Guilty. And upon the Trial, which was had before Mr. baron Hale, and sir William Thompson, recorder of London, the jury found the special verdict following, viz.

"That the said John Oneby, and the said William Gower, together with John Rich, Thomas Hawkins, and Michael Blunt, were in company together in a room in the Castle tavern, in the parish of St. Martin's in the fields, in a friendly manner; that after the said John Oneby, William Gower, John Rich, Thomas Hawkins, and Michael Blunt, had continued together in the said room, for the space of two hours, a box and dice were called for; whereupon the drawer said, that he had dice but no box; and that thereupon the said John Oneby commanded the drawer to bring a pepper-box, and accordingly a pepper-box and dice were brought; that immediately after, the said John Oneby, William Gower, John Rich, Thomas Hawkins, and Michael Blunt, began to play at hazard; and after they had played half an hour, the said John Rich asked, if any of the company would set him three pieces of money, called half-crowns; that thereupon the said William Gower, in a jocular manner, set three pieces of money, called half-pence, and then said to the said John Rich, that he had set him three pieces; that the said John Oneby, at the same time, set the said John Rich three half-crowns, which the said John Rich won; and immediately the said John Oneby, in an angry manner, turned to the said William Gower, and said to him, that it was an impertinent thing to set half-pence; and further said to the said William Gower, that he, the said William Gower, was an impertinent puppy in so doing; to which the said William Gower then and there answered, that whosoever called him so was a rascal; and thereupon the said John Oneby took up a glass bottle, and with great force threw it at the said William Gower; but the glass bottle did not strike the said William Gower, but passing by near his head brushed his peruke, which he then had upon his head, and beat out some of the powder out of his peruke; that thereupon the said William Gower, immediately after, tossed a glass or candlestick at the said John Oneby, but the glass or candlestick did not hit the said John Oneby, upon which, both the said John Oneby and William Gower presently rose from their seats, to fetch their swords, which then hung up in the room; and the said William Gower then drew his sword out of the scabbard, but the said John Oneby was hindered by others of the company from drawing his sword out of the scabbard; whereupon the said William Gower threw away his sword, and by the interposition of the said John Rich, Thomas Hawkins, and Michael Blunt, the said William Gower and John Oneby sat down again, and being so set down, continued for the space of an hour, in company with the said John Rich, Thomas Hawkins, and Michael Blunt; that after the expiration of that hour, the said William Gower said to the said John Oneby, We have had hot words, but you was the aggressor, but I think, we may pass it over; and at the same time the said William Gower offered his hand to the said John Oneby; to which the said John Oneby then answered the said William Gower, No, damn you, I will have your blood; that afterwards the reckoning was paid by the said John Oneby, William Gower, John Rich, Thomas Hawkins, and Michael Blunt: and that the said William Gower, John Rich, Thomas Hawkins, and Michael Blunt, went out of the said room, with an intent to go home, leaving the said John Oneby in the room; that the said John Oneby, so as aforesaid, remaining in the room; called to the said William Gower, Young man, come back, I have something to say to you; that thereupon the said William Gower returned into the said room, and the door of the room was immediately flung to, and shut; by reason of which shutting of the door, all of the said company, besides the said William Gower and John Oneby, were shut out of the room, and that then after shutting of the door, a clashing of swords was heard; then

* From lord Raymond's Reports, vol. 2, p. 1485, and following pages.

the jury find, that the said John Oneby gave the said William Gower, with his sword, the mortal wound in the indictment mentioned, of which he died; but they further find, that at the breaking up of the company, the said John Oneby had his great coat thrown over his shoulders, and that the said John Oneby received three small wounds in the fighting with the said William Gower, and that the said William Gower being asked upon his death-bed, whether he the said William Gower had received his wound in a manner among swordsmen called fair? answered, I think, I did: and they further find, that from the time the said John Oneby threw the glass bottle at the said William Gower, there was no reconciliation between the said John Oneby and William Gower: and whether this is murder or manslaughter, the jury pray the advice of the Court: and if, &c."

So that the question upon the special verdict is, whether John Oneby, the prisoner at the bar, is guilty of murder or manslaughter?

A great deal of time was spent in drawing up this special verdict; for although the trial at the Old Bailey was in the beginning of last March was 12 months, yet the record was not removed into this court, till Hilary term last, towards the end of which term, it was argued by counsel on both sides; and another argument being desired by the counsel for the prisoner, we thought it proper to desire the opinion of all the rest of the judges; and for that purpose, it was argued before all the judges, at Serjeant's-inn hall in Chancery-lane, upon the 6th day of May last, which was as soon as all the judges could meet, by reason of the intervention of the circuits. And after mature consideration had upon a meeting of them, they *seriatim* gave their opinions, and came to this resolution unanimously, not one of them dissenting, and which I have authority from them to declare, viz.

That John Oneby, the prisoner at the bar, upon the facts found upon this special verdict, is guilty of murder.

Without entering into a nice examination of the several definitions or descriptions of murder, as they are found in the old law-books, as Bracton, Britton, and Fleta, where the wickedness of the act is aggravated by the circumstances of secrecy or treachery, murder has been long since settled to be the voluntary killing a person of malice prepense; and that, whether it was done secretly or publicly. Staundf. Pl. Cor. 18, b. 3 Inst. 54.

But then it must be considered, what the word malice in such case imports. In common acceptation, malice is took to be a settled anger (which requires some length of time) in one person against another, and a desire of revenge. But in the legal acceptation, it imports wickedness, which includes a circumstance attending an act that cuts off all excuse. By 25 H. 8, c. 3, for taking away clergy, it is enacted, That every person who shall be indicted of the crimes therein mentioned, and thereupon arraigned, and stand mute, of malice or of frowardness of mind, shall lose the benefit of his clergy. Now in that place, malice can never be understood in the vulgar sense; for the party cannot be thought to stand mute, out of a settled anger, or desire of revenge, but only to save himself; and therefore such standing mute, and refusing to submit to the course of justice, is said to be done wickedly, i. e. without any manner of excuse, or out of frowardness of mind.

This malice, an essential ingredient to make the killing a person murder (to use the expressions of lord chief justice Coke, and lord chief justice Hale, whose authority hath established them,) must be either implied or express; and says Hale, in his Pleas of the Crown 44, this implied malice is collected either from the manner of doing, or from the person slain, or the person killing. As to the two last, there is no occasion, at present, to take them into consideration.

1. As to the first, viz. from the manner of doing, as Hale expresses it, or as Holt, chief-justice (vide Mawgridge's case *postea*) says, from the nature of the action: 1. Wilfully poisoning any man implies malice. 2. If a man doth an act, that apparently must do harm, with an intent to do harm, and death ensues, it will be murder. As if A runs with a horse, used to strike, amongst a multitude of people, and the horse kills a man, it will be murder; for the law implies malice from the nature of the act. 3. Killing a man without a provocation is murder; as if A meets B in the street, and immediately runs him through with a sword, or knocks out his brains with a hammer or bottle. And if angry words had passed in that case between A and B, yet it would have been murder in A, because words are not such a provocation, as will prevent such a homicide from being murder; lord Morley's case, Kelynge 56*. 4. The law will imply malice from the nature of the original action, or first assault, though blows pass between the parties, before the stroke is given, which occasions the death. As if upon angry words or abusive language between A and B, of a sudden A, without any provocation (for angry words or abusive language in such a case is looked on as none), draws his sword immediately, and makes a pass at B, or strikes at him with any dangerous weapon, as a pistol, hammer, large stone, &c. which in all probability might kill B, or do him some great bodily hurt, and then B draws his sword, and mutual passes are made, and A kills B, this will be murder, for the act was voluntary; and it appears from the nature of it, that it was done with an intent to do mischief; and therefore since in all probability it might have occasioned B's death, or done him some great bodily harm, the law implies malice prepense; and the resistance or passes that were made by B, were but in the defence of his person, which was violently and

* See vol. 6, p. 769 of this Collection.

orally attacked. And this was the resolution of Kelynge, chief-justice, Twisden, Windham, and Morton, justices in Hopkin Huggett's case, Kelynge 62*. And though in the principal case, the eight other judges differed in opinion from the four judges in the King's-bench; yet, to this opinion of the four, the eight judges did agree, as Kelynge took it. And this was the true reason of Mawgridge's case. The judgment in which case is a great authority in this case, that not being so strong a case as the present case. It was indeed objected by the counsel for the prisoner at the bar, in their arguments in the present case, 1. That Mawgridge's case was a single case, that the judgment in that case had carried murder further than it had ever been carried before. 2. That it was not determined with the unanimous opinion of all the then judges, for one very great judge of the then twelve, viz. lord Trever, differed from the other judges, and held it was only manslaughter. But upon our meeting to consider of this present case, all the judges unanimously agreed, that Mawgridge's case was undoubted law †, and that that judgment was a right and just judgment, so groundless was that insinuation, which had been made (for such an insinuation there was) in Westminster-hall, that some of the present judges were of opinion, that the judgment in Mawgridge's case was not a legal judgment.

And this is as much as is necessary, rather more than is necessary, to be said as to implied malice, since there will be no occasion in this case to look out for malice implied.

2. Malice express is a design formed of taking away another man's life, or of doing some mischief to another, in the execution of which design death ensues. And this holds, where such design is not formed against any particular person; as if A having no particular malice against any particular person, comes with a general resolution against all opposers; if the act be unlawful, and death ensue, it is murder. As if it be to commit a riot, to enter into a park, lord Dacre's case, H. P. C. 47. Moore 86, Sav. 67. So if A goes with a resolution to kill the first man he meets, and meeting B, kills him, it is murder with express malice: yet A had not declared any malice against B, nor against any particular person. Much more it will be express malice, when the mischievous design is formed against any particular person, which may be made evident, as well by circumstances as by the express declarations of the person killing. As that he would be revenged of B, or that he would have his life, or have his blood; and some time after he kills B. And that such declarations spoken seriously, or deliberately, or after time for reflection, manifest an express malice, nobody can doubt.

Having thus briefly mentioned that known and settled rule, that there must be either malice express or implied, to make murder, and also some instances of what is one and what the other of them; I come to the present case before us.

All the twelve judges were unanimous in opinion, that as the facts are found in this special verdict, it appears that the prisoner at the bar had express malice against Mr. Gower, when he gave him the mortal wound, of which he died: 1. Mr. Gower did nothing that could reasonably raise a passion in Mr. Oneby. He gave him no provocation whatsoever; for when Mr. Gower set the three half-pence, he set them against Mr. Rich, and that in a jocular manner; therefore that was no affront to Mr. Oneby. 2. Upon that Mr. Oneby turned to Mr. Gower in an angry manner, and gave him abusive language, and called him impertinent puppy; the answer of Gower was not improper, nor more than what might be expected, that whosoever called him so was a rascal. 3. That as Oneby had before begun with Gower, by giving him abusive language, so he then took up the glass-bottle, 'et magnâ cum vi,' threw at Gower, and beat the powder out of his peruke; if it had killed Gower it had certainly been murder; upon which Gower tossed a glass or candlestick at Oneby. And the difference of finding in the special verdict is observable: Oneby threw the bottle at Gower, 'magnâ cum vi;' Gower only tossed the glass or candlestick at Oneby. 4. When they fetched their swords, Gower did it only to defend himself; for the verdict finds, that though Gower drew his sword first, yet the prisoner at the bar being hindered by the company from drawing his sword, Gower thereupon threw his sword away. 5. By the interposition of the company, the prisoner at the bar and Mr. Gower sat down again, and continued in company for an hour; after which Mr. Gower said, We have had hot words, but you was the aggressor, but I think we may pass it over, and offered his hand to the prisoner; that the prisoner at the bar was the aggressor, is true, and that in a violent manner: This was sufficient to have appeased Mr. Oneby: but what is his answer? No, damn you, I will have your blood. There is an express declaration of malice, an express declaration of a design of taking away Mr. Gower's life. These words are incapable of any other construction. These words shew his malicious intent, even in throwing the bottle at first; they are spoken an hour after the first action, and are spoken with deliberation. The next fact the jury find is; that afterwards (not particularly finding what interval of time passed between the speaking these words, and what is found next) Mr. Gower, Rich, Hawkins and Blunt went out of the room with an intent to go home, leaving the prisoner at the bar in the

* Judge Foster's Reports, p. 288, 313, 315, Huggett's case. *Former Edition.*

† This case of Mawgridge, being so frequently quoted in this trial and that of Carnegie, and as every gentleman may not have Kelynge's reports ready at hand to turn to, we have inserted the whole case from Kelynge, p. 117 to p. 138. *Former Edition.*

room; that the prisoner remaining in the room, called to the said William Gower, saying, "Young man, come back, I have something to say to you." These words also shew a plain deliberation; and being attended with the circumstances found before, and what follows immediately, import contempt; "Young man" are insolent and imperious, and "Come back," import a resentment he had conceived against Mr. Gower, about which he had something to say to him. For what purpose did the prisoner stay, after all the company had left the room to go home? It was to say something to Mr. Gower. What is that? Why, as soon as Mr. Gower is returned into the room, the door was immediately flung to and shut, and the rest of the company shut out; and then after shutting the door, a clashing of swords was heard, and the prisoner gave Mr. Gower the mortal wound, of which he died.

These immediate subsequent facts shew, what it was the prisoner had to say to Mr. Gower; it was to carry the malicious design, he had before declared he had against Mr. Gower, into execution, viz. to have his blood; and he had it, for he gave him the wound of which he died.

To go further: If the prisoner had malice against Mr. Gower, though they fought after the door was shut, the interchange of blows will make no difference; for if A has malice against B, and meets B, and strikes him, B draws, A flies to the wall, A kills B, it is murder. H. P. C. 42. Kelynge 58.

Nay, if the case had been, that there had been mutual malice between the prisoner and Mr. Gower (which does not appear to have been on the part of the deceased)* and they had met and fought upon that malice, the killing Mr. Gower by the prisoner had been murder. H. P. C. 47. 1 Bulstr. 86, 87. Hob. 121. Crompt. 21.

The judges were all of opinion, upon the facts found in this verdict, there appeared to be express malice in Oneby against Mr. Gower; and then Oneby killing Gower, having such express malice against him, they were all unanimous, and clear of opinion, that this was plainly murder.

Having thus mentioned the reasons, upon which we ground this present resolution, I shall next consider, if any of the objections made by the counsel for the prisoner are in answer to these reasons, or take off the force of them.

The counsel for the prisoner, Mr. Oneby, insisted, that upon the whole verdict, the case was no more than that from a slight occasion passionate words arose, mutual reproaches passed; the quarrel was sudden, mutual assaults were made; and on a sudden fighting, in heat of passion, the prisoner killed the deceased, which can be no more than manslaughter.

That such fact could amount to no more than manslaughter; they cited the known case, that if A and B fall out upon a sudden, and they presently agree to fight, and each fetches his weapon, and go into the field and fight, and one of them kills the other; this is but manslaughter, H. P. C. 48. 3 Instit. 57, because the passion was never cooled.

In this case (said they) it is plain the quarrel arose on a sudden; Mr. Oneby's passion was raised, and that it is not found by the jury to have ever been cooled; and therefore the words Mr. Oneby spoke, No, damn you, I will have your blood, &c. were only words of heat, spoke under the continuance of the first passion. And they further insisted, that the law had fixed no time, in which the passion must be took to be cool; but that depends upon circumstances, of which the jury are the proper judges. In this case, the whole time that passed, between the quarrel, and giving the mortal wound, was but little more than an hour; and it has been adjudged, that the passion shall not be took to be cooled in very near that time. 12 Co. 87. Cro. Jac. 296. H. P. C. 48, Rowley's case, where the child of A. beat the child of B. B's child, all bloody, ran home to his father; B, the father, ran three quarters of a mile, and beat the child of A; by means whereof he died: This was adjudged to be only manslaughter; yet there must have been a considerable time after B was provoked by the usage of his child before he killed A's child, because he ran three quarters of a mile; yet it being one continual passion raised in B, upon the beating of his child, it was held this was only manslaughter. And in this present case, to shew the passion of Mr. Oneby, which was suddenly raised, was not cooled, the counsel for Mr. Oneby observed, that the jury had expressly found that there was no reconciliation between Oneby, the prisoner, and Mr. Gower, the deceased, from the time Mr. Oneby first threw the bottle.

This I take to be the chief objection, upon which the counsel for the prisoner principally relied.

In answer to this objection, I must first take notice, that where a man is killed, the law will not presume that it was upon a sudden quarrel, unless it is proved so to be; and therefore in Legg's case, Kelynge 27, it was agreed, upon evidence, that if A kills B, and no sudden quarrel appears, it is murder; for it lies upon the party indicted to prove the sudden quarrel.

In the next place, from what I have said before, it appears, that though a quarrel was sudden, and mutual fighting before the mortal wound given, it is by no means to be took as a general rule, that the killing a man will be only manslaughter. It is true, if reproachful language passes between A and B, and A bids B draw, and they both draw (it is not material which of them draws first,) and they both fight, and mutual passes are made, death ensuing from thence will be only manslaughter, because it was of a sudden, and each ran the hazard of his life. But there

* The verdict implies the contrary: For he offered him his hand, &c. *Former Edition.*

is a wide difference between that case, and where upon words A draws his sword, and makes a pass at B, or with some dangerous weapon attacks him, and then B draws, and they fight, and A kills B; there, though there was a quarrel upon abusive language, and there was afterwards a mutual fighting, yet since A attacked B with a weapon or instrument, which might have taken away B's life, though they fought afterwards, that will be murder. And this was agreed by all the judges in the present case.

But for the argument's sake, and it is only for argument's sake, and to give the objection made by the counsel for the prisoner its full force; if it should be looked on here, that what is found in the former part of the verdict was upon a sudden quarrel, and only the effect of passion; yet, if it appears upon the special verdict, that there was a sufficient time for this passion to cool, and for reason to get the better of the transport of passion, and the subsequent acts were deliberate, before the mortal wound given, the killing of the deceased will be murder.

And all the judges were of opinion, that, upon consideration of the facts found, it appeared, there had been sufficient time for Mr. Oneby's transport of passion to cool,* and that he had deliberated; and that the killing of Mr. Gower was a deliberate act, and the result of malice Mr. Oneby had conceived against the deceased.

But before I mention their reasons, I must lay down this proposition, to which they all agreed, viz. that the Court are judges of the malice, and not the jury; and that the Court are also judges upon the facts found by the jury, whether if the quarrel was sudden, there was time for the passion to cool, or whether the act was deliberate or not.

Upon the trial of the indictment, the judge directs the jury thus.† If you believe such and such witnesses, who have sworn such and such facts, the killing the deceased was with malice prepense express, or it was with malice implied, and then you ought to find the prisoner guilty of murder; but if you do not believe those witnesses, then you ought to find him guilty of manslaughter only; and so according to the nature of the case, if you believe such and such facts, the act was deliberate, or not deliberate; and then you ought to find so and so. And the jury may, if they think proper, give a general verdict, either that the prisoner is guilty of murder, or of manslaughter. But if they decline giving a general verdict, and will find the facts specially, the Court is to form their judgment from the facts found, whether there was malice or not, or whether the fact was done on a sudden transport of passion, or was an act of deliberation, or not.

Although there are many special verdicts in indictments for murder, there never was one, where the jury find in express terms that the act was done with malice, or was not done with malice prepense; or that it was done upon a sudden quarrel, and in transport of passion; or that the passion was cooled or not cooled; or that the act was deliberate, or not deliberate: but the collection of those things from the facts found, is left to the judgment of the Court. Holloway's case, Palm. 545. Cro. Car. 131. W. Jones 198. So in the case cited by the counsel for the prisoner, Cro. Jac. 296, Rowley's case, the jury find the fact, but don't find in express terms, that the father, whose child was beat, killed the other child in a sudden heat of passion; but that was left to the judgment of the Court, upon the particular facts found.

But then it is objected, that the law has fixed no time, in which the passion must be supposed to be cooled. It is very true, it has not, nor could it, because passions in some persons are stronger, and their judgments weaker, than in others; and by consequence it will require a longer time in some, for reason to get the better of their passions, than in others: but that must depend upon the facts, which shew whether the person has deliberated or not; for acts of deliberation will make it appear whether that violent transport of passion was cooled or no.

But thus far the resolution of the judges have already gone; and it has been adjudged, that if two fall out upon a sudden, and they appoint to fight next day, that the passion by that time must be looked on to be cooled; and in such case, if they meet next day, and fight, and the one kills the other at that meeting, it has been often held to be murder. Hale P. C. 48.

To go a little farther. If two men fall out in the morning, and meet and fight in the afternoon, and one of them is slain, this is murder; for there was time to allay the heat, and their meeting is of malice. So is Legg's case, Kelynge 27.

At the meeting of all the judges, before lord Morley's* Trial by the peers, for the murder of one Hastings, they all agreed, that if upon words two men grow to anger, and afterwards they suppress that anger, and then fall into other discourse, or have other diversions, for such a reasonable space of time as in reasonable intendment their heat might be cooled; and some time after they draw upon one another, and fight, and one of them is killed; this is murder, because being attended with such circumstances, it is reasonably supposed to be a deliberate act, and a premeditated revenge upon the first quarrel. But the circumstances of such an act being matter of fact, the jury are judges of them, Kelynge 56. The meaning of which last words is, that the jury are judges of the facts, from which those circumstances are

* *See Leach's* Hawkins's Pleas of the Crown, *book 1, chap. 31. s. 22.*

† *As to this, see the judgment of* Lawrence, J. *in the case of* Darbishire *v.* Parker, 6 East 3.

* See Vol. 6, p. 770.

collected. But, as I said before, when those facts are found, the Court is to judge from them, whether they do not shew the act was deliberate or not.

Lord Morley upon his trial by the peers was acquitted; and after that, in Easter term, 18 Car. 2, Broomwich, who was indicted as a principal, in being present, aiding, and abetting lord Morley, in the murder of Hastings, was tried at the King's-bench bar. The quarrel was at a tavern; but it was proved, when the quarrel was at the tavern, that lord Morley said, if we fight at this time, I shall have a disadvantage, by reason of the height of my shoes; and presently after they went into the fields, and fought; lord Morley killed Hastings: but while they were fighting, Broomwich made a thrust at Hastings, and lord Morley closed in with Hastings, and killed him; and (says the book) this was held as clear evidence of their intention to fight, when they went out of the tavern; and the quarrel being only about words, and fighting in a little time after, it was held murder by all the Court. And there need not be a night's time between the quarrel and the fighting, to make it murder, but such time only, as it may appear not to be done on the first passion; for lord Morley considered the disadvantage of his shoes; and the Court directed the jury that it was murder in Broomwich, being present, and aiding; but the jury acquitted him. 1 Sid. 277, reports the same case, and says, that the Court, in the direction to the jury, laid it down, that after the provocation in the house, they say, this is no convenient place (and so have reason to judge of conveniency), and appoint another place, though the fight is to be presently: this is murder, for the circumstances shew their temper.

In H. P. C. 48, if A and B fall out, A says he will not strike, but will give B a pot of ale to touch him, B strikes, A kills him; murder.

Two quarrel; the one says, if you'll go into the field, I will break your head, and there one kills the other; murder. Crompt. 25, p. 49. Two fall out on a sudden in the town, and they by agreement go into the field presently, and one kills the other; murder. Crompt. 23, fol. 31.

From these cases it appears, that though the law of England is so far peculiarly favourable (I use the word peculiarly, because I know no other law that makes such a distinction between murder and manslaughter), as to permit the excess of anger and passion (which a man ought to keep under, and govern) in some instances to extenuate the greatest of private injuries, as the taking away a man's life is; yet in those cases, it must be such a passion, as for the time deprives him of his reasoning faculties; for if it appears reason has resumed its office; if it appears, he reflects, deliberates, and considers, before he gives the fatal stroke, which cannot be, as long as the fury of passion continues; the law will no longer, under that pretext of passion, exempt him from the punishment, which from the greatness of the injury and heinousness of the crime he justly deserves, so as to lessen it from murder to manslaughter. Let us see, therefore, whether upon this special verdict it appears that the fighting and killing Mr. Gower was only done in heat of passion, or was a deliberate act. By what I observed before, it plainly appears it was a deliberate act. But to recapitulate in short; after the words had passed, and the bottle was thrown by the prisoner; and swords drawn; by the interposition of friends they sat down, and continued in company for an hour (a reasonable time under those circumstances for the passion to cool); and after that hour expired, the deceased says, We have had hot words, but you was the aggressor; but, I think we may pass it over; and at the same time offered his hand to the prisoner, which was enough to have appeased the prisoner: To this Mr. Oneby answered, No, damn you, I'll have your blood; words expressing malice, not passion: Then, when the company went out of the room, the prisoner stayed, and called the deceased back; Young man, come back, I have something to say to you: The door immediately was shut, clashing of swords was heard, and the deceased received the mortal wound from the prisoner at the bar. The prisoner's words shew, what was his intention, viz. to take away Mr. Gower's life; and the killing him may properly be said to have been done upon deliberation and consideration.

The counsel for the prisoner in their arguments insisted, that there were several circumstances found in the special verdict in favour of the prisoner, which were a foundation for the Court, to construe the other expressions to be only words of heat; and that what he did was in the heat of his first passion, which was never cooled, and not out of malice. As 1. It is found, that at the breaking up of the company, Mr. Oneby had his great coat thrown over his shoulders; from whence it would be a strain, to think he then intended to fight with Mr. Gower. 2. It might be Mr. Gower who shut the door, who came back after he was out of the room, the jury not having found who shut the door. 3. That it was found, there was no reconciliation between them, from the throwing the bottle at Mr. Gower. But as to the first of these objections, considering the words the prisoner used after this, and after the deceased was out of the room, and what followed, since the jury have found this fact, without saying any more about it, the natural construction is, that this was only used by the prisoner as a blind to the company, to conceal from them his real intention, till they were gone out of the room. As to the second; it stands uncertain upon the verdict; but it is an uncertainty which can have no influence upon the present determination; for if Mr. Gower had shut the door, that would not alone have materially altered the case. As to the third; since express malice before appeared to be in the prisoner, the finding that fact does not im-

part, that the first heat of passion continued only, but that the malice continued.

The counsel for Mr. Oneby farther objected, that it appeared there was a mutual fighting after the door was shut; for it is found that he received three slight wounds; then it is not found, who drew first, or made the first assault, after the door was shut; and it was possible a new, sudden quarrel might then rise, in which Mr. Gower might be the aggressor, and therefore the special verdict was uncertain in a material point. The answer to which is, what is said in Legg's Case, Kelynge 27, cited before; that if A kills B, and no sudden quarrel appears, it is murder; for it lies on the party indicted, to prove the sudden quarrel; and therefore the jury not having found any such thing for the prisoner's benefit, it is to be took there was no such. This is said, supposing the latter part of the verdict could be considered, without regarding the former part of it: and that when the company went out of the room, the prisoner and Mr. Gower were reconciled. But however that might have been, here it appears there was no reconciliation, and therefore there can be no imagination of a new, original quarrel in the room after the door was shut. And as to the slight wounds the prisoner received, that is immaterial; for he having malice against Mr. Gower, though there was mutual fighting, and the prisoner was wounded, yet, when he killed Mr. Gower, it will be murder.

The last fact in the special verdict, which they relied on, was, when Mr. Gower was asked upon his death-bed, whether he had received his wounds in a manner among swordsmen called fair? He answered, I think I did; whereby the deceased shewed, he was satisfied the act was fair. The answer to which is plain; that if A have malice against B, and they meet and fight, though the fight is never so fair according to the law of arms, yet if A kills B, it will be murder.

The cases the counsel for the prisoner principally relied on to make this fact only manslaughter, were Rowley's Case, 12 Coke 87; and Turner's Case, Comberbatch, 407, 8.

As to 12 Coke 87, the case was, that two boys fighting together, the one of them was scratched in the face, and he bled a great deal at the nose; and so he ran three-quarters of a mile to his father, who seeing him very bloody, took in his hand a cudgel, and went three-quarters of a mile to the other boy, and struck him upon the head, upon which he died, and it was held but manslaughter, for the passion of the father continued. And there is no time, that the law can determine, that it was so settled, that it should be adjudged malice prepense. (Note, These are the words of 12 Coke 87.)

To which the answer is plain, for the reason given in Cro. Jac. 296, which is the same case, that the father having no anger before, but being provoked upon the complaint and sight of his son's blood, and in that anger beating him, of which he died, the law adjudged it to be upon that sudden passion. But that is, considering what has been said before, clearly distinguishable from the present case; besides it may be added, it was but a little cudgel he struck with, from which no such fatal event could be reasonably expected.*

Turner's Case was this; his wife complained the boy had not cleaned her clogs, upon which Mr. Turner took up a clog, and struck him on the head, and killed him; and though there was no other provocation, it was held only manslaughter. But the reason of that was, because the clog was so small, there could be no design to do any great harm to the boy, much less to kill him; and a master may correct a servant in a reasonable manner for a fault. And lord chief justice Holt, in Comberbatch 408, says, that in that case, it was an unlikely thing, meaning, that the clog should kill the boy. The counsel for the prisoner, being apprehensive of the authority of Mawgridge's Case, besides the observations they had made, mentioned before, to induce the Court to look upon that judgment, as not warranted by law, endeavoured to distinguish the present case from it, supposing it to be law. And 1st, They said, that in Mawgridge's Case, the bottle hit Mr. Cope, and stunned him; but here the bottle did not hit Mr. Gower, but only brushed some powder out of his peruke. 2dly, In Mawgridge's Case, the bottle was full of wine; here it is not found to have been so, and therefore must be took to have been empty; and the size of the bottle does not appear, it might be very small. 3dly, Mawgridge drew his sword immediately after throwing the bottle, without intermission; here Mr. Gower's sword was first drawn. 4thly, Mr. Cope never drew; here Mr. Gower not only drew the first, but clashing of swords were heard, so there must have been fighting.

It is very true (so far as these facts will make a difference) this present case is distinguishable from Mawgridge's Case; for that case was determined only upon an implied malice (but, as I said before, was very rightly and justly determined, as we all agreed), for strictly and properly speaking, although the word express-malice is mentioned in the reasons given for that resolution, yet it was but malice implied. But still this way of distinguishing the present case from Mawgridge's, will be of no service to the prisoner, because, though all the judges held this case was distinguishable from Mawgridge's Case; it was in respect that this was a much stronger case as to the murder, the jury having found facts which shew Mr. Oneby had an express malice against Mr. Gower. Upon the whole matter, this Court, with the concurrent opinion of all the other judges, is of opinion, that the prisoner at the bar, John Oneby, by this special verdict, is found guilty of murder.

Memorandum. As soon as I had delivered

* Vide Foster's Reports, p. 294, Rowley's Case.

this resolution, I desired my brothers Fortescue, Reynolds, and Probyn, that if they disapproved any thing I had laid down, they would express their disapprobation; but they publicly declared, they concurred *in omnibus*.*

Major Oneby, observing that great stress was laid on that wicked and malicious expression of his to the deceased, Damn you, I'll have your blood: he declared, that as he hoped to find mercy at the hands of Almighty God, he never made use of that expression. He then prayed to be recommended to his majesty's clemency, in regard to his long and faithful services in the army. As to the first, the Court told him, that as the words were sworn, and stood in the special verdict, his allegation availed nothing: and to the second, that as that was a court of justice he must apply elsewhere for mercy.

The prisoner being, after this resolution pronounced, intituled by the course of the Court to have four days to move in arrest of judgment, he was sent back to Newgate, and a rule for bringing him up to receive judgment the end of the week was made; before which time, an account came of the death of his late majesty at Osnabrug, the 11th of June. And afterwards, at the time appointed by the rule, he was brought to the bar, and judgment was pronounced against him, and execution awarded.† After which, a pretty strong application was made to his majesty king George the 2d, for a reprieve; but he was pleased to declare, that the judges having adjudged the prisoner guilty of murder, the law should take its course. In which attempt, the prisoner not succeeding, he killed himself in Newgate, in the night before the day appointed for his execution, by cutting through the great artery in his arm with a razor, by which he bled to death.

On Monday, the 19th of June, he was brought up, and objected, "That there was no joinder of issue, for want of a *similiter*:‡ but the precedents in all capital cases being in this manner, the objection was over-ruled. And Mr. Justice Fortescue, in a very serious speech, pronounced the sentence for his execution; which was appointed for Monday the 3d of July. Upon the morning whereof he opened a vein, and bled to death,|| to avoid the infamy of an execution."—He was buried in the highway, with a stake drove through his body.

On his destroying himself, the following account was published in a Narrative of his Life:

"John Oneby—aged about 53 years, was born at Barwell in Leicestershire.—His father was an attorney, of an unblemished character, and practised with great success.—He took care to bestow an education on his son John—as designing him for the business of the law; who accordingly served a clerkship with a gentleman of great note and eminence in his profession: but proving a youth of an aspiring and haughty temper—his head ran upon things greater than the provision they had made, or were capable of making for him.

"The custody of the great seal of England being committed to sir Nathan Wright, a very near relation of Mr. Oneby's mother; application was made to this gentleman, to bestow some genteel employment on his young kinsman.—But nothing greater than the place of his train-bearer could be procured.

"His great spirit brooked with it for some time, hoping that something better would offer.—But as nothing did, he quitted the lord-keeper's service, and took up a resolution of going abroad into the army.

"His friends soon procured him a commission, and he served in several campaigns under the late duke of Marlborough in Flanders, where he acquired the reputation of a gallant officer, he having distinguished himself in several battles and sieges, and received divers wounds.

"He having once the misfortune to quarrel with an officer of horse at Bruges, they went out together from the camp, and fought. His antagonist received a mortal wound, and died the next day. But this being done as the people of honour call it, fairly, Mr. Oneby was called to a court-martial, and very honourably acquitted; and had now established that vain, empty character, so much admired by too many in the army, viz. of having felled his man.

"The next exploit of this nature was performed by him at Port-Royal in Jamaica; where fighting a duel with one lieutenant Tooley, they were both desperately wounded. Mr. Tooley languished for about eight months, and then died; but having been long before

* As to the law respecting the matters which were agitated in this Case, see East's Pleas of the Crown, chap. 5, § 12, § 19, § 25, § 30, § 54. See, also, in this Collection, the Case of Reason and Tranter, vol. 16, p. 1.

† Lord Raym. Reports, vol. 2, p. 1499, 1500.

‡ Strange's Reports, vol. 2, p. 775. As to the objection that there was no joinder of issue for want of a *similiter*, see the case of the King against Dowling, 5 Term Rep. 311. See, also, in this Collection, vol. 15, p. 696.

|| The case was, he desired, the morning of his intended execution, to be still, that he might compose himself against the coming of his friends; about seven, he said faintly to his footman, who came into the room, Who is that, Philip? A gentleman coming to his bed-side soon after, called Major! Major! but hearing no answer, he drew open the curtains, and found him weltering in his blood, and just expiring. Mr. Green, a neighbouring surgeon, was instantly sent for; but before he came, the major was dead; he had made so deep a wound in his wrist with a penknife, that he bled to death. Select Trials at the Old-Bailey, Octavo, vol. 2, p. 153. *Former Edition.*

perfectly reconciled to Mr. Oneby, the latter was never called in question about his death.

"Having served about 22 years in the army, and rising gradually, according to his right of seniority, he at length attained to the rank of a major in the regiment of dragoons, commanded by the honourable brigadier Honeywood. But upon the peace of Utrecht, his pay was curtailed, and a stop put to his further preferment.

"In these circumstances he returned to England, versed in all kinds of vice, particularly gaming, to which he had much addicted himself in the camp, and had there met several revolutions of fortune. Sometimes an auspicious hand of dice having enabled him to make an entertainment for the chief generals in the army; his ambition leading him to great profuseness that way, when it has been in his power. And at other times his ill luck has reduced him to scandalous necessities. He now associated himself with the principal gamesters of this town, designing to support himself after their example; and frequented all the public places of resort, where gentlemen played, being seldom without cards or dice in his pockets. And there is no doubt, but it was he who conveyed the dice upon the table at the Castle tavern, in Drury-lane, which produced gaming; the consequence whereof was then the murder of Mr. Gower; and since that, of himself."

MAWGRIDGE'S CASE,*

IN THE QUEEN'S-BENCH,

Term. Hill. 5 Ann. Reg.

At the sessions of the peace held at Guildhall, London, on the first of July, in the fifth year of the queen, John Mawgridge of London, gent. was indicted, for that on the 7th of June, in the same year, he did feloniously, voluntarily, and of his malice forethought, make an assault upon William Cope, gent. and with a sword on the left part of his breast, near the left pap, did him strike and pierce, giving him thereby a mortal wound, of which the said Wm. Cope did instantly die. Which indictment being delivered to the justices of gaol-delivery for Newgate, he was arraigned thereupon, and pleaded Not Guilty.†

The Jury found this Special Verdict:

That William Cope was lieutenant of the queen's guards in the Tower, and the principal officer then commanding there, and was then upon the guard in the guard-room; and that John Mawgridge was then and there, by the invitation of Mr. Cope, in company with the said William Cope, and with a certain woman of Mr. Cope's acquaintance, which woman Mawgridge did then affront, and angry words passed between them in the room, in the presence of Mr. Cope and other persons there present, and Mawgridge there did threaten the woman; Mr. Cope did thereupon desire Mawgridge to forbear such usage of the woman, saying, that he must protect the woman; thereupon Mawgridge did continue the reproachful language to the woman, and demanded satisfaction of Mr. Cope, to the intent to provoke him to fight: thereupon Mr. Cope told him it was not a convenient place to give him satisfiable for Mr. Cope to do; for he who hath shewn that he hath malice against another is not fit to be trusted with a dangerous weapon in his hand. The words previously spoken by Mr. Cope could be no justification for Mawgridge; and it was reasonable for the former to suppose his life in danger when attacked with so dangerous a weapon, and the assault followed up by another act indicating an intention of pursuing his life; and this at a time when he was off his guard, and without any warning. This latter circumstance forms a main distinction between that case and the case of death ensuing from a combat, where both parties engage upon equal terms; for there, if upon a sudden quarrel, and before any dangerous blow given or aimed at either of the parties, the one who first has recourse to a deadly weapon suspend his arm till he has warned the other, and given him time to put himself upon his guard; and afterwards they engage on equal terms; in such case it is plain that the design of the person making such assault is not so much to destroy his adversary at all events, as to combat with him, and to run the hazard of his own life at the same time. And that would fail within the same common principle which governs the case of a sudden combat upon heat of blood, which has been before treated of. But if several attack a person at once with deadly weapons, as may be supposed to have happened in Ford's Case; though they wait till he be upon his guard; yet it seems (there being no compact to fight) that he would be justified in killing any of the assailants in his own defence; because so unequal an attack resembles more a desire of assassination than of combat." East's Pleas of the Crown, c. 5, § 47. See, too, c. 5, § 20, of the same book; and Leach's Hawkins's Pleas of the Crown, book 1, c. 31, § 27. Concerning other matters agitated in this Case, see East's Pleas of the Crown, c. 5, § 2. 4, 25. 30. 48.

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* See the preceding and following Cases, Holt, 484. See, too, in this Collection, the Case of Reason and Tranter, vol. 16, p. 1.

† "Other cases have occurred, wherein the question has turned upon the apparency of the intent in one of the parties to commit such felony as will justify the other in killing him. As in Mawgridge's Case; who, upon words of anger between him and Mr. Cope, threw a bottle with great violence at the head of the latter, and immediately drew his sword: on which Mr. Cope returned a bottle with equal violence; which, says lord Holt, it was lawful and justi-

faction, but at another time and place he would be ready to give it to him, and in the mean time desired him to be more civil, or to leave the company: thereupon John Mawgridge rose up, and was going out of the room; and so going, did suddenly snatch up a glass bottle full of wine then standing upon the table, and violently threw it at him, the said Mr. Cope, and therewith struck him upon the head, and immediately thereupon, without any intermission, drew his sword, and thrust him into the left part of his breast, over the arm of one Robert Martin, notwithstanding the endeavour used by the said Martin to hinder Mawgridge from killing Mr. Cope, and gave Mr. Cope the wound in the indictment mentioned, whereof he instantly died. But the jury do further say, that immediately, in a little space of time, between Mawgridge's drawing his sword, and the giving the mortal wound by him, Mr. Cope did arise from his chair where he sat, and took another bottle that then stood upon the table, and threw it at Mawgridge, which did hit and break his head; that Mr. Cope had no sword in his hand drawn all the while; and that after Mawgridge had thrown the bottle, Mr. Cope spake not. And whether this be murder or manslaughter, the jury pray the advice of the Court.

A day being appointed for the resolution of the Court, and the marshal required to bring the prisoner to the bar, returned he was escaped; which being recorded, the Chief Justice (Holt) gave the opinion of the judges in this manner:

This Record being removed into this Court, the case hath been argued before all the judges; and all of us, except my lord chief justice Trevor, are of opinion that Mawgridge is guilty of murder.

This hath been a case of great expectation.

This distinction between murder and manslaughter only, is occasioned by the statute of 23 H. 7, and other statutes that took away the benefit of clergy from murder committed by malice prepensed, which statutes have been the occasion of many nice speculations.

The word "murder" is known to be a term or a description of homicide committed in the worst manner, which is no where used but in this island, and is a word framed by our Saxon ancestors in the reign of Canutus upon a particular occasion, which appears by an uncontested authority, Lamb. 141. In the laws of Edward the Confessor: "Murdra quidem inventa fuerunt in diebus Canuti * Regis, qui post acquisitam Angliam et pacificatam, rogatu Baronum Anglise remisit in Daciam exercitum suum." Thereupon a law was made, That if any Englishman should kill any of the Danes that he had left behind, if he were apprehended, he should be bound to undergo the ordeal trial to clear himself; and if the murderer were not found within eight days, and after that a month was given, then if he could not be found, the ville should pay 46 marks, which if not able to pay, it should be levied upon the hundred. Bracton, 120, agrees with this account.

Though this law ceased upon the expulsion of the Danes, yet William the Conqueror revived it for the security of his Normans, as appears by his laws, after he had confirmed king Edward the Confessor's laws. And Henry 1, anno primo regni, afterwards by his law (as appears in the addition to Lambert) establishes, "That if a man be found slain, he should be taken to be a Frenchman, if it was not proved that he was an Englishman, and the country was bound to enquire, whether the person slain was an Englishman or a Frenchman." These inquisitions were taken before the coroner, and returned to the justices in eyre, and if the jury found him an Englishman, then the country was to be discharged, which law was called Englishire, and the justices in eyre were also bound to enquire thereof, until the statute of 14 E. 3, which, as it is mentioned in Stamford, was abolished.

Hereby a mistake upon the statute of Marlebridge is rectified, which is cap. 26. "Murdrum de cætero non adjudicatur coram justiciariis, ubi per infortunium adjudicatum est, sed locum habeat murdrum de interfectis per feloniam tantum, et non aliter." This was not made upon a supposition that he that killed the person slain by misfortune should be hanged, but only to explain, or rather to take off the rigour of the Conqueror's law, that the country should not be compelled to find out the manslayer; or if he were found out, he should not undergo the penalty of that law. For as the law stood, or was interpreted before that statute, if a man was found to be slain, it was always intended, 1. That he was a Frenchman. 2. That he was killed by an Englishman. 3. That killing was murder. 4. If any one was apprehended to be the murderer, he was to be tried by fire and water, though he killed him by misfortune; which was extended beyond reason and justice in favour of the Normans:

* But according to lord Fortescue; "Murder is a Saxon word, and to be found in several places in the ancient Saxon laws; and is of a very ancient date, probably as old as the Saxon tongue itself, which is about 500 years older than Canutus's time. We frequently in Saxon authors find the words *morthur*, *morther*, *mordor*, murther or murder; and these come from the ancient Saxon word *morth*; which signifies a violent death, or sudden destruction, and sometimes signifies murder, in the present sense of our common lawyers. From hence comes the barbarous Latin term *mordrum* and *murdrum*, and the verbs *mordrare*, *murdrare*, and *mordidrare*; which are of much greater antiquity than king Canutus, who began his reign but in 1016. Now give me leave to mention the true derivation of our word *murdrare*; which I think manifestly comes from the Latin *morti dare*." Fortescue Aland's Preface to his Reports.

but if an Englishman was killed by misfortune, he that killed him was not in danger of death, because it was not felony. For, saith Bracton (who wrote the latter end of H. 3,) fol. 136, "He that killeth a man by misfortune, was to be discharged." 5. If the malefactor was not taken, then the country was to be amerced. But by the statute of Marlebridge, if it was known that the person slain was a Frenchman, and was killed by misfortune, then the country should not be amerced if the manslayer was not taken; or if he were taken, he should not be put to his ordeal trial. This seems to be the true meaning of that statute.

But, secondly, it will appear to a demonstration, that before that statute, he that killed an Englishman 'per infortunium' was never in any danger of death; for this statute of Marlebridge was made 52 H. 3. The statute of Magna Charta was consummate 9 H. 3, and that supposes, "That every one imprisoned for the death of a man, and not thereof indicted, might of right pursue the writ De Odio et Atia; and if it was found that the person imprisoned killed him 'se defendendo,' or 'per infortunium,' and not 'per feloniam,' then he was to be bailed." Which shews that he was not in danger of death; for if he had, he would not have been let to bail, 2 Inst. 42.

Hereby I have given a true account of the sense of the word Murder, what it was when (first in the time of Canutus) a Dane, and since (in William the Conqueror) when a Frenchman was killed; for, as it was then supposed in the time of Canutus, the Englishmen hated the Danes upon the account of their nation that had subdued them, and would upon all occasions seek their destruction, as they did of a considerable number of them in the time of Ethelred, the Saxon king that preceded Canutus next save one; so the Conqueror had the same reason to suspect the safety of his Normans.

Afterwards, as appears by the Confessor's laws, Lamb. 141, the secret or insidious killing of any other as well as a foreigner was declared to be murder. Bracton, 120, 134, 135. Murder is thus defined, "Est occulta hominum extraneorum et notorum occisio manu hominum nequiter perpetrata." With which agrees the other old books of Britton and Fleta: only in case of a foreigner it was penal to the country; not of a native.

Next, it may be necessary to shew what was to be understood by Homicide or Manslaughter. Bracton 128, mentions the worst part of it, which is a voluntary homicide, defined in this manner: "Si quis ex certâ scientiâ et in assultu præmeditato, irâ, vel odio, vel causâ lucri, nequiter et in felonia, ac contra pacem Domini Regis aliquem interfecerit:" if one knowingly, and by a premeditated assault, by anger or hatred, or for lucre-sake, should kill another, this was accounted manslaughter; if it be done 'clanculo,' saith Bracton, it is murder: that was all the difference there was between the one and the other.

It appears, that since that of Bracton the notion of murder is much altered, and comprehends all homicides, whether privately or publicly committed, if done by malice prepensed. With this agrees Stam. Pl. Cor. 18 b. "At this day (saith he) a man may define murder in another manner than it is defined by Bracton, Britton and Fleta: If any one of malice prepensed, doth kill another, be he Englishman or foreigner, if secretly or publicly, that is murder: this was the definition long before the making of the statutes of 4 and 23 H. 8, and the other statutes that took away clergy." To define murder, there must be *malitiâ præcogitatâ*, as also *murdravit*: so that if an indictment be that the party *murdravit*, and not *ex malitiâ præcogitatâ*, it is but manslaughter, Yel. 204. 2 Cro. 383. 1 Bul. 141, Bradly and Banks. So if it be *ex malitiâ præcogitatâ*, omitting *murdravit*, it is but manslaughter, Dyer 261. Pl. 26—304. Pl. 56. Vide Stat. 10 E. 3, cap. 2. The parliament complained that murderers, &c. were encouraged to offend, because pardons of manslaughters were granted so easily; the act therefore prohibits the granting thereof. 13 R. 2, recites the same mischief, and great damage by treasons, murders, &c. because pardons have been easily granted: therefore the act doth provide, "That if a charter for the death of a man be alleged before any justice, in which charter it is not specified that he of whose death any such is arraigned was murdered or slain by await, assault or malice prepensed, it shall be enquired, whether he was murdered or slain by assault, await, or malice prepensed; and if it be so found, the charter of pardon shall be disallowed." This is a plain description of murder, as it was taken to be according to the common understanding of men.

Ever since the killing of a man by assault of malice prepensed hath been allowed to be murder, and to comprehend the other two instances. But because that way of killing by poison did not come under the ancient definition of Bracton, &c. which is said to be *manu hominum perpetratâ*, or of this statute of 13 R. 2. Therefore by the statute of 1 E. 6, c. 12, it was enacted, "That wilful poisoning of any person should be accounted wilful murder of malice prepensed."

One thing more is fit to be observed, that in all indictments for murder a man is not charged positively, that he did murder the person slain, but that he 'ex malitiâ præcogitatâ. in ipsum 'insultum fecit, ac cum quodam gladio,' he gave him a wound whereof he died: 'Et sic ex 'malitiâ præcogitatâ ipsum murdravit,' so the murder is charged upon him by way of conclusion, and as a consequence from the antecedent matter that is positively alleged. To come close to a state of the present question, it doth appear that Mawgridge threw the bottle at Mr. Cope without any provocation given to him; for the difference was between him and the woman that was there in company, and his behaviour was so rude and distasteful as did in-

duce captain Cope to desire him to leave the room, where he was only a guest to him, and there by his permission; this Cope might reasonably do, which could be no cause to provoke Mawgridge to make the least assault upon him: therefore I shall maintain these three positions:

1. That in this case there is express malice by the nature and manner of Mawgridge's throwing the bottle, and drawing his sword immediately thereupon.

2. That Mr. Cope's throwing a bottle at Mawgridge, whereby he was hit and hurt before he gave Mr. Cope the mortal wound, cannot make any alteration in the offence by reducing it to be of so low a degree as manslaughter.

3. I shall consider what is such a provocation, as will make the act of killing to be but a manslaughter only.

1. Here is express malice, that appears by the nature of the action. Some have been led into a mistake, by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing, for some considerable time before the commission of the fact, which is a mistake arising from the not well distinguishing between hatred and malice. Envy, hatred, and malice, are three distinct passions of the mind.

1st. Envy properly is a repining, or being grieved at the happiness and prosperity of another, 'Invidus alterius rebus macrescit opimis.'

2dly, Hatred, which is *odium*, is, as Tully saith, *ira inveterata*, a rancour fixed and settled in the mind of one towards another, which admits of several degrees. It may arrive to so high a degree, and may carry a man so far as to wish the hurt of him, though not to perpetrate it himself.

3dly, Malice is a design formed of doing mischief to another; 'Cum quis datâ operâ 'male agit,' he that designs and useth the means to do ill, is malicious, 2 Inst. 42. *Odium* signifies hatred, *atia* malice, because it is eager, sharp, and cruel. He that doth a cruel act voluntarily, doth it of malice prepensed, 3 Inst. 62. By the statute of 5 Hen. 4, If any one out of malice prepensed shall cut out the tongue, or put out the eyes of another, he shall incur the pain of felony. If one doth such a mischief on a sudden, that is malice prepensed; for, saith my lord Coke, "If it be voluntarily, the law will imply malice." Therefore when a man shall, without any provocation, stab another with a dagger, or knock out his brains with a bottle, this is express malice, for he designedly and purposely did him the mischief. This is such an act that is malicious in the nature of the act itself, if found by a jury, though it be sudden, and the words *ex malitiâ præcogitatâ* are not in the verdict, 1 Cro. 131 Halloway's case, who was woodward of Osterly-park, in Middlesex; a boy came there to cut [steal] wood, whom by chance he espying, and the boy being upon a tree, he immediately calls to him to descend, which the boy obeying, Halloway tied him to an horse's tail with a cord that the boy had, then gave him two blows, the horse ran away and brake the boy's shoulder, whereof he died. This was ruled to be murder by all the justices and barons, except justice Hutton, who only doubted thereof; and that was a stronger case than this; for there was some kind of provocation in the boy, who was stealing the wood in the park, of which Halloway had the care; and it cannot be reasonably thought, that he designed more than the chastisement of the boy, and the horse running away in that manner was a surprize to Halloway; yet in regard the boy did not resist him, his tying him to the horse's tail was an act of cruelty, the event whereof proving so fatal, it was adjudged to be malice prepensed, though of a sudden, and in the heat of passion. This case is reported in Jones, 198. Pal. 585. And there held, that the Court could determine it to be malice prepensed upon the special matter found, Crompton 23. Two playing at tables fall out in their game, one upon a sudden kills the other with a dagger: this was held to be murder by Bromley at Chester assizes, 27 Eliz. So in this case, if the bottle had killed Mr. Cope before he had returned the bottle upon Mawgridge, that would have been murder without all manner of doubt.

In the second place, I come now to consider whether Mr. Cope's returning a bottle upon Mawgridge before he gave him the mortal wound with the sword, shall have any manner of influence upon the case: I hold not. First, Because Mawgridge by his throwing the bottle had manifested a malicious design. Secondly, his sword was drawn immediately to supply the mischief which the bottle might fall short of. Thirdly, The throwing the bottle by captain Cope was justifiable and lawful; and though he had wounded Mawgridge, he might have justified it in an action of assault and battery, and therefore cannot be any provocation to Mawgridge to stab him with his sword. That the throwing the bottle is a demonstration of malice is not to be controverted; for if upon that violent act he had killed Mr. Cope, it had been murder. Now it hath been held, that if A of his own malice prepensed assaults B to kill him, and B draws his sword and attacks A and pursues him, then A for his own safety gives back, and retreats to a wall, B still pursuing him with his drawn sword, A in his defence kills B. This is murder in A. For A having malice against B, and in pursuance thereof endeavouring to kill him, is answerable for all the consequences, of which he was the original cause.* It is not reasonable for any man that is dangerously assaulted, and when he perceives his life in danger from his adversary, but to have liberty for the security of his own life, to pursue him that maliciously assaulted him; for "he that hath manifested that he hath malice against another, is not fit to be trusted with a dangerous weapon in his

* See East's Pleas of the Crown, c. 5, § 42.

hand,"* Dalt. 294. Hale 42. And so resolved by all the judges, 18 Car. 2, when they met in Serjeants-inn, in preparation for my lord Morley's trial, Dalt. 272. If A of malice prepensed, discharge a pistol at B, and then runs away, B pursues him, and A turns back, and in his own defence kills B, it is murder. This I hold to be good law; for A had a malicious intent against B, and his retreat after he had discharged his pistol at B, was not because he repented, but for his own safety.

In a set duel, there are mutual passes made between the combatants, yet if there be original malice between the parties, it is not the interchange of blows will make an alteration, or be any mitigation of the offence of killing. Therefore I hold, if Mawgridge had thrown the bottle at Mr. Cope, and Mr. Cope had returned another upon him, and hit him, and thereupon Mawgridge had drawn his sword and killed Mr. Cope, it would have been murder. Some will say, that there is a difference between the cases; for that the assault by the pistol, and the fighting a duel was express malice, but this is only malice implied. Surely there is no difference, for malice implied is prepensed, as much as if there had been a proof of malice, or hatred for some considerable time before the act; for the stroke given, or an attempt made by malice implied, is as dangerous as a stroke given upon malice expressed, therefore may be as lawfully resisted. This very point was also considered by the twelve judges at Serjeants'-inn, and by them resolved to be murder upon the occasion of my lord Morley's Case. When a man attacks another with a dangerous weapon without any provocation, that is express malice from the nature of the act, which is cruel. The definition of malice implied is where it is not express in the nature of the act; as where a man kills an officer that had authority to arrest his person; the person who kills him in defence of himself from the arrest, is guilty of murder, because the malice is implied, for properly and naturally it was not malice, for his design was only to defend himself from the arrest.

3. I come now to the third matter proposed, which is, to consider what is in law such a provocation to a man to commit an act of violence upon another, whereby he shall deprive him of his life, so as to extenuate the fact, and make it to be a manslaughter only. First, Negatively, what is not. Secondly, Positively, what is. First, No words of reproach or infamy are sufficient to provoke another to such a degree of anger as to strike, or assault the provoking party with a sword, or to throw a bottle at him, or strike him with any other weapon that may kill him; but if the person provoking be thereby killed, it is murder.

In the assembly of the judges, 18 Car. 2, this was a point positively resolved.

Therefore I am of opinion, that if two are in company together, and one shall give the other contumelious language (as suppose A and B), A that was so provoked draws his sword, and makes a pass at B, (B then having no weapon drawn) but misses him. Thereupon B draws his sword, and passes at A. And there being an interchange of passes between them, A kills B, I hold this to be murder in A, for A's pass at B was malicious, and what B afterwards did was lawful. But if A who had been so provoked, draws his sword, and then before he passes, B's sword is drawn; or A bids him draw, and B thereupon drawing, there happen to be mutual passes: if A kills B, this will be but manslaughter, because it was sudden; and A's design was not so absolutely to destroy B, but to combat with him, whereby he run the hazard of his own life at the same time. But if time was appointed to fight (suppose the next day), and accordingly they do fight, it is murder in him that kills the other. But if they go into the field immediately and fight, then but manslaughter. Suppose upon provoking language given by B to A, A gives B a box on the ear, or a little blow with a stick, which happens to be so unlucky that it kills B, who might have some imposthume in his head, or other ailment which proves the cause of B's death, this blow, though not justifiable by law, but is a wrong, yet it may be but manslaughter, because it doth not appear that he designed such a mischief.

Secondly, As no words are a provocation, so no affronting gestures are sufficient, though never so reproachful; which point was adjudged, 3 Cro. 779, Wats and Braim, in an appeal of murder.

There having been a quarrel between A and B, and B was hurt in the fray; and about two days after B came and made a wry mouth at A, who thereupon struck him upon the calf of the leg, of which he instantly died. It was murder in A, for the affronting him in that manner was not any provocation to A, to use that violence to B:

There hath been another case, which I fear

* Judge Foster, in his Reports, p. 274-5, says, in Mawgridge's Case, "He, upon words of anger between him and Mr. Cope, threw a bottle with great violence at the head of Mr. Cope, and immediately drew his sword, Mr. Cope returned the bottle with equal violence; it was, saith lord Holt, lawful and justifiable in Mr. Cope so to do: for, as he argueth a little afterwards, He that hath shewn that he hath malice against another, is not fit to be trusted with a dangerous weapon in his hand."—Upon which the judge observes, "It was upon this principle I presume (and possibly, too, upon the rule laid down touching the arrest of a person who had given a dangerous wound), that the legislature in that case of the marquis De Guiscard, who stabbed Mr. Harley sitting in council, (9 Anne cap. 16,) discharged the party who was supposed to have given him the mortal wound, from all manner of prosecution on that account; and declared the killing to be a lawful and necessary action." *Former Edition.*

hath been the occasion of some mistake in the decision of questions of this kind, Jones 432, D. Williams's Case, he being a Welshman, upon St. David's day having a leek in his hat, a certain person pointed to a Jack of Lent that hung up hard by, and said to him, Look upon your countryman; at which D. Williams was much enraged, and took a hammer that lay upon a stall hard by, and flung at him, which missed him, but hit another and killed him: he was indicted upon the statute of stabbing. Resolved, He was not within that statute, but guilty of manslaughter at common law. I concur with that judgment, that it is not within the statute of stabbing, for it is not such a weapon, or act that is within that statute, neither could he be found guilty of murder, but only of manslaughter, for the indictment was for no more. But if the indictment had been for murder, I do think that the Welshman ought to have been convicted thereof, for the provocation did not amount to that degree, as to excite him designedly to destroy the person that gave it him.

Thirdly, If one man be trespassing upon another, breaking his hedges, or the like, and the owner, or his servant, shall upon sight thereof take up an hedge-stake, and knock him on the head; that will be murder, because it was a violent act beyond the proportion of the provocation, which is sufficiently justified by Halloway's Case, who did not seem to intend so much the destruction of the young man that stole the wood, as that he should endeavour to break his skull or knock out his brains, yet using that violent and dangerous action of tying him to the horse's tail, rendered him guilty of murder.

If a man shall see another stealing his wood, he cannot justify beating him, unless it be to hinder from stealing any more; (that is) that notwithstanding he be forbid to take any, doth proceed to take more, and will not part with that which he had taken. But if he desists, and the owner or woodward pursues him to beat him so as to kill him, it is murder.

If a man goes violently to take another man's goods, he may beat him off to rescue his goods, 9 E. 4, 281, b. 19 Hen. 6, 31. But if a man hath done a trespass, and is not continuing in it; and he that hath received the injury shall thereupon beat him to a degree of killing, it is murder, for it is apparent malice; for in that case he ought not to strike him, but is a trespassor for so doing.

Fourthly, If a parent or a master be provoked to a degree of passion by some miscarriage of the child or servant, and the parent or master shall proceed to correct the child or servant with a moderate weapon, and shall by chance give him an unlucky stroke, so as to kill him; that is but a misadventure. But if the parent or master shall use an improper instrument in the correction; then if he kills the child or the servant, it is murder: and so was it resolved by all the judges of the King's-bench, with the concurrence of the lord chief justice Bridgman, in a special verdict in one Grays' Case, found at the Old Bailey, 10th October 18 Car. 2, and removed into this court, Kelyng, p. 64. Gray being a smith, B was his servant; he commanded B his servant to mend certain stamps belonging to his trade; afterwards he and his servant being at work at the anvil, Gray asked his servant whether he had mended the stamps, as he had directed him. But B the servant having neglected his duty acknowledged it to his master; upon which the master was angry, and told him if he would not serve him, he should serve at Bridewell; to which the servant replied, That he had as good serve in Bridewell as serve the said Gray; whereupon the said Gray took the iron-bar upon which he and his servant was working, and struck his servant with it upon the skull, and thereby brake his skull, of which the servant died. This was held to be murder; yet here was a provocation on a sudden, as sudden a resentment, and as speedy putting it in execution; for though he might correct his servant both for his neglect and unmannerliness, yet exceeding measure therein, it is malicious. Every one must perceive that this last is a stronger case than this at bar.

First, Gray was working honestly and fairly at his trade, and justly calling to his servant for an account of his business: this miscreant was in the actual violation of all the rules of hospitality.

Secondly, Gray's action was right as to the striking his servant by way of correction; but the error was in the degree being too violent, and with an improper weapon. This of Mawgridge was with a resolution to do mischief.

Thirdly, He had not the least provocation from Mr. Cope, until after he had made the first and dangerous assault, and then pursued it with the drawing his sword to second it, before Mr. Cope returned the other bottle. But Gray had a provocation by the disappointment his servant gave him in neglecting his business, and returning a saucy answer.

The like in obstinate and perverse children, they are a great grief to parents, and when found in ill actions, are a great provocation. But if upon such provocation the parent shall exceed the degree of moderation, and thereby in chastising kill the child, it will be murder. As if a cudgel in the correction that is used be of a large size, or if a child be thrown down and stamped upon; so said the lord Bridgman and justice Twisden, and that they ruled it so in their several circuits.

5. If a man upon a sudden disappointment by another shall resort violently to that other man's house to expostulate with him, and with his sword shall endeavour to force his entrance, to compel that other to perform his promise, or otherwise to comply with his desire; and the owner shall set himself in opposition to him, and he shall pass at him, and kill the owner of the house, it is murder, 2 Roll. Rep. 460, Clement against sir Charles Blunt, in an appeal of murder. The case was, that Clement

had promised a dog to sir Charles Blunt; and being requested accordingly to deliver him, refused, and beat the dog home to his house: at which sir Charles Blunt fetched his sword, and came to Clement's house for the dog. Clement stood at the door, and resisted his entry. Blunt thereupon kills Clement. The jury were merciful, and found this fact in sir Charles Blunt to be but manslaughter. Doddridge was clearly of opinion it was murder. But the lord chief justice was a little tender in his direction to the jury. But Rolls makes this remark, that it was not insisted upon by the appellant's counsel, that Clement was in the defence of his house, and that Blunt attacked Clement to force in: it was without all question murder, though of a sudden heat, for there was no assault made by Clement upon him nor on any of his friends, but all the violence and force was on sir Charles Blunt's side.

Having in these particulars shewn what is not a provocation sufficient to alleviate the act of killing, so as to reduce it to be but a bare homicide, I will now, secondly, give some particular rules, such as are supported by authority and general consent, and shew what are always allowed to be sufficient provocations.

First, If one man upon angry words shall make an assault upon another, either by pulling him by the nose, or filliping upon the forehead, and he that is so assaulted shall draw his sword, and immediately run the other through, that is but manslaughter; for the peace is broken by the person killed, and with an indignity to him that received the assault. Besides, he that was so affronted might reasonably apprehend, that he that treated him in that manner might have some further design upon him.

There is a case in Stiles, 467, Buckner's case. Buckner was indebted, and B and C came to his chamber upon the account of his creditor to demand the money, B took a sword that hung up, and was in the scabbard, and stood at the door with it in his hand undrawn, to keep the debtor in until they could send for a bailiff to arrest him; thereupon the debtor took out a dagger which he had in his pocket and stabbed B. This was a special verdict, and adjudged only manslaughter, for the debtor was insulted, and imprisoned injuriously without any process of law, and though within the words of the statute of stabbing, yet not within the reason of it.

Secondly, If a man's friend be assaulted by another, or engaged in a quarrel that comes to blows, and he, in the vindication of his friend, shall on a sudden take up a mischievous instrument and kill his friend's adversary, that is but manslaughter: so was the case, 12 Rep. 87. If two be fighting together, and a friend of the one takes up a bowl on a sudden, and with it breaks the skull of his friend's adversary, of which he died, that is no more than manslaughter. So it is, if two be fighting a duel, though upon malice prepensed; and one comes and takes part with him, that he thinks may have the disadvantage in the combat, or it may be that he is most affected to, not knowing of the malice, that is but manslaughter, Pl. Com. 101, John Vaughan and Salisbury.

Thirdly, If a man perceives another by force to be injuriously treated, pressed, and restrained of his liberty, though the person abused doth not complain, or call for aid or assistance; and others out of compassion shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter, 18 Car. 2, adjudged in this Court upon a special verdict found at the Old-Bailey, in the case of one Hugett, 18 Car. 2, Kelyng, p. 59. A and others in the time of the Dutch war without any warrant impressed B to serve the king at sea; B quietly submitted and went off with the press-masters; Hugett and the others pursued them and required a sight of their warrant; but they shewed a piece of paper, that was not a sufficient warrant: thereupon Hugett with the others drew their swords, and the press-masters theirs, and so there was a combat, and those who endeavoured to rescue the pressed man killed one of the pretended press-masters. This was but manslaughter; for when the liberty of one subject is invaded, it affects all the rest: it is a provocation to all people, as being of ill example and pernicious consequence. All the judges of the King's-bench, viz. Kelynge, Twisden, Wyndham and Moreton were of opinion, that it was murder, because he meddled in a matter in which he was not concerned: but the other eight judges of the other courts conceived it only manslaughter, to which the judges of the King's-bench did conform, and gave judgment accordingly.

Fourthly, When a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter; for jealousy is the rage of a man, and adultery is the highest invasion of property*, 1 Vent. 158. Raymond 213, Manning's Case.

If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter; so is the law, though it may seem hard, that the killing in the one case should not be as justifiable as the other, Lev. xx, ver. 10. "If one committeth adultery with his neighbour's wife, even he the adulterer and the adulteress shall be put to death." So that a man cannot receive a higher provocation. But this case bears no proportion with those cases that have been adjudged to be only manslaughter, and therefore the Court being so advised doth determine that Mawgridge is guilty of murder. More might be said upon this occasion; yet this may at pre-

* In such a case the Court of Justiciary in Scotland admitted the wife of a pannel upon his trial for murder to give evidence that the pannel discovered the deceased in the act of adultery with her. See Christie's Case, M'Laurin N° 92.

sent suffice to set the matter now in question in its true light, to shew how necessary it is to apply the law to exterminate such noxious creatures.

Upon this conviction the Court did direct that process should be issued against Mawgridge, and so to proceed to outlawry if he cannot be retaken in the mean time.

The case was, Mr. Cope (a younger branch of the Copes of Bramsel, in Hampshire, barts.) having got a lieutenant's commission in the guards, invited some officers and other gentlemen to dine with him at the Dolphin tavern in Tower street, June 17, 1706, in order to wet his commission; one of the gentlemen took Mawgridge along with him, telling him he would be as welcome to Mr. Cope as any of the company; upon that he went, and after dinner was over, and paid for by Mr. Cope, they all staid a while longer, and had more wine brought in, and paid half a-crown each for their club; then they broke up, and most of them went away; but Mr. Mawgridge and the rest being invited by Mr. Cope to the guard-room in the Tower, went with him, and called for wine. Two bottles were accordingly brought; and as they were drinking, a coach came to the guard-room door with a woman in it (of no very modest behaviour), and asked for capt. Cope; whereupon he and Mawgridge went to the coach door, and brought her into the guard-room; where having been a-while, she cried, Who shall pay for my coach? Upon this Mr. Mawgridge said, I will, and so discharged the coach; then he offered to salute her, but she rejected him, and gave him ill words; to which he made returns of the like kind; on which lieut. Cope took the woman's part; and then Mawgridge demanded satisfaction of Mr. Cope, in order to provoke him to fight, &c. &c. and killed Mr. Cope. Upon this Mawgridge was tried at the Old-Bailey in July 1706, for the murder, and a special verdict found, wherein all the particulars are related, as before-mentioned:—But before the arguing the special verdict, he made his escape out of the Marshalsea, where he was confined; and that night went to his father, major Mawgridge, who with his wife (Mawgridge's mother-in-law) washed and rubbed him all over with green walnut shucks and walnut liquor to disguise him, and then all three set out in the night, and walked above 30 miles into Essex, where the father gave 100 guineas to a master of a vessel, near Colchester, to carry him safe to Holland, which he did; there he was concealed above a year and half; for though he was a very handsome man, he was so disfigured scarce any one knew him; he spoke French and Spanish generally and mighty well; but at last being at a tavern in Ghent in Flanders, and a little too merry, he spoke English so fluently, and by some expressions he dropt, became suspected, seized (a large reward having been offered for apprehending him), and on examination found to be the man who killed Mr. Cope, was brought over to England in March 1707-8, and being brought to the King's-bench bar, received sentence of death, and was executed at Tyburn, on Wednesday, April 28, 1708, with William Gregg, for high-treason.* The ordinary says, Mawgridge went in a coach with him (and Gregg in a sledge) to Tyburn; "That he submitted willingly to his sentence, owning the justice of it, though he declared he had no premeditated malice against the gentleman he so unfortunately killed. He said, he heartily repented of it, and prayed that God would wash away the stain, and deliver him from the guilt of that blood which he had so shed. He owned that he had been a very great sinner, but was sorry that he had any ways offended God and man, and begged pardon of both. That he hoped God would shew him mercy in another world, because he was always grieving for his sins, and particularly for this, ever since he had made his escape; and though he had no apprehension of being brought to condemnation here for it, it was still continually before him, and the remembrance of it was painful to him. He made strong resolutions to live otherwise, and was always praying to God to pardon him, and to keep him for the future. He acknowledged the justice of God had overtaken him, and would not suffer him to live long unpunished for this heinous crime: He declared his being in charity with all the world, even with those who had brought him to this his punishment, and prayed for the conversion of all wicked persons, desiring they would take warning by him. He told me, he was about 40 years of age, born at Canterbury of good parents, and brought up in the Church of England; that both his father and ancestors had had the honour to serve the crown for above 200 years as drum-major; and that he himself had received a very good education, and brought up genteelly, though he was for a considerable time kettle-drummer to the first troop of guards, and was a going with a commission into the army when this melancholy accident happened."—Major Mawgridge, on his son's execution, which had so great an effect on him, could not be prevailed on either to eat or drink for three nights and three days, and raved about like a madman; he afterwards behaved at times like one distracted, drawing his sword, and threatning to murder his wife, obliging her to kneel down for him to stab her, &c. and then relenting. In short, he was never after easy or in his right senses; moving about from place to place, though he lived to near 80 years of age.

* See his Case, vol. 14, p. 1371.

469. The Trial of JAMES CARNEGIE, of Finhaven, before the Court of Justiciary (in Scotland), held at Edinburgh, July 25, for the Murder of Charles Earl of Strathmore: 2 GEORGE II. A. D. 1728.

CURIA JUSTICIARIÆ, S. D. N. *Regis tenta in nova Sessionis Domo Burgi de Edinburgh, decimo quinto Die Mensis Julii, Millesimo septingentesimo vigesimo octavo*, per honorabiles Viros Adamum Cockburne de Ormistoun, *Justiciariæ Clericum*, Dominos Jacobum Mackenzie de Roystoun et Gulielmum Calderwood de Polton, *Magistrum Davidem Erskine de Dun*, Dominum Gualterum Pringle de Newhall, et Magistrum Andream Fletcher de Miltoun, *Commissionarios Justiciariæ*, dict. S. D. N. *Regis*.

Curia legitime affirmata:

Intran'

James Carnegie of Finhaven, prisoner in the Tolbooth of Edinburgh, pannel.

INDICTED and accused, at the instance of Susanna countess of Strathmore, and Mr. James Lyon, brother-german and nearest of kin to the deceast Charles earl of Strathmore, with concourse and at the instance of Duncan Forbes, esq. his majesty's advocate, for his highness's interest, for the crime of wilful and premeditate murder committed by him upon the person of the said Charles earl of Strathmore, as is more fully mentioned in the indictment raised against him thereanent, which is as follows: "James Carnegie of Finhaven, now prisoner in the Tolbooth of Edinburgh, you are indicted and accused, at the instance of Susanna countess of Strathmore, and Mr. James Lyon, brother-german and nearest of kin to the deceased Charles earl of Strathmore, with concourse and at the instance of Duncan Forbes, esq. his majesty's advocate, for his highness's interest: that where, by the laws of God, the law of nature, the common law, and the municipal law, and practice of this kingdom, as well as the laws of all well-governed realms, wilful and premeditate murder, and all murder and homicide, or being art and part thereof, are most atrocious crimes, and severely punishable; yet true it is, and of verity, that you have presumed to commit, and are guilty, actor, art and part, of all, or one or other of the foresaid horrid crimes: in so far as, having a causeless ill-will and resentment against the deceast Charles earl of Strathmore, you conceived a deadly hatred and malice against him; and shaking off all fear of God, and regard to the foresaid laudable laws, on Thursday the 9th of May, in this present year, 1728, or one or other of the days of the said month, about the hour of eight or nine of the night of that day, or some other hour of that day or night, upon the street of the town of Forfar, within the county of Forfar, you did, with a drawn sword, or some other offensive or mortal weapon, without the least colour or cause of provocation then given by him, invade the said deceast earl, who had no weapon in his hand, and did basely and feloniously murder and kill him, by giving him a wound therewith in the belly, some inches above the navel, which, by following the thrust with a second push, went through the intestines and the back, a little lower than where the said weapon entered the belly: of which wound, after great pain, on Saturday immediately thereafter, or in some short space thereafter, he died; and so was cruelly and barbarously murdered by you. At least, at the time and place above-mentioned, with a drawn sword, or some other mortal weapon, without any just cause or provocation, you gave the said deceast Charles earl of Strathmore a wound in the belly, which reached through the intestines and back, wherethrough he soon after fell down, and died at the time foresaid. At least, at the time and place above described, the said Charles earl of Strathmore was with a drawn sword, or some other deadly weapon, feloniously and barbarously wounded, and of the said wound died within a few days thereafter; and you were art and part in his murder. By all which, it is evident, that you are guilty, art and part, of the crimes of wilful and premeditate murder and homicide, or one or other of them, at the time and place, and in the manner above set forth. And which facts, or part thereof, or your being art and part of any of the said crimes, being found proven by the verdict of an assize, in presence of the lords justice general, justice clerk, and commissioners of justiciary, you ought to be exemplarily punished with the pains of law, to the terror of others to commit the like in time coming."

Pursuers.—Mr. Duncan Forbes, his majesty's advocate; Mr. Charles Areskine, his majesty's solicitor; Mr. Alex. Hay, advocate; Mr. Patrick Grant, advocate; Mr. George Ogilvy, advocate; Mr. John Ogilvie, advocate; Mr. Hugh Dalrymple, advocate.

Procurators in Defence.—Mr. Robert Dundas, advocate; Mr. James Fergusson, senior, advocate; Mr. John Forbes, advocate; Mr. William Grant, advocate; Mr. James Paterson, advocate; Mr. George Smollet, advocate.

The libel being openly read in court, and debate *viva voce*, in presence of the lords, they ordained both parties to give in their informations to the clerk of court, in order to be recorded; the pursuers to give in theirs against

Saturday next; and the pannel's procurators to give in his against Friday thereafter: and continued the cause till the 1st day of August next to come, at nine o'clock morning; and ordained witnesses and assizers to attend at that time, each person, under the pain of law; and ordained the pannel to be carried back to prison; and granted second diligence for the pursuers against the witnesses.

INFORMATION for SUSANNA Countess of STRATHMORE, and Mr. JAMES LYON, Brother-german to the deceased Charles Earl of Strathmore, and his Majesty's Advocate for his Highness's Interest, against James Carnegie of Finhaven, Pannel.

The said James Carnegie is indicted and accused as guilty, art and part of wilful and premeditate murder; at least of murder and homicide: in so far as, upon the 9th of May last, upon the streets of Forfar, with a drawn sword, he wounded the deceased Charles earl of Strathmore in the belly, some inches above the navel; which wound went through the intestines and the back, a little lower than where the said weapon entered the belly; of which wound he died soon after.

The indictment, in the first place, charges the fact as proceeding from a causeless ill-will and resentment the pannel had conceived against the defunct, who, at the time the wound was given, had done nothing that could be pretended as a colour or cause of provocation: and a circumstance is noticed, from which it may be inferred, that there was deadly hatred and malice; namely, that after one push there was a second, whereby the wound went quite through his body.

There is a second branch of the indictment, in which the circumstances of premeditate malice and forethought felony, needed not to be libelled; and he is charged only with murder or homicide, as separately relevant. And, lastly, art and part is charged upon him.

At calling before the lords of justiciary, against the first branch of the indictment, it was excepted, "That the indictment was too general, particular circumstances not being expressed from which the causeless ill-will or resentment mentioned, and forethought and premeditate malice could be inferred, whereby the pannel was deprived of the benefit due to all pannels, when tried for their life, to exculpate himself, by shewing, that if at any time, prior to the time mentioned in the indictment, there was any appearance of grudge or quarrel between the defunct and him, there was an after-reconciliation and entire friendship:" And it was said, "That general libels ought not to be sustained."

To this it was answered, That a previous grudge is charged, and that the deceast was invaded without the least colour or cause of provocation; which is the strongest evidence of forethought, especially when joined with this other particular, that the first thrust was followed with a second push, which was a mark of inveterate and relentless malice; and that it was sufficient to charge a previous quarrel in general, which would be made appear by the proof. Nor will it be found, that in libels of forethought felony, it is usual or necessary to libel all the circumstances from which the forethought may be presumed, especially when the *species facti* is charged in that manner, as affords the presumption of forethought, setting forth, that the wound was given without the least colour or cause of provocation on the part of the defunct at that time. Neither can it be thought unfair with regard to the pannel, who if he had any relevant ground of exculpation, would have access to prove friendship with the defunct, to take off any charge of precedent quarrels, whereof he could not be ignorant. And still there must be less ground of complaint, where no good reason of exculpation is offered, whereby the pannel can be allowed to adduce proof, which it is believed is, without contradiction, the case upon the first branch of the libel.

As to the two last branches of the indictment, it was alleged, "That several circumstances attending the fact complained of were concealed, which, when opened, afforded the pannel plain and obvious defences; and therefore it was informed, That the pannel, a person disposed to peace, and in entire friendship with the defunct, chanced to be in company with him about the time charged in the indictment, with one John Lyon of Bridgeton, and others: that Bridgeton gave him the highest provocation, not only by words, but by proceeding so far, as to throw him into a kennel, where the pannel was in hazard of perishing, being extremely drunk: that getting up, heated with liquor, and so extremely provoked, he drew his sword, and pursued Bridgeton, and that the defunct thrusting himself between them, casually received the thrust aimed at another."

From these circumstances, it was pled for the pannel, "That if he did kill the defunct, it was a mere misadventure, rather a misfortune as [than] a fault, and in no event could subject him to the *pœna ordinaria;* for that, 1mo. In these circumstances had he killed the said John Lyon of Bridgeton, the pain of death could not have been inflicted either by the law of God, the common law, nor by the municipal law of this kingdom, neither by the laws of other well-governed realms; particularly by the laws of our neighbouring nation, in regard the fact was done of suddenty, by a person in drink, and highly provoked."

And, 1mo. As to the law. of God, chap. xxi, v. 13, of Exodus was appealed to, where it is said, "that if a man lie not in wait, there was to be a place appointed whither he should fly;" which seemed to require forethought. And the xxxvth chap. of Numbers, ver. 22, where it was said, "That if any one thrust another suddenly without enmity, the congregation was to judge between the slayer and the revenger of blood;" from which it would seem,

that slaughter of suddenty was not punishable by death.

To this it was answered, that in the law of God the general rule was, "Whoso sheddeth man's blood, by man shall his blood be shed: And at the hand of man, and at the hand of every man's brother, and at the hand of every beast was the life of man to be required," Gen. chap. ix. That by the law of Moses, death of a suddenty was plainly capital; nor had the manslayer the benefit of the city of refuge, but where the slaughter was mere misfortune, and casual, which was plainly the meaning of the words in Exodus, "If a man lie not in wait, but God deliver him into his hand;" which could not with any propriety be understood of slaughter committed, where the intention and design 'antecedit ictum licet non congressum.'

And this matter is clearly explained in the 35th chap. of Numbers, where he who smites with an instrument of iron, is called a murderer; and where it is said, "That he who smites with a throwing stone, or with a hand weapon of wood, wherewith a person may die, and he die, the murderer is surely to be put to death." And then the law proceeds plainly to treat of cases, where death ensues from strokes or thrusts of a weapon not deadly, and there it requires indeed hatred and enmity; but if it be done suddenly and without enmity, or (which is remarkable) in the 23d verse, "With any stone wherewith a man may die, seeing him not, and was not his enemy, nor sought his harm; then the congregation was to judge between the slayer and the revenger of blood." From which it is plain, that slaughter upon suddenty, even without forethought or previous enmity, was capital by the law of Moses, if the wound was given with a lethal [deadly] weapon, except when it was done by mere chance, as by throwing a stone whereby a man may die, the person who threw it seeing him not, and so at no time was his enemy, or sought his harm. And this is the case mentioned, chap. xix, ver. 4, Deut. where it is said, "Whoso killeth his neighbour ignorantly, whom he hated not in time past" (which is limited by the example immediately subjoined to homicide merely casual), "shall fly into one of these cities, and live." Now, in the present case, the nature of the weapon and of the wound are such, as clearly exclude founding with any colour upon the disposition of the law of Moses, though the question were of the pannel's claiming the benefit of the city of refuge. But neither is it an argument of any force to plead, that where the benefit of the city of refuge was granted, that by the law of nature the crime was not capital; for the revenger of blood could never have been tolerated to kill without the city of refuge, where innocent blood was spilt, whereby the land must have been polluted, and the subjects were permitted tumultuously to break in upon the established laws of nature; and therefore, though it is an argument of unavoidable force, that wherever, by the law of Moses, capital punishments are allowed, such punishments are lawful: But the argument is not of equal strength, that where the powers of the law were suspended by the *jus asyli* established by positive precept, that therefore, in countries where there is no such privilege, either by the laws of God, or the laws of the land, that there the punishment is not to be capital, where the *jus asyli* could have been claimed.

2do. It was contended, "That by the common law, not only *dolus* but *propositum* was necessary; and that slaughter committed *impetu et rixâ* were not to be punished capitally." And to this purpose, the authority of the learned Voet, was cited, who seems to say, That *in rixâ*, if the person cannot be discovered who gave the deadly wound, the ordinary punishment should not take place.

But when this matter is considered, it is plain there arises no good argument for the pannel from the common law: For though there is a difference to be made between *propositum* and *machinatio præmeditata*, and sudden passion and heat of drink, determining the will to commit the crime; yet as laws were made and became necessary, chiefly from the depraved passions of mankind, they cannot afford a sufficient excuse against the ordinary punishment of an atrocious crime; and there is *dolus*, when a crime is even committed of a sudden, although there be no forethought: So it is commonly said, that opportunity makes the thief, and theft is committed *impetu*, nevertheless not without dole. Nor is it necessary to prove or libel a forethought in the commission of the crime. In the same manner passion or provocation may unfortunately determine the will to the commission of a horrid crime; but it would be of dangerous consequence to allow of bloodshed under colour of passions which men ought to subdue, or of drunkenness which they ought to avoid, or of a sudden vicious turn of mind; and therefore, in the Roman law, whoever committed slaughter *dolo malo*, whether deliberately and upon forethought, or of suddenty, was to be punished ex lege Corneliâ de Sicariis. And to shew that it was sufficient, that the design should only precede the act from which death followed, and not the meeting of the persons, as the acts of the mind are only to be known by external circumstances; the kind of weapon, in the same manner as in the law of Moses, was sufficient to found a presumption of such *propositum*, as, joined with the act of killing, brought the manslayer under the pœna legis Corneliæ: So in the l. 1, § 3, ff. ad legem Corneliam de Sic. it is said, "Si gladium strinxerit, et in eo percusserit, indubitatè occidendi animo id eum admisisse;" and if prior forethought had been necessary, the kind of weapon could not possibly have founded a sufficient presumption: But as it manifestly made appear the intention to kill, whether that intention had its birth from passion or drink, it was voluntary slaughter, done *deditâ operâ*, and therefore to be punished capitally. And the

passage cited from the learned Voet, rather confirms this doctrine, That if *in rixâ*, which must suppose suddenty, the person who inflicted the mortal wound was discovered, he was to be subjected to the ordinary punishment. And the same author, § 9. of that title, observes, That though such as commit slaughter, *calore iracundiæ*, may be said *impetu delinquere*; yet there, "neque judicium, neque assensus animi, neque voluntas deest;" and says, That a person provoked by verbal injuries, how great soever, was not free from the *pœna ordinaria*. And the truth is, if passion and provocation were sufficient to excuse slaughter, it were in vain to lay down the rules so anxiously conceived in the laws concerning the "moderamen inculpatæ tutelæ," where the slayer must prove that he was "constitutus in periculo vitæ." And had the case stood otherwise in the Roman law, it could never have been doubted, when jealousy was the rage of a man, and adultery the highest provocation against a husband, and a real injury; the question could never have been stated to be determined by the emperor, as in l. 38, ff. § 8, ad legem Juliam de adult. Whether a husband, "impetu tractus doloris, uxorem in adulterio deprehensam interfecerit," was liable to the pœna legis Cornelie de Sicariis? And who, by that decision, upon the peculiar circumstances of the case was exeemed [exempted], and nevertheless made subject, *si loci humilis*, of being condemned *ad opus perpetuum*, and if *honestior* was to be condemned *relegari in insulam*. But as the case must be determined upon the law of Scotland, it is unnecessary to dwell too long upon the arguments drawn from the Roman law.

3tio, It was contended for the pannel, "That by the law of Scotland, slaughter and murder were of old different species of crimes, and only murder committed upon forethought felony was properly computed murder, and punished as such; but that slaughter committed upon suddenty, or *chaud melle*, and *in rixâ*, was deemed only *homicidium culposum*, and not punishable by death." And to support this position, several acts of parliament were appealed to, by which it was statuted, that murder was to be capitally punished; but *chaud melle*, or slaughter committed upon suddenty, was to be punishable according to the old laws: and that in this case, if the pannel had even killed Bridgeton, at whom he aimed the thrust, in the circumstances above set forth, it was not murder upon forethought, but upon suddenty and high provocation.

To this it was answered, That this doctrine, so directly contrary to the received opinion, had little countenance from the old laws and acts of parliament, less from the constant practice before the act of parliament king Charles 2, in the year 1661, and stood in plain contradiction to this last law, and the constant practice and repeated decisions of the Court of Justiciary from that time down to this day.

By the old law, particularly chap. 3, of the first statutes of king Robert 1, intitled, Men condemned to the Death should not be redeemed, "It is statuted and ordained, gif any man, in any time coming or bygane, is convict or attainted of slaughter, reif, or any other crime touching life and limb, common justice shall be done upon him, without any ransome." Here slaughter in general is mentioned, and justice was to be done upon the person convict of it, and the punishment by the title was plainly death: so that, at common law, slaughter in general was capital. The next paragraph does indeed save the king's power (which must be the power of pardoning), and the liberties granted by the king to the kirk and kirkmen, and other lords; which must be understood of special immunities in the case of manslaughter: for no privilege was to protect against murder upon forethought; and the exception confirms the rule.

By chap. 43, of the statutes of king Robert 3, it is statuted, "That na man use any destruction, hershipe, burning, reif, slaughter, in time to come, under the pain of tinsel of life and goods:" whereby the pain of death is clearly made the punishment of slaughter in general. And in the immediate subsequent chapter, the sheriff was to take diligent inquisition of destroyers of the country, or such as had destroyed the king's lieges with hershipe, slaughter, &c. and was to take bail from them, if arrested, to compear at the next justice-ayr; and if bail was not given, the sheriff was to put him to the knowledge of an assize: "And gif he be tayut with the assize for sic an trespassour," it is said, "He shall be condemned to death:" which seems only to relate to manslaughter, and not to murder upon forethought felony, which was one of the pleas of the crown, to be tried only before the king's justiciar; as is evident from chap. 11, king Malcolm 2's laws, and chap. 13, and 15, whereas slaughter might be tried by the sheriff, where there was a certain accuser, as appears from book 1, of the Regiam Majestatem, chap. 1, § 7, 8, 9.

There are sundry others of the old statutes, that seem plainly to pre-suppose that slaughter was capital, and particularly these of Alexander 2, chap. 2, § 3, 4, 5, 6. And so Skene in his Treatise of Crimes, tit. 2, chap. 6, says, "That slaughter *in rixâ*, or *chaud melle*, is generally punished by death, and confiscation of the moveable goods pertaining to the trespassour; but with this difference, that the girth or sanctuary was no refuge to him who commits slaughter by forethought felony, but he should be delivered to the judge ordinary, to underly the law:" which plainly appears from act 23, parl. 4, James 5, whereby masters of girth are ordained to deliver up such persons as are guilty of murder upon forethought felony. And it is in vain to found upon Law 90, parl. 6, James 1, which says in the end, "Gif it be forethought felony, he shall die therefore;" because the act relates to all manslayers; and though that particular and most atrocious species be mentioned, as

that for which the murderer should die, yet the argument will not hold, that therefore no other kind of slaughter was capital: for it is there said in the general, that if the slayer is taken with red hand, the law shall be done upon him within that sun; which cannot be understood of a crime not capital. And sir George Mackenzie, in his observations upon it, says, "This may seem to imply, that men die not for murder committed without forethought felony; but this holds not in our law, for murder, though committed without forethought felony, is punishable by death, except it was either casual, or in self-defence."

The act 51, parl. 3, James 1, was improperly founded on by the pannel's procurators; for that act does no more than extend the difference between forethought felony and *chaud melle* to all transgressions as well as slaughter; as sir George Mackenzie observes upon that law, where he says, That *chaud melle*, or *homicidium in rixâ commissum*, is capital by our present law.

That criminals who resorted to, and took sanctuary in churches, had protection, though their crimes were capital, is extremely plain from chap. 6, of the statutes of K. Alexander 2, where it is said, "That thieves and reivers who fly to haly kirk, if moved with repentance, he confess that he has heavily sinned, and for the love of God is come to the House of God for safety of himself, he shall have peace in this manner, that he shall not lose his life nor limb, but restore what he had taken, and satisfy the king, and swear upon the Evangel, that for thereafter, they shall never commit reif nor theft; but if he declared himself innocent, he was to be tryed." And in the last paragraph of that chap. it is said, "Moreover manslayers, &c. if they fly, in manner foresaid, to the kirk, the law aforesaid shall be kept and observed to them."

There seems to have been this other difference too, by the books of the old law between murder upon forethought and slaughter, that the trial of murder was summar, whereas manslaughter could not be tried till after forty days, as appears by the statutes of Robert 2, from chap. 3, to chap. 9.

After the Reformation, when the *jus asyli*, formerly given to churches, dropped, the distinction between murder and manslaughter was looked on with less attention, and libels were commonly framed indifferently, for murder, and slaughter in general, without any mention of forethought felony; nor was it ever objected, that malice or premeditate design was requisite to make the crime capital: and criminals were punished to death, where from the proof there was not a colour or pretence of forethought, or any premeditate design; as will appear from looking into the books of adjournal. And many instances might be given, particularly in the case of Jean Carrie against William Fraser, the last of July, 1641; where the pannel was condemned upon an extrajudicial confession, adminicu-

lated with other circumstances; in which he set forth the fact, that the defunct and he had some little quarrel about a staff; and hearing that he had murdered his brother, he came into a house where the defunct was; and that either the defunct, or some other that was by, took the pannel by the arm, to hold him: having freed himself, he aimed a stroke with a whinger at the defunct's arm; but missing it, he struck the defunct about the pap: and upon this proof, he was found guilty, and executed.

In the case of Bruce against Marshall, the 3rd April, 1664, slaughter was libelled, and he was condemned upon his own judicial confession: from which it appears, that he was so far from having any forethought, that he suffered not only the greatest provocation in words, but was even beat with hands and feet by the defunct while he was on the ground; but at last getting up, and (as the confession bears) being overcome with passion, he drew a knife, and struck at him in two several places of his body, whereby he died. And upon this confession, where there was suddenty, provocation and passion, he was brought in as guilty, and condemned to be beheaded.

The law remaining somewhat uncertain concerning casual homicide, and there being no longer any benefit of girth as formerly; in the year 1649, an act was passed during the usurpation, for removing all question and doubt that might thereafter arise in criminal pursuits for slaughter, ordaining, that the cases of homicide after-following, viz. casual homicide, homicide in lawful defence, and homicide committed upon thieves and robbers, should not in time coming be punished by death, notwithstanding any laws or acts of parliament, or any practick made heretofore, or observed in punishing of slaughter. And this passed into a law after the Restoration in the year 1661; and at the same time, all decisions given conform to this act, since the 4th of February, 1649 years, are declared to be sufficient to secure all parties interested, as if the act had been of that date; which was necessary, because the acts during the usurpation had been rescinded: and this law has ever been looked upon as the standard. And the practice of the Court of Justiciary, since that time, clearly demonstrates, that slaughter of suddenty, and slaughter upon provocation, which could not be brought under one or other of the particulars there mentioned, have been taken to be capital.

The procurators for the pannel here observed, "That though in the cases there mentioned, the law ordained slaughter not to be capital, yet it neither said, nor supposed, that the former law, whereby pannels were entitled to plead against a capital punishment, was thereby abrogated, but only statuted in the cases there mentioned."

To this it was answered, that the narrative of the statute was for removing of all question

and doubt that may arise thereafter in criminal pursuits for slaughter, and consequently cannot be supposed to have left doubtful cases, that the pannel's procurators must admit were not so clear as casual homicide, and homicide in defence: nay, the law seems to suppose pretty plainly, that all slaughter by the laws and acts of parliament, or practicks, was capital, not declaring what was law from any other period than the year 1649, but enacting the same with a *non obstante*, and judging it necessary to confirm the decisions that had past, conform to that act during the usurpation, which would have been vain, if it had not been at least doubtful, whether casual homicide, homicide in lawful defence, and slaughter committed upon thieves and robbers, did not subject those guilty to the pain of death: and if those degrees of homicide were so much as doubtful, it is not possible to conceive that *chaud melle*, or slaughter committed, *deditâ operâ*, though without forethought, was, by the law of Scotland, not capital. Or if it should be supposed to have been doubtful, whether these last degrees of homicide were capital: that the legislature, upon a narrative, that all question and doubt that might arise hereafter in criminal pursuits for slaughter, should be removed, would have enacted in the clearer cases, with a *non obstante*, and left the more difficult in the dark, as surely the greatest advocates for slaughter on suddenty must admit, that, at least, it is more culpable than either homicide merely casual, or homicide in lawful defence.

The argument drawn from the rubrick of the act, which mentions degrees of casual homicide only, can conclude no more, than that the title is imperfect; and it would be resting too much upon an argument *à rubro*, to make it defeat what is said in the law, that all questions concerning slaughter were thereby to be removed, and which opposes casual homicide to homicide in lawful defence; and consequently cannot under the words, "casual homicide," comprehend all slaughter not upon forethought felony. And sir George Mackenzie in his observations upon the act takes notice, that the title is very ridiculous, and consequently no argument can be drawn from it.

One thing it may not be improper to notice, is, that if killing by forethought felony was the only species of slaughter capital, the crown was disabled from pardoning any capital slaughter whatsomever, which does not appear to have been the opinion of our lawyers.

As to the decisions subsequent to this law, they will be found entirely agreeable to the doctrine now laid down; sir George Mackenzie observes, that though many lawyers are positive, that though *homicidium in rixâ*, even where the author of the plea is known, may by the rigor of law be punished by death, yet that no country uses this rigor; yet he remembered, that in William Douglass's case, this was urged, and albeit it was not proven that he was the killer, yet the assize found him guilty, and he thereupon died. This is a case more favourable, than where the person that gave the mortal wound is known, though given suddenly, and even upon provocation; and therefore shews what our law is, and with how little reason the procurators for the pannel maintain their argument upon the law of Scotland.

In the case, his majesty's advocate against Nicolson, the 24th June, 1673, murder and slaughter, without forethought, were charged upon Nicolson, the pannel; and his procurators pleaded the benefit of the act of parliament anent casual homicide, in the several degrees thereof, he being in a condition that he was not able to remember. To this it was answered, that the defence was not relevant, in regard the homicide could not be said to be casual, such as the case of throwing of stones over dikes, and accidentally killing a passenger: and the pannel having afterwards proponed a defence, that being in use to carry a gun as a fowler, and calling accidentally for meat to his dogs at a mill, the defunct fell upon him, and offered to secure him as a French soldier, or fit to be one; in the struggle, his gun being half bend, went off, and killed the defunct: both the libel and defence were found relevant, and it appeared upon the proof, that Nicolson was drunk, and that there was no previous quarrel; but taking exception at somewhat the defunct said, he shot him with his gun; and by the verdict of the assize, "he was found guilty of the slaughter committed upon the defunct," and sentenced to have his head struck off in the Grass-market; which shows that neither drunkenness nor suddenty is a relevant defence against the *pœna ordinaria* in slaughter.

And, in the case of Murray *contra* Gray, 10th June, 1678, the lords "found the libel relevant, and that there was no necessity of any distinct probation for proving prepogitate malice;" which clearly shows that slaughter, other than upon forethought, was capital. And to show that provocation and passion are not received as defences against the *pœna ordinaria*, a multitude of decisions might be brought, particularly in the case of Aird, who was indicted in 1693, for the slaughter of Agnes Bayne, having given her some strokes on the side and belly with his foot, by which she fell into fainting-fits, and immediately died. The defence was, "great provocation and casual homicide:" provocation, in as far as she threw a chamber pot in his face; and when he gave her hard words, she and her neighbours fell upon him, and beat him; upon which he gave her the strokes above mentioned. And in that trial it was argued, there was no *animus occidendi*, no previous malice, no mortal weapon; and the texts from Scripture urged in defence of the present pannel, and the arguments from the civil law, and from our own acts of parliament, were urged: nevertheless the lords "found the libel relevant, repelled the defences;" and, upon the proof, he was sentenced to die.

In the case of William Carmichael in 1694,

drunkenness was founded on to excuse a *pœna ordinaria*, and forethought was neither libelled, nor proven; and the lords found the libel relevant, and, upon the proof, he was sentenced to be hanged.

In the year 1695, George Cuming, writer in Edinburgh, was indicted for the crime of murder or manslaughter of Patrick Falconer; the defences now offered for the pannel, upon the distinction in the old law, between forethought and *chaud melle*, were offered; nevertheless the libel was found relevant, and the assize returned a verdict guilty of manslaughter; upon which he was condemned to die.

In the case of Burnet of Carlops, the 22d January, 1711, though a defence was sustained, yet the libel without forethought was found relevant: and in that of Hamilton of Green, the 30th June, 1716, the pannel offered to prove, that he was accidentally at the house of Thomas Arele, of whose murder he is accused, at the day libelled, with some of his acquaintances, and had no deadly weapon along with him; that he became inebriated to a great degree, and having left the house, and returned to ask for the slip or cover of the sheath of a sword, the defunct gave him most indecent, injurious and scurrilous language, and persisting in it, the pannel pushed; or struck at him with his sword, having the scabbard thereon, that he had reason to believe had a crampet upon it: and being still more and more provoked by repeated, injurious words, to protect himself from further insolence he had reason to look for, the pannel still remaining on horseback, the defunct rushed himself upon the sword. And this circumstantiate fact was offered to be proven. Nevertheless the libel was found relevant, and the pannel's haill defences repelled, and upon the proof, was sentenced to have his head severed from his body; and was accordingly beheaded.

In the case of Thomas Ross and Jaffrey Roberts, the 20th July, 1716, it was pled for the pannels, that being recruits lately come from England to Scotland, and not knowing the way, they asked the defunct the road to Edinburgh, who refusing to shew it, and one of the pannels expostulating with him, why he treated a stranger so, that came to serve the king? He uttered very disrespectful words with respect to his majesty; and one of the pannels having called him villain for such opprobrious expressions, he came up to Ross, and with his fist gave him a blow on the face, and then pulled him down to the ground, and beat him with a great stick, to the imminent danger of his life, saying, That he should never go alive out of his hands: and Roberts having come to his assistance, and rescued him a little; Ross, the pannell, gave the defunct a wound with a knife, whereof he died. Ross pleaded, there neither was nor could be forethought felony, or premeditate malice, against a person whom he had never seen before: that it was committed upon sudden heat: that he had the highest provocation, both verbal and real. Nevertheless, by the interlocutor, Ross, the pannel, his giving the wound was found relevant to infer the pain of death. And the defence from provocation by words, and receiving a blow on the face, being pulled down to the ground, and beat with a great stick to the danger of his life, jointly sustained relevant to restrict the libel to an arbitrary punishment, was found to be elided by the reply, that, at the time of giving the wound to the defunct, the defunct's hands were held by Jaffrey Roberts, the other pannel. From whence 'tis evident, that slaughter upon suddenty, *in rixâ* or *chaud melle*, and by a person who had received the greatest verbal and real injuries, even beyond that of being thrown into the kennel, of the nature that is set forth into which the present pannel was thrown, is by that interlocutor found *homicidium dolosum*, and not *culposum*, but capital.

And, in a very late trial, in the case of Davidson, the soldier, slaughter upon the greatest suddenty was sustained, and he was upon the proof executed.

And the judgment given in 1717, in the case of Brock and Lindsay, determines this point beyond all dispute. These pannels were accused of the murder of one Anderson: and as the libel did expressly set forth a quarrel and a struggling betwixt the two pannels and the defunct, which made it directly an *homicidium in rixâ*; so the pannels, at least Lindsay, offered a pretty strong defence, namely, that the defunct, without any provocation, justled them, and struck at Lindsay, and beat him down to the ground; and it was while they were on the ground, the wound was given. And the defence was pled for two several purposes: First, that the crime was not capital, because no forethought felony. And, 2dly, to entitle them to the act of indemnity, under which all homicides were included, except wilful murder, and slaughter of forethought felony. And the interlocutor upon the relevancy was in thir words, "Find the pannels, or either of them, at the place and time libelled, their giving Archibald Anderson a cut or wound in the neck or throat, or other mortal wound, with a knife or other mortal weapon, whereof he, the defunct, soon thereafter died; or that the said pannels, both or either of them, were art and part therein, relevant to infer the pains of death, and other pains libelled: and repel the haill defences for the pannel, excepting that defence pled upon his majesty's gracious act of indemnity; anent which the said lords superseded to give their judgment, till the conclusion of the probation, and return of the verdict."

This then is an undoubted authority, that homicide may, by the law of Scotland, infer the pain of death, though it be neither wilful murder, properly so speaking, nor forethought felony; otherwise the Court could not have found the crime relevant to infer the pains of death, and at the same time reserve the consideration, whether there was any forethought felony, or not.

Upon this interlocutor a proof was adduced,

and a verdict returned, finding Lindsay, one of the pannels, guilty; and yet the Court having resumed the consideration of the indemnity, found him intitled to the benefit of it: that is, in other words, they found the crime was neither voluntary murder, nor slaughter of forethought felony. So that it is plain, had not the indemnity intervened, Lindsay must have suffered death for killing, though there was no previous design of forethought.

And an interlocutor upon the relevancy, much to the same purpose with the former one, was also pronounced, the 31st of August, 1721, in the case of Samuel Matthews, a soldier; where the libel was found relevant to infer the pain of death, reserving the consideration of another act of indemnity then pled for the pannel.

It would be in vain, and lengthen a paper already too long, to run through all the decisions which shew, that neither the drunkenness of the pannel, nor provocation given him, nor the suddenty upon which the fact was committed, can afford a defence to the pannel, to exculpate the slaughter, or lessen the ordinary punishment; and therefore the pursuers shall leave the first branch of the defence with the lords, with this observation, that if it is really founded in law, by looking into the books of adjournal, one would think our law has hitherto been very ill understood.

2do, It was offered, what indeed is alone applicable in the present case, "That if the pannel intended only to wound or kill Bridgeton, and by misadventure the deceast earl of Strathmore was wounded, and of that wound died, the *pœna ordinaria* was not to be inflicted."

It was answered, that according to the rules of the civil law, he who intending to kill one, kills another, is nevertheless subject to the *pœna ordinaria*; so Julius Clarus delivers his opinion in his Receptæ Sententiæ lib. 5. § homicidium, N. 6. where, after having taken notice, that the contrary was indeed the opinion of some, adds, "Sed certè ego si casus contingeret, illi facerem caput amputari." And the learned Mathæus, lib. 48. tit. de Sicariis, § 12. gives the same opinion, observing that the act is consummate, there is *animus* or design of killing, and death: that it would be a ridiculous defence, that the pannel intended to steal the goods of one man, but happened to steal those of another; or against adultery, that he intended to defile one man's wife, and happened to light upon that of another: and he thinks it is as unreasonable to hope for safety from this defence, that the meaning was to kill one, but another received the stroke and died.

Voet in his commentary agrees with them, lib. 48, tit. 8, ne. 2, where he says, that there is no difference, "Sive vulnus in titium directum ab eo declinatum, Mœvio in proximo stanti lethale fuerit, sive denique occidatur qui cædis impediendæ causa, sese medium inter agressorem et defendentem interposuerit: quia prævalet, quod principale est, nec error talis tollit aut occidendi animum, aut eadem lege Corneliâ vindicandam." And for this not only founds upon the l. 18, § 3, et § ult. ff. de inj and l. 5, s. 1, ff. de servo corrupto; but al the authorities of Farinacius, quæst. 125, 156, et 157, as also, that of Fachinæus, Ca zovius and Berlichius, and others. And t opinion obviates the defence, as put in its m favourable light, which however would be very delicate proof, that the defunct thr himself between Bridgeton and the pann and received the stroke aimed at the other.

The learned Sande, lib. 5, tit. 9, defin. which has this title, "Qui alium pro a occidit, nihilominus ordinaria, leg. Corn pœnâ afficiendus," says, after agreeing, th according to the Roman law, such error wou not have excused the murder, "Hæc senten ubique usu obtinuit, et secundum eam, reus mortem condemnatus et decapitatus est," 17 November anno 1621; and there alledges th authority of Gomesius, Emanuel, Soir, an Carolus Molinæus, "Qui alios cumulat," i his book ad consuetudines Parisienses. An sir George Mackenzie in his Criminals, ti Murder, § 9, says, after stating the questio "Yet I think he should die, seeing the desig of killing a man, and not any particular man, murder; and the killer intended to deface Go Almighty's image, and to take from the king subject."

It is nothing to the purpose, that some of th authors who write upon the Roman law, ar of a different opinion, in a case not determine in words by the text, when the bulk of th commentators are of the other side, the mos recent and of greatest authority; and when i appears to be received as a rule by the practic of nations, that the ordinary punishment shoul be inflicted. And it may not be improper t observe, that the cases where lawyers disse from the received opinion, are generally unjus tifiable homicide, that is, where the bystande was killed, when the killer intended to execut his purpose in lawful defence, and not *in ho micidoi culposo*, which is the highest the pannel's case could possibly be pled upon provoca tion, according to any opinion delivered by th strongest advocates for the question the panne pleads.

That it is not always necessary, that the in tention should be directed towards the mischie done, in order to inflict the pain of death, must b evident from looking to the xxi. chap. of Exod. ver. 22, and 23, where, "If a woman with child is hurt when men are striving, and mischief follow; life is to be given for life." And the kind of killing now in question was plainly such as, according to the law of Moses, would not have intitled the slayer to the benefit of the city of refuge: For though in the xix. chap. of Deut. ver. 4, "Whoso killeth his neighbour ignorantly, whom he hated not in time past," is said to be intitled to that privilege; yet this is limited immediately with an example of manslaughter merely casual.

The procurators for the pannel insisted, "That this kind of killing was intirely casual,

beyond, and without the intention of the party: That in the case of Masson, in the year 1674, Burnet of Carlops, and several others, where it appeared there was no intention to kill, the punishment was mitigated."

It was answered, That where, from the nature of the weapon, and means by which the wound was given, taking all the circumstances together, there was no evidence or presumption that the pannel intended death to any person whatsoever; and the *propositum* was neither proved nor could be presumed, as in the case of Masson. And in that of Burnet of Carlops, where persons having swords, only struck with staves, it was held as approaching towards a casual homicide. But that can never be pretended, when the wound given as libelled was so clearly mortal, and the instrument the most lethal [deadly]; and the decision of Carlops, even with that difference, stands single in the books of adjournal.

It was farther contended for the pannel, "That as *animus occidendi*, and death following, are admitted to be necessary, in order to inflict the highest punishment; so as from the circumstances mentioned in exculpation, it is evident there was no intention against the defunct: And it cannot be known whether the pannel's design was to kill Bridgeton, since he was not killed, or if the wound would have been mortal, had the sword reached him; and consequently the necessary requisites to constitute a murder, were not to be found here."

It was answered, that the invasion with a mortal weapon, with which the defunct was killed, was a sufficient proof in law that the invader intended to kill, since death followed; and that there is no wounding by measure, and certainty not to kill. The act implies *dolus* and malice, which, with death following, makes murder, without any farther proof of an act of the will to kill; and there would have been as little evidence that the pannel intended to kill Bridgeton, if he had actually received the wound and died, because it was possible the sword might have pierced farther than he intended; and if he did not design to kill Bridgeton, and killed the defunct, he must have been the person against whom the mischief was directed. As indeed it may be argued from the rage and drunkenness pled in excuse and defence, it is possible that *ex rabie* he intended to kill whomever he met with; and if rage from passion and drink is allowed to palliate murder, it is impossible any one can be safe. And these very circumstances, without which the defence has not a colour, must, at the same time, give evidence, that the pannel's intention of purming Bridgeton with a sword, was to kill and destroy him; for he pleads them to excuse his killing of the defunct, as sufficient provocations to incite him to it.

The law of England was frequently mentioned by the procurators for the pannel in the pleading, as what would justify the arguments brought for them; and particularly it was said, "That all killing of a suddenty by that law, was only manslaughter, and not murder." But the contrary will appear, by looking into Hawkins's Pleas of the Crown, book 1, chap. 31, of Murder, where he clearly distinguishes between deliberate murder, and murder committed on a sudden: And in this last case, malice prepensed is, by the law of England, often implied, as lord chief justice Keylinge* lays it down, Regina *v.* Mawgridge, and justifies it by the case of Holloway, who espying a boy that came to cut wood, took him, and tied him to an horse's tail with a cord, and then gave the horse two blows, whereby he run away, and broke the boy's shoulder, whereof he died; which must have been sudden, and was adjudged murder. And p. 130, he supposes A to have been provoked by B, and to have drawn his sword, and made a pass at him, when B had no weapon drawn, but missed him; thereupon B draws his sword, and passes at A, and there being interchange of passes between them, A kills B. I hold, says the author, this to be murder in A, for A's pass at B was malicious, and what B afterwards did was lawful. Here is both suddenty and provocation, and yet, in the opinion of that great lawyer, it would have been held murder. And in the present question, neither Bridgeton, nor the deceased, had any weapon drawn.

And to shew, that according to the law of England, the aiming at one, and hitting another, does not make death following manslaughter; in the end of the next page he sets down the Case of Dr. Williams, a Welshman, who having a leek in his hat, upon St. David's-day, a certain person pointed to a Jack-of-Lent that hung up hard by, and said to him, "Look upon your countryman!" At which Dr. Williams being enraged, took a hammer that lay upon a stall hard by, and flung at him, which hit another, and killed him: And though being indicted upon the statute of stabbing, it was resolved he was not within that statute, because of the kind of weapon; "Yet," says the author, "if the indictment had been for murder, I do think that the Welshman ought to have been convicted thereof."†

And since the pannel's procurators insisted so much upon the law of England, the pursuers cannot but mention the authority of one of those lawyers, as to one of the cases they themselves stated in the debate; Hawkins's Pleas of the Crown, chap. 31, in fin.: The case is, That a person shooting at tame fowls with intent to steal them, accidentally kills a man; that author says, "That it is agreed it would be murder, and not manslaughter."

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* So in the Former Edition. But it appears that chief justice Holt is intended. See Mawgridge's Case, p. 57, of this Volume.

† Lord Chancellor Bacon is in this opinion of Hawkins expressly: See Vol. 4, (Edit. 1740) p. 41, on explaining this maxim of English law; "In criminalibus sufficit generalis malitia," &c. where he states cases very similar to the case here argued. *Former Edition.*

It is true indeed, that it would appear by the law of England, as laid down in these reports, that if there is provocation, in some particular cases, sufficient to alleviate the act of killing, it reduces it to a bare homicide. But then no provocation from words is ever sustained, nor even assaults, but upon this ground, that he who was affronted or assaulted, might reasonably apprehend, that he that treated him in that manner might have some farther design upon him, which resolves the matter into a kind of self-defence; and in this the law of England differs from the law of Scotland, which requires, in order to lawful defence, and killing under the notion of danger from the assailant, "ut quis sit constitutus in periculo vitæ." But then there is no pretence of apprehending dangerous consequences, when the party killed, or intended to be killed, was flying, and had no weapon, as in this case, and the passion in such circumstances resolves itself simply into revenge, which no law ever sustained to alleviate or palliate murder; for there the malice prepensed is clear and evident.

But then, if it be considered in the present case, that the party affronting or invading, is not only set forth to have fled, and to have had no weapon in his hand, but that he escaped; what colour is there, upon these principles, to alleviate the killing of a person interposing to prevent the mischief, when there was no resistance upon the part of any person whatsoever, as in the case of a combat, and where it was voluntary as to the person giving the wound, in regard he could have stopped when Bridgeton fled, which cannot be said with regard to the Welshman who threw the hammer.

To conclude this matter, it appears prettyevident, the circumstances offered in exculpation afford, by the law and practice of Scotland, no relevant defence, suppose the person killed had been the provoker, much less in the case where the person killed generously interposed to prevent the mischief, having given no colour or cause of provocation, having no weapon, and where the person, against whom the invasion is said to be meant, was without drawn sword, and flying: the murder in these circumstances must have proceeded either from rage and revenge, which no law can ever favour, since laws were made, and judges appointed, that private persons should not attempt judging in their own case, and to bridle the unruly passions of men, or from set purpose and design to kill the defunct, from former resentment. And what adds to the presumption of the last, is the nature of the wound, quite through the body, and that the sword went through the back lower than where it pierced the belly; which excludes all possibility of pleading, that the pannel's stumbling might have pushed it forward, because by the nature of the thing, had he stumbled after the sword had pierced the defunct's body, it must have raised the point of the sword, so that it could not have pierced lower in the back than in the belly.

Upon the first branch of the libel, the pursuers think it unnecessary to open the particular circumstances from which the pannel's causeless ill-will and resentment may appear against the defunct; that is matter of evidence, and upon which no interlocutor in the relevancy can pass, and must lie in the breast of the assize; and against this relevancy no exception, or colour of exception can be pretended to lye. And as to the separate relevancy, and art and part, what is offered to be proven, that the defunct thrust himself in a manner upon the pannel's sword: as it is of too delicate proof, and was repelled in the case of Hamilton of Green, it is believed the lords can have no regard to it. And as for the drunkenness and provocation, especially where the provocation is said to have been given by a third party; if it were sustained, it must turn up what have been thought the foundations of the law of Scotland, and stand in opposition to all the practice that can be discovered from the books of adjournal. And the allowing such defences as might possibly have some colour in the law of England, to be proven, would be of dangerous consequence in the law of Scotland, where the pursuers are tied up to a precise relevancy; so that the procedure in that part of the island, in trials of this kind, unless the whole form of trial were adopted in our law, would open a door for leaving murders unpunished. The law of Scotland alone can be the rule in this case; though, at the same time, it is believed, that the *species facti*, as set forth by the pannel, would be sufficient warrant for a verdict of murder, even according the laws and practice of England. In respect whereof, &c.

CHA. ARESKINE.

INFORMATION for JAMES CARNEGIE, of FINHAVEN, Pannel; against Susanna, Countess of Strathmore, the Hon. Mr. James Lyon, Pursuers, and his Majesty's Advocate, for his Highness's interest.

The said James Carnegie, of Finhaven, stands indicted before your lordships of wilful and premeditate murder and homicide; in so far as, having a causeless ill-will and resentment against the deceased Charles, earl of Strathmore, he conceived a deadly hatred and malice against him; and (on the day libelled) "did, with a drawn sword, without the least colour or cause of provocation then given by him, invade the said deceased Earl, and did basely and feloniously murder and kill him, by giving him a wound therewith in the belly, whereof he soon after died. At least, at the time and place described, the said Charles, earl of Strathmore, was with a drawn sword, feloniously and barbarously wounded, and died of the said wound within a few days thereafter; and that the pannel was art and part in this murder." And the Indictment concludes, "By all which it is evident, that you are guilty, art and part, of the crimes of wilful and premeditate murder and homicide, or one or other of them, at the time and place, and in the manner above set forth."

The pannel was brought to your lordships bar, upon the 15th of July current, to plead to this indictment, where he appeared under that deep melancholy and oppression of spirit with which a man and Christian must be loaded, who finds himself accused, not only of shedding of blood, but of shedding the blood of one, whose personal character and qualities, drew from all who had the honour to know him, the highest esteem and regard; and for whom the pannel himself had all the honour, entire friendship, sincere affection, and high respect, that either his rank, personal merit, or great benevolence could call for; and of having done this barbarously, from premeditated malice, deadly hatred, and felony fore-thought.

Your lordships having put the question to him, in the ordinary way, What he said to the Indictment? He expressed himself in these words:

"My lords; I find myself accused by this indictment of maliciously murdering the earl of Strathmore; but as to any ill-will, malice, or design to hurt the Earl, God is my witness, I had none: on the contrary, I had all the due regard, respect, and kindness for his lordship, that I ever had for any man. I had the misfortune that day to be mortally drunk, for which I beg God's pardon, so that, as I must answer at God's great tribunal, I do not remember what happened, after I got the affront your lordships will hear of from my lawyers. One thing I am sure of, if it shall appear that I was the unlucky person who wounded the Earl, I protest before God, I would much rather that a sword had been sheathed in my own bowels. And further, I declare, that I do not, so much as remember, that I saw the Earl after I came out of the kennel, and even not so much as the drawing of my sword, and therefore I cannot acknowledge the libel, as it is libelled."

From these words so expressed, it is evident, in what a dismal situation of mind this unhappy gentleman must be. If what he hath said be true, he cannot be guilty of the malicious murdering the deceased lord; yet he may have been the unhappy instrument of his unfortunate death; and what a bitter reflection that must afford, all circumstances, particularly that of friendship, considered, will occur to every generous man: it may produce thoughts more afflicting than that of death itself.

The counsel for the pannel, in the entry to the debate, judged themselves under a necessity, from the great honour all of them had for the person of the deceased lord, and always will have for those who remain of his family, and from the particular obligations of friendship that some of them owed him in a more distinguished manner, to declare, that if they had the least apprehensions, that his lordship's death had happened by, or from any design or intention of the pannel against his life, that no motive, even of relation or natural tie to the pannel, would have induced them to open their mouth in his defence; but that innocence is always presumed, and that the circumstances, so far as yet appears, seem to set forth the action as a fatality, and not a design, justice and duty called upon them to give their weak assistance, until the matter appeared in another light.

The fact, as laid in the libel, is in very general terms; and those circumstances from which the nature of the action falls to be determined, and which are material for the pannel's defence, being entirely omitted, the procurators for the pannel were obliged to set forth the case as it truly happened, according to the information given them; which by our law and form, they are enabled to do, without owning the libel, or admitting even those facts, which, in the recital, according to information, they are led to narrate: and the account given of it was,

"That, on the 9th of May last, the deceased earl of Strathmore, the pannel, and several others, were called to be present at the funeral of a daughter of Patrick Carnegy of Loures, a near relation of the pannel's; that they dined together at the gentleman's house, where they drunk a good deal, all in friendship and familiarity, without the least appearance of quarrel or difference: that, after the burying was ever, they, together with the lord Rosehill, Mr. Thomas Lyon, and Mr. Lyon of Bridgeton, and other gentlemen, went to one clerk Dickson's, a tavern in Forfar, where they drunk pretty plentifully, and where the pannel happened to be overtaken with too much liquor: that all this while, nothing but friendship appeared betwixt the deceased Earl and the pannel; but that Bridgeton was, from time to time, bearing hard upon the pannel; and, by the whole tenor of his conversation, endeavouring to fret or affront him.

"After this, the pannel waited on the lord Strathmore, at the lady Auchterhouse's, where his lordship went to visit, and Bridgeton followed them thither, and in that house began the former way of conversation, making the pannel's family-concerns the subject of his discourse, in the most provoking manner, asking him in a jibing way, to supply a lord in the company with money, pulling him rudely by the breast, and griping him by the wrist, and striking his hand against the table, telling him, he must give that lord such a sum at that time; then insisting, that he should give him the choice of his daughters; and still griping him, and dashing his hand in the foresaid rude manner, told him he would have him promise to do so; and asking him, in an insolent way, What, would he not do it? Then telling him, if it were his case, if he refused, he would maul him, shaking his hand in the pannel's face. After this, in a ridiculing way, desiring him to settle his estate in a certain manner, since he had no sons of his own; then upbraiding him with his debt. All which, the pannel bore with patience, and endeavoured to ward off the discourse, when Bridgeton still insisted in the most provoking way. And that Bridgeton

likewise used very great rudeness to the lady in whose house they were; particularly, when she in civility offered him a glass of brandy, he, seeing the pannel already overtaken with drink, desired the lady to give it to him, her brother; and upon her saying that her brother did not seem to want it at that time, he griped her by the arm so rudely, as to make her complain, and swore, by God, her brother either should drink it, or she should drink it herself; and persisted in this way of doing, till the lord Strathmore thought it proper to break off the visit, and so went out of the house.

"That Finhaven and Bridgeton followed the Earl; and when they came to the street, some words passed, and Bridgeton used the expression, 'God damn him,' meaning the pannel, and with that gripped him by the breast, and pushed him into a dirty kennel two feet deep, over head and ears, where, in the condition he was, he might have been smothered if a servant of the Earl's had not helped him out, who at the same time expressed his indignation at the action he had seen, by these words addressed to Bridgeton, 'Sir, though 'you be a gentleman, you are uncivil.'

"That Bridgeton, after having so flung the pannel into the kennel, leaving him there, walked forward; at the same time turning about, and folding his arms across his breast, scornfully laughed at him in that condition.

"That the pannel being helped out of the kennel in manner foresaid, immediately drew his sword, and, in a just passion, pursued Bridgeton with a staggering pace: and Bridgeton ran towards the earl of Strathmore, whose back was then to him, and endeavoured to pull out his sword; at which time the pannel coming up with Bridgeton, made a push at him; in which instant the Earl turning hastily about, pushed off Bridgeton, and threw himself in the way of the sword, by which he received the fatal wound."

These are the unlucky circumstances of the fact, as the lawyers for the pannel have been instructed to plead: and from it, as so stated, the defence insisted upon for the pannel was, that the act of killing is not murder, nor capital, where there is no malice nor forethought against the person killed, either proved to have been conceived and retained at any time preceding the act of killing, or presumed from the circumstances to have preceded the act immediately before the committing of it: but that in this case there is no antecedent malice specified or lybelled; and therefore it must be taken for granted, that there was none. And as to presumed malice immediately preceding the act, that the circumstances entirely exclude that presumption; first, because, as the fact is laid, any blow or push that was intended, was made at, and designed for Bridgeton, and not against the earl of Strathmore; and since the *initium facti* is to be considered, as well as the event, a push begun and intended against Bridgeton, could never be the foundation of a presumption of malice against the lord Strathmore, the person killed, without which, the killing could not be capital, but in this case was merely casual and accidental, it having happened by the Earl's unluckily turning about in the time of the pannel's very act of pushing against Bridgeton, whereby the Earl received the fatal wound. 2do, That the pannel could never be more criminal in having killed the earl of Strathmore by a thrust directed at Bridgeton, than he would have been if he had killed Bridgeton himself; but that so it was, that if he had killed Bridgeton, after the provocation given in manner above set forth, that it would have been construed only as casual or culpable homicide, without forethought, because done 'ex 'incontinenti, et ex subito impetu, et calore 'justæ iracundiæ;' yea, in some measure in self-defence, since the pannel having been thrown into the kennel, even to the danger of being suffocated, he had reason after that to expect the worst from Bridgeton, since no gentleman will throw another into a puddle, who is not supposed to be ready to go further, as he cannot but expect the strongest retortion of the injury; and that the pannel had the more reason to think so, that Bridgeton immediately betook himself to the earl of Strathmore's sword, and endeavoured to pull it out, having none of his own, by reason that the known ferocity of his character and behaviour is such, that the country-gentlemen of his acquaintance decline to keep company with him, if he wear any arms: in such case the pannel was to expect the worst, and so was in some measure in his own defence, although he may have exceeded the 'moderamen inculpatæ tutelæ;' which excess, in such circumstances, would not be punishable by death, but only by an arbitrary punishment.

And in support of this defence the counsel for the pannel shall now, in this information, endeavour, though somewhat out of the order of their pleading, to follow the information given in for the pursuers. And first, to show your lordships, that killing in such circumstances was not capital by the divine law, or law of Moses. 2do, That it was not capital by the common law, which we in great measure follow in matters of that kind. 3tio, That it was not capital by our own ancient law. 4to, That our ancient law in that particular is not altered by the statute of Charles 2. 5to, That the practice of the Court is not inconsistent, but agreeable to what is here pled. And 6to, That the laws of our neighbouring nations are for the most part consonant to those principles, as well as the judgment of foreign courts.

And to begin with the divine law, it may be divided into two: First, the law of nature, which is the first of all laws, and hath no other author than God Almighty himself. 2do, His will revealed by writing, particularly in the laws delivered by Moses.

And as to the law of nature, one of the first principles seems to be, that every action must be construed and regulated from the intention

of the actor. Every action whatever, except in so far as it is conjoined with the will and intention of the agent, differs in nothing from the action of an irrational creature; yea, if we may so speak, as to call the operation or impulse of an inanimate creature an action, the actions of man separated from his intention and design as a rational creature differ in nothing from the actions of brutes, or the impulse of things inanimate; and consequently that action, be what it will, can neither be crime nor virtue; it is a mere impulse or motion, not properly subject to laws or rules. But then, indeed, when it comes to be conjoined with the intention, or, which is the same thing, considered as the action of a rational agent, there it comes to be subject to laws, to be considered as criminal or virtuous: or if it appear to be accidental, so as to have depended upon no will nor deliberation of reason, then it returns to be of the nature of the act of an irrational creature, or inanimate substance, and is subjected to no penalty, nor yet capable of receiving a reward. The plain consequence of which is, that it is the *animus* alone that determines the nature of the act; and if the *animus* or intention was criminal, then, by the law of nature, the action itself amounts to a crime. On the other hand, if it be good and virtuous, the act is laudable by the law of nature, supposing even a bad consequence should follow. But, in the third place, if the action truly arise from no intention or principle governing that action, it is neither laudable nor punishable, it returns to be of the kind already mentioned, the same with the like act of an irrational creature, or the impulse of an inanimate substance, moved by a cause intrinsic to itself. And the consequence of all this is, that by the primary law of nature, the intention must make the crime; and therefore if there appear no intention to commit that particular fact which happens to be complained of, it is not a crime, notwithstanding of a bad consequence; it is considered as a fatality.

And the application is plain to the present argument, that if the unfortunate act of killing the deceased lord did not flow from any intention to him directed; then that act is not by the law of nature a criminal act, however the antecedent acts directed against another may be criminal. It is another question, how far a rational agent, *versans in illicito*, is bound for consequences that did not fall under his intention? We shall afterwards endeavour to shew, that that is neither a question in the law of nature, nor in the divine law; but is a question arising from the municipal laws of particular kingdoms, or at farthest from the law of nations, sometimes called the secondary law of nature.

As this point, that the intention directed towards the act committed, must govern the action, so as to render it criminal or not, according to the first principles of the law of nature, seems to be pretty plain, if we retire our thoughts from other after laws; so indeed it is confirmed and illustrated by the written law of God, as delivered by Moses, with regard particularly to the question of manslaughter. It is almost unnecessary to observe, that whether the remedy against the penal consequences of actions, committed without intention, was in form of an absolvitor upon the trial, or by having access to a city of refuge; it is the same thing: the question is, what was to be the punishment that was to take effect? If the punishment was to be stopped in that form, by flying into a city of refuge, the principle of law is the same, as if the effect had been to be stopped in any other way. And just so, as we will afterwards have occasion to notice, it is the same thing as to our law, whether the manslayer was to be safe, by flying into gyrth or sanctuary, according to the old law, or now to be safe by a judicial absolvitor or restriction of the punishment. And just so with regard to the law of neighbouring nations; it is all one, whether a man is to be freed by benefit of clergy, or such other form, if he is to be free. The foundation question is only, what was the punishment that necessarily, *cum effectu*, falls to be inflicted upon a homicide of such and such a kind; and as in this case, upon a homicide committed without forethought or malicious intention directed against the person that hath suffered? And therefore if, by the Mosaic law, one in the pannel's circumstances was to have the benefit of a city of refuge, the argument concludes, that by that law he would not have been subjected to the pain of death. Indeed we believe we will be able to go a little farther to shew your lordships, that, according to the opinion of the most learned interpreters and doctors of the Jewish law, the benefit of the city of refuge was scarce necessary in such a case as that which is now before you.

In the 19th chap. of Deut. the cities of refuge are appointed to be separated in the midst of the land, that every slayer may fly thither: "And this is the case," (says the text) "of the slayer, which shall fly thither, that he may live: whoso killeth his neighbour ignorantly, whom he hated not in time past;" or, as it is said to be more literally in the original, "from yesterday the third day." By this text your lordships see those two are conjoined as explicatory of one another, "ignorantly whom he hated not in time past;" and so the word "ignorantly" is put in opposition to "hatred in time past," and by that means the sense is plain, that by "ignorantly" is not meant, without knowing that he kills his neighbour, but without a fore-knowledge, a foresight, a former ratiocination and design: in which sense, knowledge is most frequently taken, because it is impossible to maintain, that if a man ignorantly kill his neighbour, even whom he hated before, taking the word "ignorantly," in that sense, of his not knowing that he kills him, or killing him by mere accident, without his knowledge, can be liable as a murderer; because it is impossible to conjoin even previous enmity with accidental ignorant killing, so as to make out a crime of murder; that were ex-

ceeding inconsistent with every principle of reason, far more with a law flowing from infinite perfection. But then the matter is fully explained by ver. 11, of that same chapter, which determines when a man is not to have the benefit of the city of refuge; "But if any man hate his neighbour, and lie in wait for him, and rise up against him, and smite him mortally that he die, and flieth into one of these cities; then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die." Here are both sides of the question put, the one fully to explain the other; the last to explain what is meant by "ignorantly, whom he hated not in time past." The last text does by no means say, that if a man smites his neighbour whom he knoweth, although without hatred, and without lying in wait, and without rising up against him, that he shall surely die; but on the contrary, puts the issue of his dying upon his hating of him whom he killed, and upon his rising up against him whom he did kill; and upon his lying in wait, that is, in other words, upon his designing to take his opportunity from a premeditated malice: for indeed the meaning cannot be that of a formal lying in wait, or lurking in a passage where the person was to pass; but he who designs the thing, and takes his opportunity, lies in wait in the plain sense of the text. Besides, the word "ignorantly" very plainly imports, and carries under it that case of a man's killing, by misadventure, one whom he did not intend to kill, that is plainly ignorance as to him who was killed; and yet it will be true, that if he designedly kill one in place of another, mistaking the person, but designing to kill that person, as supposed to be the other, he does not ignorantly kill the man whom he does slay, he kills him knowingly, although he mistake the man.

Nor is it of any importance, that the examples immediately subjoined in the 5th verse, are instances of slaughter entirely accidental; and where the slayer did really not know that he killed, that is an example, but not an example exhausting the rule, which the 11th verse fully clears, as not extending the capital punishment to all who came not under the description in the 5th verse, but to those alone who "hated their neighbour, lay in wait for him, and rose up against him."

And though this is plain enough from that part of the law, yet the matter is indeed more fully explained in xxxvth chap. of Numb. where there is another ordinance as to cities of refuge, and they are appointed to be six; and the general rule is set down, That every one that kills any person unawares, may fly to those cities. Nothing can be plainer than the meaning of killing unawares, that is, without deliberation, unexpectedly, without forethought, *ex improviso, ex inconsulto:* these are all synonymous, and accordingly the Septuagint translation so renders the words *axwiv* that is, "involuntarily;" and so likewise the Jewish doctors have explained it, as will afterwards be noticed.

After this the text goes on with an enlargement or amplification of that general law, "And if he smite him with an instrument of iron (so that he die) he is a murderer, &c. And if he smite him with throwing a stone (wherewith he may die) and he die, he is a murderer, &c. Or if he smite him with an hand-weapon of wood (wherewith he may die) and he die, he is a murderer." These are the amplifications; but then follows the limitation in the 20th verse. "But if he thrust him of hatred, or hurl at him by lying of wait, that he die; or in enmity smite him with his hand, that he die: he that smote him shall surely be put to death; for he is a murderer," &c. Here is the limitation, he that killeth or thrusteth with an iron-weapon, is a murderer, under the limitation introduced by the particle 'but,' as an explicatory exception to the generality of the rule, but if he thrust him with hatred; that is, in other words, that he is a murderer, if he thrust him in hatred: and therefore commentators refer from this text to the other in Deuteronomy, already cited, for explication of this, where it is statuted, That if a man hate his neighbour, and rise up against him, and smite him; whereby they plainly understand, thrusting him of hatred, as the same with rising up against him, and smiting him with hatred, so as to comprehend every manner of killing with any weapon; and consequently that this is not a distinct manner of killing, from what is expressed in the 16th verse, but a quality adjected to the manner of killing, so as to make it capital, viz. That it must be done in hatred. And this is yet more clearly explained by the 22nd and following verses, where the opposition is stated betwixt thrusting suddenly and of enmity, with a direct reference to the 16th, 17th, and 18th verses, "But if he thrust him suddenly without enmity, or have cast upon him any thing, without laying of wait; or with any stone wherewith a man may die, seeing him not, and cast it upon him that he die, and was not his enemy, neither sought his harm; then the congregation shall judge, &c. and shall deliver the slayer out of the hand of the avenger of blood." There all the three methods of killing before-mentioned are referred to: thrusting, properly applicable to the killing with a sword, but without enmity; casting any thing upon him, without lying in wait, or forethought, or with any stone, wherewith a man may die, the very thing expressed in the 17th verse, and from which he is deemed to be a murderer; yet, if he was not his enemy, neither sought his harm, he is not a murderer, he is not to die, but to be delivered from the avenger of blood. So that these three last verses are a plain limitation of all that went before; the instrument, whatever it was, was to raise a presumption, if a mortal one: but yet if it appear the person was not thrust, or hurled at, or smitten in enmity, &c. the

slayer was to be delivered from the avenger of blood.

Neither can it stumble your lordships, that in the 22nd verse are these words, "seeing him not," as if this were one of the requisites necessary for the slayer's safety, that he did not see the man whom he thrust at, or killed with a stone, though not done in enmity: for, first, It is impossible to imagine, that the words, "seeing him not," however they might refer to the case of throwing a stone, can have any reference to the words, "thrusting without enmity." How can a man thrust at him whom he seeth not? Or, How can he smite him whom he seeth not, in any proper sense of smiting? And therefore it is plain, that as to the thrusting, the only limitation is, that it be done without enmity. But, 2do, your lordships will observe, that the word "him" in that sentence, "seeing him not," is not at all in the original; it is an adjection of the translator's, and, as such, is distinguished in different characters in any correct editions of our bibles, and indeed is an erroneous adjection: the words should be only "seeing not;" and perhaps the translations ought not at all to be by the participle "seeing," but, according to the idiom of the Latin language, by an adjective, such as, *improvidus imprudens*, or the like; and, according to our language, by a substantive and adverb, such as, 'without foresight:' and so the Septuagint does translate it in these words, ως ουκ, which, in our language, is directly, 'without foresight,' that is, without premeditation or anterior design to give the stroke. And so the sense comes out, that where a thrust or blow of that kind is given, without enmity, foresight and premeditation, or, in other words, *sine dolo*, that there death was not to follow, but the slayer to have the benefit of the city of refuge. And that the most ancient lawyers, and Jewish doctors themselves, have understood the scope of the Mosaic law to be such, is the next point we are to endeavour to shew your lordships.

And, in the first place, we beg leave to refer to an ancient treatise, called Mosaicarum et Romanarum Legum Collatio, last published by the learned Schulten, with his own notes upon it; in the first Tit. of which, De homicidiis casu, V. voluntate, § 5, are those words, "Item de casualibus homicidiis Moises legaliter dicit, Si autem non per inimicitias immiserit super eum aliquod vas non insidians, vel lapidem, quo moriatur, *non per dolum*" (your lordships will please mark those last words) "et ceciderit super eum, et mortuus fuerit, si neque inimicus ejus, &c. liberabitis percussorem." Here is directly set down, by way of paraphrase, the sense of the 23rd verse of the xxxvth chap. of Numb. before cited; and in place of these words, 'seeing not,' the paraphrase of this ancient collator is expressed by these words, 'non per dolum;' which shews what understanding he had of the words, directly congruous to what we have above set down, and, as we apprehend, to be the Septuagint translation; and this paraphrase the annotator approves of as the just meaning of the text.

But we beg leave to give your lordships another great authority, who founds his opinion upon the notions of the Jewish doctors, or rather sets forth what they all agreed on to be the import of the Mosaic law on this head, and that is the great and learned Selden, in his treatise, De jure naturali et gentium, juxta disciplinam Hebræorum, lib. 4, cap. 2. The title of which is, "De homicidio involuntario, seu quod casu factum aut errore." There the learned author takes notice of all the texts upon this subject, and of the Jewish doctors who had wrote upon it, whose names we need not trouble your lordships to repeat, but refer to the quotations Selden makes. That learned author takes notice of three sorts of homicide, which he and the Jewish doctors reckoned to be involuntary, according to the Mosaic law, and not to be punished with death: the first is, What is merely accidental. The second is, Where the killing was not merely accidental, but as he expresses it, "prope accedens ad violentiam." The third we beg leave to set down in his own words, as coming up directly to our case: "Tertia autem homicidii involuntarii species est, ubi qui alium occidit ex errore quidem aut ignorantiâ, quæ tamen prope accedit ad id quod spontaneum est seu voluntrium; veluti ubi quis alterum occidere volens, alterum jactu aliterve perimit, aut ubi jactu sive saxi sive teli in hominum cætum, cujus nec ignarus qui jecerit quis occisus: adeoque intervenerit culpa latissima. Ex tribus hisce homicidii involuntarii speciebus, nulla est quæ morte ex sententiâ forensi ordinariâ, sive in Ebræo aliove circumciso, sive in proselyto domicilii, aut gentili alio puniretur. Nam in universum pronunciant, homicidium nullum, seu qui non sponte scelus patraret, sic foro puniendum." Yea, he goes farther, that, in this last case, according to the Jewish doctors opinion, there was no need of going to the city of refuge, for that the avenger of blood had not a power in that case to kill.

We apprehend, nothing can be more direct or strong to the present case, than that authority which is laid down, as the universal opinion of the Jewish doctors, which we hope does deserve some regard in the interpretation of the Mosaic law.

And this naturally leads us farther to observe to your lordships what we insinuated before, that the question started by Roman and modern lawyers, how far a person that intends to kill one man, is liable to the pain of death if he kill another, hath no foundation in the Mosaic law, either from the texts, or the opinion of those Jewish doctors. As to the last, your lordships see, that Selden from them, directly states the case, "ubi quis alterum occidere volens, alterum jactu aliterve perimit;" and he and they determined that to be an involuntary homicide, not punishable with death; and we apprehend, that in this

they are founded in the words of all the texts, "If any man hate his neighbour, and lye in wait for him, and rise up against him, and smite him mortally, that he die:" Not one word here of rising up against one and killing another; not a word of hating one, and in consequence of that hatred killing another; that was a case which did not fall under that law. The hatred and the rising up, was, by that law, to be against the man who was killed; if another by fatality happen to be killed, that was a different case, it was an involuntary homicide; the crime there was not the killing, but stood upon the rising up against him who was not killed; and so the punishment was for invasion, but not for killing. The texts in the book of Numbers are all to the same purpose: "If he smite him who is killed of hatred, or hurl at him by laying of wait that he die, or in enmity smite with his hand that he die," &c. where all the rules are still directed towards the person alone that is killed; and that of killing another, when the stroke was not designed at him, is quite left out of the case. And the application of this reasoning to the present unhappy accident, is too evident to need enlargement. If it appear that the push was aimed at Bridgeton, that the enmity was against him, and not against the deceased lord; then, whatever be the constitution of the Roman, or more modern laws, the present case is quite out of the description of the Mosaic law concerning this article of manslaughter.

What hath been already said at so great length, does fully obviate what is offered in the pursuers' information in way of answer. It is true, that the general rule in the divine law is, "That whoso sheddeth man's blood, by man shall his blood be shed;" and so, by the sixth Commandment, the prohibition is general, "Thou shalt not kill:" yet even the Commandment itself admits of exceptions; such as, killing in self-defence, and killing in execution of justice, and killing in prosecution of just war, and the like. The other rule likewise admits of exceptions, not so as entirely to justify the killing, and to make the act lawful, but yet so as to excuse from the pain of death. The texts already noticed are express, that a man's blood may be shed, and yet the blood of the shedder not be required on that account. The question is, Whether this misfortunate pannel's case comes not under the exceptions? And that we have already discussed.

The position, that by the law of Moses, "Death of a suddenty was plainly capital, and that the slayer had the benefit of the city of refuge, only where the slaughter was by mere misfortune," is assumed without sufficient foundation. It is plain, that he who thrusts without enmity, does not kill the man by mere casualty: the act from which death follows, is a voluntary act, although without enmity: and although the killing is involuntary, and so can never be said to be merely casual in the sense the pursuers would take the words; neither are the words in Exodus, "If a man lie not in wait, but God deliver him into his hand," in the least contrary to what hath been advanced for it is most properly said, that where the act is without the design of the killer, without enmity, and without hatred; that there, in so far as concerns the killing, God hath delivered the man into the hand of the slayer. The plain meaning is, that where a man is killed, not with design, but that the thing happens by the over-ruling hand of Providence, permitting things of that kind, in his sovereign wisdom and from his supreme power; that there the person is delivered to death by the over-ruling hand of God. And where could ever this be more properly applied, than on the present melancholy occasion, when the providential turning about of the unfortunate, deceased lord, occasioned his receiving the fatal wound?

It is likewise a position assumed without reason, "That wherever a man was killed by a mortal weapon, that was murder by the Mosaic law." We hope we have already demonstrated the contrary. If enmity and forethought was required, (and we need only repeat that one text, which expresses the killing a man with a stone, wherewith he may die) there the text declares the stone to be a mortal weapon; yet for all that, in case of the circumstances mentioned in the other verse, the slayer was not to die, but to be delivered from the avenger of blood: and this single consideration must be sufficient to refute such a position. Is it not possible for a man to use a mortal weapon, where there is no enmity, nor design to kill the person who is slain? If it be possible, as it certainly is, then can we imagine that a law, so perfect as the divine law itself, could make a man guilty of murder, because of the use of such a weapon, where he really intended no more harm, than a man that used a weapon of another kind? Besides, that in truth every weapon is a mortal weapon with which a man may be killed: and therefore, to imagine that the divine law laid such a difference betwixt an instrument of iron, and one of another kind, is certainly to go too far. The law of God has put the matter upon a much juster footing, to wit, the intention of the person, which alone can distinguish his actions.

The pursuers also say, "That though the argument is good, that wherever the benefit of the city of refuge was not competent, there the crime was capital; yet it does not follow, that where the power of the laws were suspended by the *jus asyli*, that the punishment is not to be capital in a country where the *jus asyli* takes no place."

But, with submission, this is no solid way of arguing: the question hitherto treated is, What was the law of Moses, with regard to punishments in the case of manslaughter? If the punishment in any case was not capital, because of the privilege of the asylum, the conclusion is just, that the all-wise God did not intend such punishments should be inflicted for such an offence, and the form of granting the protection

for the punishment, does not alter the substance of the law.

The next point undertaken to be illustrated, is, That manslaughter, under such circumstances as occur in the present case, was not, by the common law, punishable by death: and this argument must indeed be divided into several branches, such as, 1mo. That culpable homicide was not so punishable, and that homicide committed upon such high provocation, as was here given by Bridgeton, could amount to culpable homicide only. 2do. That, by that law, the deceased lord not having been intended to be killed, but the invasion, whatever it was, intended against another; the killing the earl was casual, or at worst culpable, not punishable with death.

And as to the first of these points, we shall not trouble your lordships with infinity of laws and opinions of lawyers that might be adduced upon the point, but only take notice of some of the most remarkable, and which seem most apposite to the present case. And in the first place, the foundation of the Roman law on this point, appears to have been laid down as early as the days of Numa: for the Roman writers take notice of a law of his in these words; "In Numæ legibus cautum est, ut si quis imprudens hominem occidisset, pro capite occisi et natus ejus in concione offerret arietem." This law is taken notice of by Pithaeus, in his annotations upon the fore-cited, ancient treatise, comparing the Mosaic and Roman law, with regard to this head of manslaughter, as agreeing precisely with the law of Moses; and the plain meaning of it is, that where a man kills another, although culpably, yet if it be *sine dolo per imprudentiam*, he is not to suffer death, but to make an assythment to the nearest relations of the person killed: and the same treatise takes notice of a rescript of Adrian's to the same purpose, directed to Taurinus Ignatius, approving of a judgment given in the case of one Marius Evaristus, whereby the proconsul had mitigated the punishment of manslaughter upon that ground, that suppose it was done *per lasciviam*, and culpably, yet it was *sine dolo*. The words of the rescript are, "Pœnam Marii Evaristi recte, Ignate Taurine moderatus es ad modum culpæ; refert enim, et in majoribus delictis consulto alio quod admittatur an casu; et sane in omnibus criminibus distinctio hæc pœnam aut justitiam provocare debet aut temperamentum admittere." And Schulten, in his annotations, explains what is meant by *casu* in these words, "Per casum hic intelligitur fieri quod non fit dolo, quomodo et quod impetu fit, casu dicitur fieri," l. 1, sect. 3, ad leg. Cornel. de Siccar. "Ubi pro causa, editiones veteres et glossam recte haberi casu certissimum est." Which, by the bye, shows how erroneous the pursuers' interpretation of the words *casus* and 'casual' is, when they would restrict them to what is done by mere accident.

The general rules of the civil law are plain on this point, that it is the "animus qui malefica distinguit;" that there can be no murder, "sine animo occidendi." But these general topics need not be insisted on, where the texts themselves are so express, such as not only these already mentioned, but even that l. 1, sect. 3, ad leg. Corn. de Siccar. "Divus Adrianus rescripsit, eum qui hominem occidit, si non occidendi animo hoc admisit, absolvi posse." And a little after, "Et ex re constituendum hoc, nam si gladium strixerit, et in eo percusserit, indubitate occidendi animo id eum admisisse." But then he adds the exception, "Sed si clavi percussit, aut cuccumâ in rixâ: quamvis ferro percusserit, tamen non occidendi animo, leniendam pœnam ejus qui in rixa casu magis quam voluntate homicidium admisit." It is true that the pursuers, and indeed several of the doctors, endeavour to turn this text the other way, by a plainly erroneous interpretation, and wrong pointing of the text. They pretend, "That where a wound is given by a sword, there the *animus* is undoubtedly presumed;" and so far right as to the rule. But then the law sets down the exceptions; first, if the stroke be "clavi aut cuccumâ," suppose these be mortal weapons wherewith a man may die, yet because they are not instruments expressly made for death, the presumption is, that "aberat animus occidendi," unless circumstances make it appear otherwise. Then the second exception is "in rixa, quamvis ferro percusserit," although a man strike with a sword, yet if it be *in rixa*, suddenly, or upon a provocation given, "tamen non occidendi animo, leniendam pœnam," because "in rixa, casu magis quam voluntate homicidium admisit." Those doctors, indeed, who go wrong in the interpretation of this text, pretend, that the meaning of *quamvis ferro* is not, although he strike with a sword, but would make the meaning to be, "Although he struck with an instrument of iron," and so make the word *ferrum*, and also those words *in rixa*, refer to other words "clave aut cuccuma;" so as that the sense should be, if a man strike, "clave aut cuccuma in rixa," although these be instruments of iron, he is not presumed to have had the *animus occidendi*. But, with submission, as both the learned Noodt and Schulten observe upon that law, the interpretation is strained, and indeed illiterate: for the word *ferrum* is never used in law in that sense, but always does signify a sword, and so the expression is the same, but ornately repeated in other words, as if the emperor had said, "in rixa quamvis gladio percusserit:" and so the sense is, that the *animus* is in general presumed from the using a sword, that it is not presumed where the instrument is not an instrument made for death; but if the killing happen *in rixa*, the *animus* is not presumed, although the stroke be given with a sword.

And this is likewise the opinion of the learned Grotius, in his annotations upon the text, in Numbers above cited, verse 16, which, in the Latin translation, is rendered "Si quis ferro percusserit;" on which Grotius hath this note, "Mos Ebraiorum multis verbis rem circumloqui. Sensus est; mortis esse pœnam quali-

cunque telo quis hominem occiderit. Ex telo præsumitur malum consilium, nisi contrarium appareat." There your lordships see that author's opinion is as we plead, that the using a mortal weapon presumes the design, but not "præsumptione juris et de jure;" for he adds, "nisi contrarium appareat."

The rescript of the emperor Antonine is likewise as express on this head as can be, l. 1, Cod. de Siccar. "Frater vester rectius fecerit, si se præsidi provinciæ obtulerit. Qui si probaverit, non occidendi animo hominem a se percussum esse, remissâ homicidii pœnâ, secundum disciplinam militarem sententiam proferit; crimen enim contrahitur, si et voluntas nocendi intercedat, cæterum ea quæ ex improviso casu potius quam fraude accidunt, fato plerumque non noxæ imputantur." Here the emperor plainly sets down these two things, first, That "pœna homicidii est remittenda, si animum occidendi non habuerit." 2do, That where the thing is done *ex improviso*, there is no *animus;* that it is to be looked upon as done *casu*, by fatality, rather than crime: but nevertheless that in such a case there may be an arbitrary punishment.

The doctors of the Roman law seem to be unanimous on this general point. Carpzovius, one of the severest criminalists, is most express upon it; "Cessat porro pœna ordinaria homicidii, si culpa vel casu fuisset commissum homicidium;" and goes on, "quod adeo verum est, ut in homicidio lata culpa, dolo non æquiparetur." Clarus is likewise as express upon this general head; and such shoals of others are by them quoted and referred to, that it were vain to repeat their names, or trouble your lordships with quoting their words. We don't know that any lawyer of reputation differs upon the general point.

But then indeed the question comes, What is culpable homicide? And whether the present case falls under that description? Which is next to be illustrated. And here we humbly insist, that where the homicide is committed upon a sudden quarrel, and provocation given, especially by real injury, and that quarrel begun not by the killer; that this is no more than culpable homicide: and for this, in the first place, we oppone the law already cited, "in rixa quamvis ferro percusserit." And to the same purpose is the first law, § 5. ff. ad senat. consult. Turpilianum, the l. 2. Cod. de abolit. and the § 2, l. 16, de pœnis; the words of which we shall not trouble your lordships with repeating, because they are the common texts founded upon by doctors on this head. We have likewise for us the authority of all the ancient, moral philosophers; such as Aristotle, Plato, Plutarch, and many others, likewise commonly taken notice of by the lawyers on this subject. It is true, some of the severest criminalists, such as Matthæus and Carpzovius, don't admit the rule in general, but still they admit as much as is necessary in the present question: they don't allow, that where the killer is *auctor rixæ*, that he is at all to be excused, although the killing happen *in calore iracundiæ;* but then most of them do admit if the killer be not the *auctor rixæ*, but be t person provoked, to whom a just provocati has been given, especially by a real injur and so particularly Carpzovius, one of the s severest, after he has argued at length agai the general point, concludes in his Quæstio §§ 14 and 16. "Nihil quoque adversatur gula adducta, quod scilicet delictum ira co missum, mitius puniri soleat; quia hæc regu de ira ex justa causa proveniente accipienda e duplex etenim ira est, alia ex justa causa pr venit, quæ si non in totum, tamen ex parte e cusat, ut delinquens mitius puniatur; alia ve non provenit ex justa causa, quæ in nihilo e cusat." Then he adds, "Hæc distinctio con muniter recepta est ab interpretibus," and cit severals. And then concludes, "Si ergo jus causa calorem iracundiæ præcedat, veluti quis ab alio fuerit provocatus, aut alio mo offensus, tunc is qui irâ et intenso dolore pe motus, provocantem seu offendentem interfi absque dubio a pœna ordinaria liberabitur; sec vero si quis, absque justa et probabili cau iratus, aliquem occidat, de quo casu nos h loquimur, qui pœnæ homicidii ordinariæ neut quam est eximendus." And then takes notic that the practice in the court of Lipswick agreeable to this.

There is an adjudged case very apposit published in a book, called Alphonsi Villag Neapolitani Consultationes Decisivæ, ver learnedly resolved. It is the Decisio 29. W shall state the case in the words of the autho "Quidam nobilis Ragusinus fuisset verberatu extra (sed prope) ecclesiam sanctæ crucis cast tri Gravosæ, a quodam alio nobili Ragusino, i eodem pacto evaginavit pugnionem contra di tum verberantem, ac in fugam jam conversu et ipsum insequens, unico vulnere sibi inflict in dicta ecclesia (quam ille ingressus fuera dictam ecclesiam egrediens sese in fugam dedi et cum dictus verberator, ex dicto unico inflict vulnere intra dictam ecclesiam mortuus esset. The case came to be tried, at least the ques tions upon it to be resolved, by the said Alphon sus; where several questions occurred, bu those which are most applicable to the presen case are two: First, "An hujusmodi homici dium in ecclesia perpetratum, fuerat dicendu voluntarium necne, eo quod dictus nobilis in secutus fuisset illum cessantem a verberibus in ferendis, ac sic unico vulnere inflicto interfecis set?" The second question is, "An dictu nobilis prædicto modo ac de causa violans dic tam immunitatem ecclesiasticam, veniat in for seculari, et ecclesiastico pœna ordinaria plec tendus, vel solum mitiori pœna?" The resolu tion upon the first question is, That though, a first view, the homicide might seem voluntary "Eo quod dictus nobilis, nemine ipsum com pellente, fugientem hominem vulneraverit, ni hilominus nullo pacto fore judicandum homici dium voluntarium, aut pro tali dictum nobilem puniendum." The reasons for this resolution ar set down with great learning and judgment, bu

are so long, that it is impossible to repeat them: first, They are taken from the definition of voluntary homicide. 2do, From the texts of the Roman law, and the opinion of doctors. 3tio, From that particular, that the nobleman had been immediately struck before; on which the words are remarkable, "Ex hoc ergo articulo, apertissime elicitur homicidium hujusmodi fuisse casuale, et non voluntarium, nam nullâ morâ interjacente, evaginato pugnione, ipse nobilis bacculo percussus insecutus fuit dictum percussorem jam fugientem, et hoc pro honoris proprii redemptione, ut sic se tueretur ab injuria corporali recepta ex verberibus:" after which follows a long reasoning, all in the pannel's favours. And this case we take the more notice of, because the pursuers pretended to make a distinction betwixt the case of a wound given the very moment a real injury is done, and the like given after the injurer has desisted from beating, and retired to some distance; but there is no difference, except the interval be so long, as it can be supposed the thought of the person injured was cool. The other question is likewise resolved in favour of the accused, that in such a case, not the ordinary punishment, either ecclesiastical or civil, ought to take place, but only the *pœna mitior*, and confirmed by very strong reasons, which we cannot recite, but refer to.

Amongst other authors that might be cited for supporting this opinion, is the learned Voet, in the very section cited by the pursuers, ad. tit. ad leg. com. de Sic. n. 9, where, after he has said what is cited for them, that one killing another who has provoked him only by a verbal or slight injury, "vix est ut ab ordinariâ pœnâ absolvendus sit;" he adds, that if the provocation was by an atrocious real injury, that would be sufficient to mitigate the ordinary punishment; and to confirm that, cites Mathæus, Berlichius, &c. And the reason given by these authors for making this allowance, in case of just provocation, is expressed in these words by Gothofred, ad. l. 17, d. t. "Quod ei sit ignoscendum, qui provocatus se ulcisci voluit, quique justum dolorem prosequitur."

And indeed we apprehend this opinion is founded in the first principle of nature; for scarce any human constancy can suffer such high real injury, without the passions being inflamed: and although killing is no doubt an excess in the retortion of a real injury, yet still it is but an excess, and the injury shews the thing done without design; and therefore, because of inseperable, human weakness, the punishment falls to be mitigated. And the application to the present case, as we apprehend, is obvious; Bridgeton had given the highest provocation, not only by a track of verbal injuries and endeavours to pick a quarrel, but had committed the most provoking and real injury, to throw a gentleman over head and ears in a dirty puddle, in the middle of a town, and sight of so many on-lookers; no injury could be more provoking. Yea indeed there was more in it than an injury only: one that was able to throw the pannel into the puddle in that manner, was likewise able to have suffocated him there; the pannel had no reason to expect otherwise, and therefore no wonder if he betook himself to his sword. And the other circumstance noticed, that Bridgeton, immediately upon the doing the thing, endeavoured to draw and make himself master of my lord Strathmore's sword, gave the pannel ground to expect the worst; and so it may be doubted, if he was obliged to wait till Bridgeton should have an opportunity to give him the blow, even with a mortal weapon. And when this is considered, the fact goes farther than a retortion of the highest injury: the pannel was in some measure put upon his defence; and granting that his pushing at Bridgeton was an excess, yet still that excess falls only to be punished *pœnâ extraordinariâ*.

All lawyers distinguish excesses of that sort into three kinds, that of time, place, and weapon that is used; and excess in point of time is punished even with death, where the interval is great; because that interval presumes fraud and deliberation: but here was no excess of time; the thing was done *ex incontinenti*, when the injury was fresh and recent. There is likewise excess in point of place, when the injurer is allowed to retire to a considerable distance from the place where the injury is given; and this in some measure coincident with the other, because it implies an interval of time: yet if it be not great, the lawyers hold it to be only punishable arbitrarily. And then the third is the excess in the use of the weapon, where there is no interval of time or place; and that is always agreed to be punishable only arbitrarily, where the provocation is high.

From what is said it seems plain, that if Bridgeton had received the thrust, the homicide would have been culpable only; and so it remains to be considered, if the case comes out worse for the pannel, because it was my lord Strathmore that received the wound, and not Bridgeton. And we apprehend it does not, but on the contrary, that this gives a great strength to the defence: And that because, 1mo, The push being designed at Bridgeton, shows that there was no malice at my lord Strathmore, neither premeditated, nor presumed from the giving of the wound: for admitting it to be true, that in an ordinary case, the giving a wound with a mortal weapon presumes the dole or malevolous intention; yet that can never be where the push is pointed at another than him who by fatality receives it. And so the case comes out thus, that the pannel in making one push, could not design it at two persons; and so if he designed it at Bridgeton, it is impossible to say he had a design against my lord Strathmore. It is plain in the nature of the thing, that the design, though presumed from the giving the wound, yet in point of time it precedes the actual receiving of the wound, although that preceding or precedence be but momentary; and therefore if, in the very act of pushing, the design appears to have been

against Bridgeton, it excludes all pretence of any *animus* against another who received the wound by fatality, in the very moment that the design was pointed against the other.

And here your lordships will likewise observe, that there can be no *animus occidendi* presumed at all against any man, not even against Bridgeton himself; because the drawing a sword, and pushing at a man with it, does not of itself presume a design to kill the man pushed at, except the wound, and death actually follow: for it is from the event of the wound, and death following alone, that the intention is presumed. Therefore since death did not happen to Bridgeton, the law cannot presume an intention to kill him; since the foundation of the presumption is removed, or did not happen. If the blow had missed him, or had not killed, but wounded him; the intention would not be presumed; and therefore it cannot here be presumed, as the case happened; for there is no such presumption in law, as that killing one presumes a design to kill another; except where it appears that the slayer killed one man by mistake, taking him to be another: as for instance, killing Caius in the dark, when the killer really believed him to be Titius; there indeed the killing of Caius presumes the intention of killing Titius, although he was not actually slain: and therefore in that case the killer is indeed guilty of murder. But it is quite another case, where one man is killed, not by mistake for another, but by fatality, when the push was intended at another, whom the killer knew, which is the case in hand. And therefore we do humbly insist, that it cannot be said there was an intention to kill Bridgeton, since his death did not follow. Neither can it be said there was an intention to kill the earl of Strathmore; because, though his death did most unluckily happen, yet the *initium*, upon which the intention must be founded, did not happen, the push being made at Bridgeton; for those two must always concur, the push made at the man who dies, and the actual death: and where it happens otherwise, the death is a mere fatality; not intirely innocent, because the killer was so far faulty in invading the other; but then it is no more than an invasion; it is not murder from malice presumed. No presumption of law can get the better of contrary evidence: the presumption of law may be, that where a man is killed, he was intended to be killed: but if from the circumstances the direct contrary appear, that there was no intention against him; this is evidence which excludes the presumption; and so there can be no murder in the case.

It is indeed a case stated by the lawyers, what should be the consequence, if a person intending to kill one man, kill another? And we acknowledge they are greatly divided among themselves upon the question; a great many of the ablest of them are in all cases clear, that where one man is killed, and another was designed, it cannot be murder, because of the want of an intention against him. Bartolus, Farinacius, Gomesius, Menochius, and numbers of others quoted by them, are plain in that opinion, and give an account of several judgments of the courts of Mantua and Naples, and others to that purpose; and Farinacius says, that it is the common opinion, "Et ab hac sententia in judicando non esse recedendum." And however other lawyers may seem to differ, yet, in the first place, the divine law, for any thing that can be found in it, is on this side; because it plainly speaks only of beating him, and rising up against him who happens actually to be killed, and mentions no such case as deserving death, as this is of rising up against one man, and by fatality killing another. 2do, That this was the opinion of the Jewish doctors, is plain from the quotation already brought from Selden, where this very thing of killing one man in place of another is made part of the third case stated of involuntary homicide, and determined not to be capital. But 3tio, Those lawyers, who at first view seem to differ, do really not differ, when the cases are distinguished: for what they plainly mean, is only where a man by mistake kills Titius, believing him to be Mevius. This we admit is capital, for reasons before given; but not the other of killing one by fatality, and not for another, but directing the blow at the other.

But then your lordships will observe, that all lawyers agree in this, that wherever a man is to suffer for killing one, when he intended to kill another; that can only be where the forethought and dolose intention to kill the other is certain, but not where the invasion is *ex impetu*: And therefore, supposing one invade another, with an intention to hurt, or *percutere*, as the lawyers call it, but without a certain evidence that his thorough intention was to kill; there, supposing the blow intended for one do kill another, the killer cannot suffer death: and which by-the-bye shows your lordships, that there is no such presumption in law, as, that because the push killed the earl of Strathmore, therefore the pannel intended to kill Bridgeton; for if that were law, then the question could never occur, but would be inept, whether a man intending to kill one, and killing another with that blow, is guilty of murder, or is presumed to have intended to kill that other at whom the stroke was intended? We shall trouble your lordships only with two authorities on this point, which are very direct to the case: the first is that of Berlichius, which we the rather notice, because he seems to be against us on the general point; after discussing which, he hath these words, speaking of his own opinion, "Fallit, si quis aliquem non occidere, sed percutere tantum, volens, alium præter intentionem percutiat ut moriatur." From this your lordships see, that it is no consequence, that because the thrust killed my lord Strathmore, therefore it should be presumed the pannel intended to kill Bridgeton: if that were true, that lawyer's position, from whom nobody differs, must be direct nonsense. And therefore since there is no other evidence of a farther in-

tution against Bridgeton than *percutere*, except it arise from the death of my lord Strathmore, and that his death cannot presume it; we are directly under the position the lawyer lays down, that though my lord was unhappily killed, yet the pannel ought not to suffer death, where it does not appear that he intended to do more than to push at Bridgeton at random, *percutere*, without a certain design to kill.

But this is yet more plainly laid down by another very distinct lawyer, Masurius Labio, in his treatise called, Homicida excusatus, cap. 35, where treating of this very question, he first notices, that if the killer was *occupatus in re licita*, such as defending against any aggression, which in some measure is the case here, that then he is not liable, although he chance to kill a third party: but then he goes further, "Aut etiam, ut amplius dicta extendamus, reus quantumvis in re illicita, occupatus, tali tamen in casu constitutus fuit, ut si Caium interfecisset, non nisi culpæ reus futurus fuisset, ejusque loco eum infelici fato Sempronius lethalem acceperit ictum, magis est, ut reus hoc ipso causam suam non gravasse censeri debeat: cum enim Caii interfectione mortem meritus non fuisset, certe imprudentia atque in facto error magis eum à Sempronii cæde excusare debet: atque Caio potius, si is vel rixæ auctor fuerit, vel iracundiam alterius justam provocaverit, id quod inde secutum imputandum reor." Here your lordships see he is stating the case of a *rixa*, where one had given provocation as Bridgeton did; he indeed supposes, that in such a case killing the provoker ought not to infer death; much less, says he, the accidental killing of a third party: and your lordships will observe he asserts further, that the provoker, or *auctor rixæ*, is rather to be judged guilty of the slaughter.

And a little after, he comes yet closer to the present case: "Quod si tamen Caium adversarium occidere nollet, sed illi tantum nocere, Sempronium autem imprudenter se ictui objicientem, eo ipso interemit, tunc certe imprudentia Sempronii delictum rei aggravare non debet: si enim is moderatorem rixæ se non obtulisset, corpusque suum subito et ex propinquo non objecisset, Caius a cædente forte remotior, non nisi vulnus aliamve noxam inde reportasset, unde Sempronio mors oblata est: excusandus ergo a tanto merito percussor tunc, cum occidendi animus hic non adfuisse apparet."

This is so apposite to the present question, that one would think it were a resolution on the case: for by that your lordships see, that notwithstanding one's being killed, the author says it does not from thence appear, that there was an intention to kill the other: the other, who, as being at a greater distance, might not have been killed, might only have been hurt and wounded, although the person that came unhappily in the way happened to be killed. This is just what we have pled, that it does not appear there was an intention to kill Bridgeton, because he might not have been killed, but he might only have been hurt or wounded; and therefore the pannel ought not to suffer death, because of the fatality of killing the deceased lord, "qui subito corpus suum ex propinquo objecit." And upon all those grounds, we humbly insist, that if Bridgeton had been killed, there would have been no place for a capital punishment: but then separately, whatever be in that, that since it does not appear (nor cannot, since death did not follow) that there was a certain intention to kill him, the casual killing of the earl of Strathmore cannot be punishable with death.

What has been said, fully removes any argument that may be drawn from sir George Mackenzie's opinion, "That he who by mistake kills one for another, should die:" For your lordships see, that he speaks only of that case, when one man is certainly intended to be killed, but another is killed by mistake, being supposed to be him: that is not the case now before your lordships.

And in this question, concerning the pannel's intention and design, the circumstance of his being overtaken with drink, is a circumstance that assists in the argument. We do not say, that being drunk affords a defence for killing; nevertheless it is a circumstance whereby to show, there was no malice or dole, especially against the earl of Strathmore; since every body may conceive, how easy it is for a man that is drunk, pushing at one, even to stagger upon another, or not to have the judgment and presence of mind to draw back, when that other suddenly throws himself in the way of the thrust.

What is laid down by the pursuers, in opposition to all this, in their information, is so fully obviated, that it is quite needless to repeat their argument; only whereas they say, "That if killing, notwithstanding of provocation, had not been capital, it could not have been a doubt in the common law, whether a husband ought to suffer death, who killed his wife taken in the act of adultery?" But we apprehend, that the direct contrary consequence follows, that if high provocation had not afforded a defence, then indeed there could not have been a doubt the husband must have died, because high provocation was all that he had to plead: but the doubt was, whether a provocation of that kind, where there was no real corporal injury to the husband himself, was sufficient? And the law determines that it was; and consequently establishes the rule, that high and grievous provocations ought to alleviate the punishment.

The brocard, that "versans in re illicita tenetur de omni eventu," affords no argument against the pannel in this case; nor indeed hath it been much insisted on by the pursuers. 1mo, It is not true in many cases. But, 2do, It holds in no case, except with regard to consequences or events, that happen with regard to that subject or object, against whom or which the unlawful act is directed: as for instance, if one sets fire to a house, he is guilty of murder, if a person happen to be burnt in that house; or if he undermine a house, he is liable for all the goods that may be destroyed by its fall; but he is not liable for any extrinsic

damage that may happen to another subject casually and by accident: and therefore, suppose it were proved, that one unlawfully invading another, without a design to kill, might in some cases be liable, if death followed; yet that can only be with regard to the person he invades, but never with regard to what accidentally happens to another person. And so Carpzovius explains the matter, qu. 1. §. ult. in these words: "Supra dicta enim (quod nempe danti operam rei illicitæ imputari debeat, quicquid fuerit præter ejus intentionem ex eo actu secutum) procedunt tantum, quantum ad subjectum, circa quod versatur ipsa malitia illicite operantis, et quantum ad ea quæ illi objecto per se et immediate junguntur, aut necessario sequuntur; non autem quoad illa quæ per accidens oriuntur, a re illa mala cui opera datur." Besides, it is certain, that the brocard is no rule at all in the matter of manslaughter, otherwise there never could be such a thing as culpable homicide; which it is plain there is.

The next thing to be considered is, what was and is the law of Scotland concerning this matter? and first, as to our ancient law, the pursuers seem to be the first that ever disputed, that according to it there was a distinction betwixt slaughter and murder. Sir George Mackenzie is express upon it. By our law, says he, slaughter and murder did of old differ, as "homicidium simplex et premeditatum" in the civil law; and murder only committed, as we call it, upon forethought felony, was only properly called murder, and punished as such; for which he quotes the express statute, parl. 3, cap. 51. K. James 1, appointing that murder be capitally punished, but *chaud melle*, or slaughter committed upon suddenty, shall only be punishable according to the old laws, and several other acts of parliament, to which we beg leave to refer [See the abstract of them at the end;] which expressly make the distinction betwixt forethought felony, and slaughter of suddenty: and though none of all these laws particularly express the punishment of manslaughter, as they could not well do, because that was arbitrary according to circumstances; yet, as sir George observes, the opposition and distinction is established betwixt slaughter by forethought, and *chaud melle*, and the punishment of the one to be less than that of the other: and therefore, we apprehend, we may leave this point as clear and undoubted.

The pursuer has endeavoured, to no manner of purpose, to set up others of our ancient laws, in opposition to those observed by sir George Mackenzie, such as the third statute of king Robert 1, which, with submission, is nothing to the purpose: for, first, It does not concern capital crimes only, but any crime touching limb, as well as life. 2do, Though the word slaughter is mentioned, without adding 'by forethought felony,' yet the same thing is added in other words, when it says, touching life or limb, to which alone the act relates, that is, forethought felony; because slaughter, by *chaud melle*, touched neither life or limb. The title of the act is, "Men condemned to death should not be redeemed." But what is that to the purpose, in a question, who should be condemned to death, and who not?

The 43rd chap. of the act of king Robert 3, is as little to the purpose; for as it speaks of hairships, burnings, reif, and slaughter, it is very plain it means only wilful, premeditate slaughter, otherwise it would follow, that not only wilful fire-raising, but burning of a house by neglect, or *lata culpa*, would infer the pain of death, which nobody ever dreamed. And the next paragraph makes it further clear, appointing sheriffs to take diligent inquisition, "gif any be common destroyers of the country, or hath destroyed the king's lieges with hairship, slaughter," &c. Can a man be a common destroyer by slaughter, except where the slaughter is supposed to be by forethought felony? It is certain he cannot; and therefore the pursuer's procurators fall into a great mistake in law, when they say, that gif he be ken'd with the assize, "Si attentus fuerit per assisam tanquam talis malefactor, condemnabitur ad mortem," must relate to manslaughter, because the sheriff could not judge of murder. It is directly otherwise: if he be attainted by the assize as such a malefactor, that is, as a common oppressor by slaughter, &c. he is to be condemned to death. This is an exception from the rule, that murder was to be tried by the justice-ayr: this law appointed it to be tried in that way, in case the person accused could find his barras or borgh to compear at next justice-ayr; but if he could not, the sheriff was immediately empowered to try: and by-the-bye, this does not concern particular fact, but concerns that general accusation of being a common oppressor, like to the case of a sorner, or one habite and repute an Egyptian. Nor can the lawyers for the pannel find any word in the statutes of Alexander 2, which the pursuers refer to, that does in the least presuppose that manslaughter was capital in them: the direct contrary appears, that manslayers were to be tried, whether guilty of murder or not; and if found not guilty, that they were to have the benefit of the gyrth. And accordingly Skeen, in his annotations, refers directly to the acts of parliament, which sir George Mackenzie takes notice of, establishing the distinction, and to some of the English acts to the same purpose.

As to the passage cited from Skeen, in his Treatise of Crimes, tit. Slaughter, there is certainly a direct blunder in the printing; and instead of these words, "or casually by chaud melle," probably it ought to have been, "not casually, or by chaud melle;" for otherwise he directly contradicts himself, and cites acts of parliament which prove the very contrary of what the pursuers would make him assert: yea, the very next paragraph establisheth the distinction in these words, "sua that the gyrth or sanctuary is nae refuge to him wha commits slaughter be forethought felony;" *ergo*, it was a refuge to him that com-

mitted slaughter, not by forethought felony, and saved him even from the arbitrary punishment of manslaughter. And Skeen himself, in his explication of the words *chaud melle*, says it is in Latin *rixa*, "an hot, sudden tuilzie, or debate," which is opponed, as contrary to forethought felony; and cites the act James 1. But how is it contrary in our law, if the effect and punishment be the same? And upon the words 'forethought felony,' he in like manner makes the just distinction, and supports it by the authority of Cicero, in his treatise De Officiis, where he is writing, as a moralist, and not as an orator.

The pursuers' answer to the 8th act, 6 parl. J. 1, is quite trifling; for nothing can be plainer than the opposition there stated betwixt forethought felony and other slaughter: and when the act statutes, "that if it be forethought felony, the slayer shall die;" the consequence is obvious, according to the plainest rules of logic, that if it be not forethought felony, he shall not die, otherwise the act is absurd. And as to sir George Mackenzie's observation upon these words, it is certainly not so accurately placed as an observation upon that act, because it plainly relates to the act of Charles 2, and therefore falls to be considered, when we come to argue the import of that act.

The pursuers' observation, by way of answer to the 51st act, parl. 3, James 1, is entirely nought; for if it extend the difference between forethought and *chaud melle* to all transgressions as well as manslaughter; then for certain it establishes the distinction in the case of manslaughter; and so sir George Mackenzie likewise says, in his observations on this act, as well as in his Criminals. And as to his further observation, that *chaud melle* is by our present law punishable by death; that still refers to the act of parliament Charles 2, and must be examined with it.

The pursuers have further pled, "that the benefit of the sanctuary might be competent where crimes were capital;" which be founds upon the statutes of Alexander 2. But this is not worth disputing; for if the flying to the sanctuary, joined with repentance, and so forth, rendered the crime not capital, it is all the same thing; that is, in effect, to render the crime not capital only by another form, but still the substance remains, that according to the law the pain of death was to be inflicted. At the same time that statute concerning reifs, whereby repentance absolves from the punishment, is somewhat peculiar, and does not at all contradict the other laws, which make or suppose *chaud melle* not to be capital; and the last part of the statute, appointing, "That if manslayers fly to the kirk, the law shall be keeped and observed to them," establishes the point, that if they were not found murderers by forethought, they were to be returned to the sanctuary, and freed from punishment.

The pursuers say, "That after the Reformation, when the *jus asyli* was in effect abolished, then the distinction betwixt forethought felony and *chaud melle* ceased; and that it was never objected, that malice or premeditate design was requisite to make the crime capital." And for this they take notice of two cases, Currie against Fraser, July 1641, and Bruce against Marshal, April 1644. But in the first place, the procurators for the pannel with reason say, that if that happened, it was an error in judgment; for since the distinction was established by the old laws, and that there was no law at that time altering or repealing those old laws, the abolition of popery, and of the flying to the kirk in consequence, was no reason for judging contrary to the civil laws that were still standing; and if an escape of that kind happened, it must be attributed to the over-great zeal, and, if we may be allowed to say it, a sort of enthusiastic keenness of those times: And we do apprehend, that the act 1649, and the act of Charles 2, were intended to correct the errors that by too great zeal had then crept in.

At the same time, as to the two cases cited, they are nothing to the purpose; for as to the first, which is Fraser's, there was not one circumstance pled or proved which could make the slaughter *chaud melle*: But, on the contrary, it appeared direct premeditate murder, no real provocation, but a quarrel about a staff; a murder committed in revenge, upon the slayer's hearing the person killed had murdered his brother, which plainly implied a premeditate design. What argument this can afford, is submitted. This indeed may be remarked, that the case gives some notion of the spirit of the times; the presbytery took evidence whether the murder was accidental or wilful, they found it to be wilful, and no ways accidental; their having done so, was taken as evidence in court, and even the wife of the deceased was sworn as a witness: things, it is hoped, not to be drawn into example; only so far it shews, that even then it was a consideration by the presbytery themselves, whether it was a wilful murder or not? Which seems to point at an establishment of the distinction. But, in short, there is not one circumstance in the whole case that could exclude the premeditation or forethought, but all quite on the contrary.

The other case of Marshall, in the year 1644, is as little to the purpose; he was libelled for wilful murder, and he confessed it, without pleading any defence, because indeed he had none. He in his confession adjected some circumstances which might have given some colour, but indeed very little for a defence: But he offered no proof even of those circumstances; and his own declaration could be no evidence of them. They were not intrinsic, but extrinsic qualities of the declaration. He had given repeated stabs with a knife. Where could be the question that that was murder? And these being all the instances the pursuers bring before the act of Charles 2, it is plain they prove nothing by them.

As to the act, Charles 2, [See the act at the end] it is humbly insisted for the pannel, that it introduces no new law against any person.

accused of slaughter, but ascertains somewhat in their favour, viz. "That casual homicide, homicide in lawful defence, and homicide committed upon thieves, &c. shall not be punished by death. And then further statutes, That even in case of homicide casual, it shall be leisome to the criminal judge, with advice of the counsel, to fine him in his means, &c. or to imprison him." This law seems introduced to correct some abuses that had been; whereby homicides falling under some of those descriptions, either had been punished with death, or at least that it had been made a doubt of, if they might not be so punished. What those cases were, does indeed not appear from the records, so far as the pannel's procurators know; but it seems such cases, at least such doubts, were. But then the act does not determine what was meant by casual homicide, and does by no means say, that nothing was to be reckoned casual homicide, except that which was merely accidental; but, on the contrary, it leaves casual homicide to be explained, according to the construction of former laws, whether our own laws, or the laws of other nations.

2do. It is plain from the act, that, by casual homicide, something is understood quite different, at least beyond slaughter merely accidental; for the act is concerning the several degrees of casual homicide: And so even homicide in defence, and homicide committed upon thieves, &c. are brought under that general description of casual homicide; and these last kinds are given as exemplifications of the general description; which shews, that casual homicide was intended to be opposed only to slaughter *dolose* committed either by premeditate forethought, or malice presumed to be taken up from the circumstances immediately preceding the act; and therefore, however critical exceptions may be taken to the rule, yet materially there is no strong objection lies to it, because when 'casual' is taken in the extensive signification, as opposite to fraudulent and *dolose* slaughter, all the species mentioned in the act do properly enough fall under it, and are degrees of casual homicide. And indeed it is worth observing, and makes in this case for the pannel, that the rubric cannot be said to have been indigested or adjected by mere inadvertency, since the same rubric is made use of in the act 1649, and again repeated in the act 1661, so many years after.

And this rubric affords another plain argument, that the legislative did at least consider that there might be degrees of casual homicide, and consequently they could not understand by that, only merely accidental slaughter, strictly so called: Since there can be no degrees of that; it is but one, and does not admit of degrees. And therefore this is sufficient to shew, that more was meant than the pursuers incline to admit; and if more was meant, that can allow of no other construction, than to bring under these words what the lawyers call "culpable homicide," so as that your lordships and the jury may judge from circumstances, whether the slaughter is to be reckoned as casual, or really malicious, from malice prepense.

The last part of that act of parliament further enforces that matter, which gives a power not only to fine for the use of the nearest relations, but even to imprison for casual homicide. Now, how is it possible to believe, in consistency with any justice, that a man might be imprisoned for a fact intirely innocent, and no ways either culpable or criminal? Yet such homicide merely accidental is: And therefore this shews to demonstration that the legislator understood, that under the description of casual homicide, such a fact might come as carried a *culpa* along with it, and was not absolutely accidental or innocent.

And this being the plain meaning of the law, it must remain only to consider, whether culpable homicide, or more particularly the present case, does not, in a true and legal sense, fall under the words "casual homicide." And we hope we can be under no difficulty to make that good, from what has been already said; first, that even by the Jewish doctors and interpreters of the Mosaic law, homicide without hatred and foresight, hath been called, "casual homicide;" the passage above cited from the collation of the Mosaic and Roman law expressly shews it. 2do, all that has been said from the texts of the civil law, and lawyers, prove it; since they directly call slaughter, "ex subito impetu, ex calore iracundiæ, in rixa," where there was just provocation, casual; "casu magis quam voluntate fit; casui magis quam noxæ imputandum." And all the rest of their expressions plainly denominating all slaughters casual in the large sense, except that which is done *dolose animo occidendi*. 3tio, The expressions in our own old laws prove the same thing; those kind of slaughters are called *chaud melle* or *chance-medley*, which is casual: And so Skeen speaks, in the very place the pursuers have cited, manslaughter committed voluntarily, by forethought felony, or not (which ever of the degrees be received) casually by *chaud melle*. There your lordships see *chaud melle* is expressly brought under the description of casual; and so that being the case, we are under the letter of the act Charles 2, we are included under the first branch of casual homicide.

And as we apprehend this holds in general, so it holds more particularly in the pannel's case, where, whatever was designed against Bridgeton, yet, as to my lord Strathmore, the killing was casual, and therefore falls directly under the words of the statute.

It affords no solid argument against us, that the act of parliament bears these words, "For removing of all question and doubt that may arise hereafter in criminal pursuits for slaughter." For, 1mo, Those words must still be understood with regard to the particulars enacted upon, that it is for removing all doubts as to those particulars; for it can never be pretended, that this or any act of parliament could remove

all doubts, even upon unforeseen cases, many of which might happen that could not fall under the words of that law: for instance, homicide committed in suppressing a mob, strictly speaking, falls under none of the words; or homicide committed in preventing the escape of a prisoner actually imprisoned, and endeavouring his escape: and many other cases may be figured. But 2do, According to the interpretation we insist upon, the act of parliament does remove all questions, so far as human eyes could foresee, if the words 'casual homicide' be taken in the sense we give them; and, on the contrary, it does not remove all questions, if culpable homicides, and this very case be not included; for then the law has statuted nothing upon them, either one way or other, but hath only statuted upon murder merely accidental, homicide in defence, and the others therein mentioned. Besides, that it may be pled without any stretch, that a culpable homicide is a species of homicide in defence; though not precisely in defence of life, it is in defence against a further injury threatened, and expected from the prior injury already given: and on these considerations, *we* humbly apprehend, the act of parliament makes nothing against the pannel, but rather favours him, since the question is anent a homicide purely casual as to the person that was killed: and which consideration entirely distinguishes his case from every other case that hath been tried since the act of parliament. And it may not be improper to notice, that sir George Mackenzie says, "The word "casual,' in the rubric of this act, is taken in the lax signification." And *why* not then take it in the same lax signification in the statutory part?

It is now proper to take notice of sir George Mackenzie's observations upon the 51st act, James 1. And in the first place, if sir George be supposed to go as far in his opinion as the pursuers plead, we must beg leave to oppose the law, and submit the interpretation of it to your lordships' judgment, as not sufficiently supporting his opinion. 2do, sir George says nothing against the slaughter's being casual in the present case, where the blow was intended at one, and another struck by fatality. 3tio, His words do not go so far as the pursuers would stretch them; for, in his observation on the said 51st act, he only says in general, "That *chaud melle* or *homicidium in rixa commissum*, is capital by our present law:" and so it is in many cases; for instance, where the killer is the provoker, where he reiterates strokes in such a manner, as to shew a forethought and formed design, although not premeditated for a long interval of time before: but sir George does by no means say, that *chaud melle* or *homicidium in rixa commissum*, is in every case capital; the contrary is most certain, as will appear from your lordships' judgments afterwards to be noticed.

His observation upon the 90th act is no ways against us; he says, indeed, "That murder, though committed without forethought felony is punishable with death:" by which he must mean premeditated malice, and that is true; for no doubt malice, where it can be presumed from the act itself, and where the contrary does not appear from circumstances, is punishable by death, without further forethought; but then he subjoins an exception, which leaves the matter where it was, "except," says he, "it be casual;" that is, according to the words of the law: and so the question remains, what is casual in the sense of that law?

The pursuers use an argument, which seems to be of no force, "That if manslaughter was not capital, then the crown could not pardon any capital slaughter; because by our law the crown could not pardon murder." We might easily admit the whole, without hurting our argument; for if it be true that the crown could not pardon murder, then it is likewise true that he could not pardon any slaughter that was capital; because no slaughter was capital but murder: nevertheless the position, that the crown could not pardon murder, is not supported by practice, and, we doubt, not by our law; because in several cases, even of murder, the very thing statuted is, "That the person of the criminal shall be in the king's will;" consequently the king can pardon, as well as order to be put to death.

The pursuers, in their Information, next go on to mention a great many cases that have been judged by the Court since the act 1651; and the first mentioned is that of Wm. Douglas, which appears in the Records, and is noticed by sir George Mackenzie, and is indeed noticed by him as a foundation for some things, wherein he seems to go too far. But this case will never deserve any regard; it has always been looked upon as a hard one, and we are afraid a reproach on the justice of the nation. But at the same time the fault did not lye on the Court; it was truly the jury; for the trial went in general upon the art and part; and there appears no particular pleadings to this purpose on record in that case: so that what sir George says of it must be from mere memory of things not thought fit to be recorded.

The next case mentioned is that of Nicolson, in the year 1673, which can never make for the pursuers, because there your lordships sustained both the libel and the defence, though indeed the defence was not proved: and therefore, if the pursuers say, that the defence was upon *chaud melle*, or culpable homicide; the case is with us, because your lordships sustained the defence. And although in reality the crime was proved to be wilful murder, and the defence not proved; yet so far it is on the pannel's side, that the advocate insisted Nicolson was *versans in re illicita*, by carrying a gun, which he acknowledged used to go off on half-bend; yet your lordships sustained the defence, "That the gun went off in a struggle." And if an argument from a lawyer's pleading be good for any thing, sir George Mackenzie pled for the pannel, in that case, some of the very same principles we now insist

on, "That there was no prejudice against the person killed, and that the gun went off in a struggle." But, indeed, the case is naught in the argument, and it seems very strange why it is cited: it is true the man was said to be drunk, and there was not a previous quarrel; but then there was no provocation, no *justa causa iracundiæ*, and no *iracundia* at all; but the gun was twice deliberately snapped, and the third time the man was killed.

The third case mentioned, is Murray contra Gray, yet less to the purpose than any other: for there, the giving the wound was libelled so far premeditate, that the slayer followed the person out of the house where he was, and killed him without any provocation: and not one single fact was pled in defence, but a strange demand made, that the lords should make an inquisition, in order to discover who was the first aggressor; but it was not once pled that the defunct was the aggressor or provoker. What can be the meaning of citing such cases?

The next case cited is that of Aird, in the year 1693; which indeed is something more to the purpose, but yet does not answer the pursuers' intention: for the lords did not there find, that every homicide was capital, except what was merely accidental; they indeed sustained the libel, and repelled the defences, which were mainly founded upon provocation by ill words from a woman, and her throwing a chamber-pot at the pannel's face, who was a soldier: which the lords did not find sufficient to exculpate from the libel, which bore reiterate strokes to have been given the woman in her own door (which, by the bye, was hamesucken) she thrown over the stairs, and pursued by the then pannel. That case was very singular: first, an attack upon a woman by a soldier, who ought to have contemned insults from the female sex, at least, not returned them with any blows: no injury of that kind from a woman can justify blows given, much less reiterated blows, and deliberately trampling to death, throwing her over her stair, and still continuing to pursue her: there, the presumed difference of strength, and difference of the sex, made such an attack a barbarous murder; just as an invasion by a much stronger man against a weaker, or by a man against a woman, although not with a mortal weapon, would make a blow with a mortal weapon, given by such a woman or weaker person, come within the description of self-defence: which is a case that lawyers state, although the same thing would not be good, if they were of equal strength, or that the invasion was by the woman, or person of weaker strength.

Another case mentioned, is that of Carmichael in the year 1694. But sure your lordships must be weary of so many cases, so little to the purpose: for neither there, is there one circumstance pled upon to exclude forethought, or to show that the thing was casual in any sense; but some trifling objections against the form of the libel: only, indeed, drunkenness, by itself, was founded on, which your lordships did not sustain. And who can doubt it must be so?

The seventh case mentioned by the pursuers, is that of George Cuming, in the year 1695. And upon looking into the case, it must be owned, that it seems a very narrow, hard case: but then the whole burden of the pursuers' pleading turns upon this. That supposing there was a *rixa*, and that the thing happened upon a sudden quarrel; yet Cuming himself was the first provoker, and the *auctor rixæ*, and therefore could not plead the benefit even of self-defence; which indeed brings the case within what all lawyers agree on. And had it not been for that circumstance, it is impossible the decision could have gone as it went: for in effect, the king's advocate admitted the defence, barring that circumstance; but insisted upon that as what governed the case. Yet still the decision is narrow.

The pursuers also mention the case of Burnet of Carlops, anno 1711. But it is plainly against them; and it being to be noticed for the pannel, shall not be dwelt upon here.

The next case is that of Hamilton of Green, anno 1716; which does not all meet: for there a plain murder was libelled, that the pannel first made several pushes with his sword and scabbard upon it; and not content with that, drew the sword, and gave the defunct the mortal wound. And no provocation was pled upon, on the part of the pannel, except what was verbal only. And the only real injury, by striking with the sword and scabbard, was admitted to have been given by the pannel. And though it was there pled, that the defunct himself rushed upon the sword, that was contrary to the libel. And if the fact had come so out, the libel would not have been proved. And therefore, that case does not all meet; for there were not sufficient circumstances to exclude the dole, or so much as to make a *homicidium culposum*.

Another case they mention, is that of Thomas Ross, and Jeffery Roberts, 20th July, 1716; which makes against the pursuers, as it is set forth by themselves: for there the lords did sustain the defence of provocation by words, receiving a blow on the face, being pulled down to the ground, and beat with a great stick or car-rung, relevant to restrict the libel to an arbitrary punishment. And though the words, "To the imminent danger of his life," are insert, as they were pled in the defence; yet that was not a fact, but a consequence inferred from the being struck with a stick. And if the *periculum vitæ* had been the foundation on which the interlocutor went, then it must have been unjust; because no man alive ever doubted, that a man in self-defence might lawfully kill, without being subject to any arbitrary punishment whatsoever: but the case was, that your lordships found the provocation and real injuries reduced the fact to a *homicidium culposum*. You indeed sustained the reply, that the defunct was held by Jeffrey at the time of receiving the wound, because that excluded the de-

fence of the pannel's being upon the ground when he gave the wound, and made the fact amount to murder; because it never was doubted, but if one stab another, especially with a knife, which is stabbing in the most barbarous sense, when that other is held, and so put out of the state of doing further injury, that is murder by the law of all nations.

The pursuers likewise mention a case of Davidson, without noticing either date or circumstances; and therefore the pannel must conclude there was no defence proposed, exclusive of the dole or forethought.

The case of Lindsay and Brock, the Greenock taylors, is very far from putting the case out of doubt, or indeed touching it at all. The case was, that the defunct was enticed out of his house, and was attacked by two at the same time; and when he and they were on the ground, one of them, which came out to be Lindsay, stabbed him in the throat with a penknife. There your lordships did not sustain the crime as capital against them both, even upon the art and part, but only against the one who should appear to have given the stab, and that came out to be Lindsay: but then indeed you found, not without difference in opinions, that nevertheless he had the benefit of the indemnity, upon this foundation, that though the *homicidium* was *dolosum*, because of the circumstances, yet it was not from malice premeditate: and the majority were of opinion, that the indemnity excluded nothing but premeditate murder, and did not touch any case done in *rixa*, notwithstanding the person guilty might be the *auctor rixæ*. This does by no means determine any question betwixt a *dolosum* and *culposum homicidium*; for that fact was insisted to be *dolosum*, and indeed so found. It is true, it proves that an indemnity may reach even a *homicidium dolosum*, where the dole arose immediately, and not *ex intervallo*; but that says nothing to this question, nor is it proper to enter upon the argument about the indemnity, now that the judgment is given.

The case of Mathews, the soldier, the pursuers admit, was of the same nature, and so needs no other answer; only, that, in that case, there were no circumstances sufficient to exclude the dole, or make it only a culpable homicide.

These are all the cases the pursuers have mentioned, and, if numbers would do, no doubt there is enough; but your lordships are to judge how far to the purpose: and one thing is remarkable with regard to them all, that not one of them touches the case in hand, in so far as concerns the slaughter's being casual as to my lord Strathmore, the invasion being intended against Bridgeton.

But now the counsel for the pannel beg leave to take notice of several decisions, even since 1661, which directly establish the point pled for the pannel; and the first is Mason's case in the year 1674, to be seen in the Record; and also observed by sir George Mackenzie. Mason was accused of killing Ralston; the defences were three, first, That Ralston had followed Mason from house to house, at last put violent hands upon him; whereby Mason was forced to throw him off, and that he fell against a stool. 2do, That the wound was not mortal, but Ralston died *ex malo regimine*. 3tio. That the homicide was merely casual, and in self-defence, Ralston being the aggressor. The lords sustained the libel only relevant to infer the *pœnam extraordinarium*, and separately sustained the other defences to assoilzie *in totum*, and remitted all to the knowledge of the inquest. Here your lordships see, the killing only sustained *ad pœnam extraordinariam*, without regard to the three defences of casual homicide, self-defence, and dying *ex malo regimine*; for they are all sustained separately to assoilzie, even from the *pœna extraordinaria*: here then was a culpable homicide, sustained only *ad pœnam extraordinariam*, though neither merely casual, nor in self-defence; and so there can be no judgment more direct upon the point now pled.

And here the pannel must notice, once for all, that it makes nothing to this question, that in that, and other like cases to be mentioned, a mortal weapon was not used; for it is one question, what is sufficient to make a homicide only culpable? And quite another, whether, in our law, there is such a thing as culpable homicide, though neither merely casual, nor in self-defence? That of the using a deadly weapon enters into the argument, whether a homicide is dolose or culpable only? But it makes nothing to the other question, since homicide may not be merely casual, although no mortal weapon is used, as appears both from this decision, and the case of Bain, cited for the pursuers.

Another case is that of Grierson and others, 12th March, 1684; where the pannels being accused of murder, for killing the defunct in a scuffle; the defence proponed was, that the defunct was the first aggressor, and did invade the pannels, or one or other of them; and that William Grierson, or one or other of them, being standing before the fire, the defunct threw the said William, or one or other of them, in the fire, and fell upon him himself; and then, after the scuffle was over, the defunct did rise, walked up and down, discoursed, and of new again beat the said William Grierson, and threatened to kill him if he would not be gone; that the defunct went in good health to the door thereafter. These the lords sustained relevant to liberate from the ordinary pain of death. Here is another decision in point; the crime was not found merely casual, or the Court must have assoilzied; at least, could only have imprisoned, and could have inflicted no other arbitrary punishment. But that was not the case, it was found culpable, and not merely casual; and therefore the punishment restricted. Sure then it is not true in law, that all homicides are capital, unless they be merely casual.

A third case, is that of Maxwell and others,

7th November, 1690, pursued for the murder of John Russel, where the Court sustained this defence, that there was a previous combination to make a convocation, in order to debar and keep out Mr. Walter Macgil, minister of from entering into his church that Sunday, in consequence of which a convocation happened; and when they were required to disperse, they took the keys from the beadle, and beat the notar, and the minister's wife and others, before the slaughter was committed, relevant to restrict the slaughter to an arbitrary pain. And found yet further, that if any actual attempt was made, by throwing great stones at the minister, before committing the slaughter, that that was sufficient to liberate from the slaughter *simpliciter*. Sure the first part of the defence implied neither accidental homicide, nor self-defence, but a provocation by real injuries; yet the Court justly sustained it to restrict.

On the 6th November that same year, another judgment was given, very opposite to the pursuer's pleadings, in the Case of captain Price and others, who were prosecuted for shooting one John Reid, a tradesman of Glasgow, and serjeant at that time of a guard kept in that town. The case was, that captain Price, and others with him, had made some disturbance in the house where they lodged, and committed some rudeness to the landlady and her maid, which occasioned the guard to be called; and when the guard came, commanded by Reid, and entered the room where Price was, he and his company resisted the guard, and one of them shot Reid dead. The defence proponed was, "That before any guard came, a mob had begun to rise, and had gathered at the door where the officers were, who had shut the door upon themselves, and cried out to shoot the dogs, and words to that purpose: That when the guard came, they did not know it was the guard, but resisted and fired, from apprehension that it was the mob, and so killed Reid the commander of the guard." The lords "sustained that defence relevant to restrict the libel." And in that judgment, beside the establishment of the general principle, this may be observed, That Reid was killed by mistake, as one of the mob, and there neither was nor could be any provocation from him; neither was it pled, That the mob had given any real injury, but only were gathered in a tumultuous way, and uttering injurious words: Yet the Court justly restricted the libel; though it is plain the slaughter was not accidental, except in so far as the commander of the guard was killed in place of a mobber. Neither was it self-defence, because the pannels had no right to resist the guard, only there was an injury by the convocation, and an apprehension given of greater injuries, though that apprehension was not solidly founded.

The case of captain Wallace firing on the boys from the Abbay, may likewise be noticed; but being a well known case, needs not be at length recited.

A fourth case is that of Ensign Hardie, 6th June, 1701: He was accused of murder, by giving repeated thrusts, with a drawn sword, to one Smith, who at the time had no arms, whereof Smith instantly died; and that he afterwards boasted of his crime and cruelty, telling other gentlemen, that he had bowed his sword upon the person of a fellow at Scarbridge. The defence proponed, and sustained, was, "That the defunct was the first aggressor, and did take hold of the pannel's horse-bridle; and when he was holding the horse by the bridle, did give the pannel a stroke over the face with a rung or tree, and wounded him to the effusion of his blood; and that the defunct beat the pannel from his horse." These were "found relevant to restrict the libel to an arbitrary punishment." And then the reply was sustained relevant to elide it, "That the pannel beat the defunct on the face with a twisted rod, before he struck the pannel." Here again the point is fixed; no casual homicide, nor homicide in self-defence; and so your lordships had found by a former interlocutor, wherein you repelled the defence, when proponed as self-defence, but yet restricted the punishment, because the homicide was culpable.

A 6th case yet stronger, is that of the 1st of March, 1710: Peter Maclean, who was accused of the murder of James Ewing, by shooting him dead with a fowling-piece, when Ewing had no arms in his hand. The defence sustained to restrict the libel to an arbitrary punishment was, "That the defunct quarrelled the pannel, under the name of rascal, how he durst carry a fowling-piece, and that if the prince had his own, he durst not so do;" and adding these words, "That her majesty was but a whore;" and thereupon assaulted the pannel for taking his carabin from him." These are the words of the interlocutor; and it is so plain, that no observation needs to be made upon it.

Another case is that of Bathgate, 23d January, 1710: he was accused of murdering Andrew Braidwood, by throwing him down to the ground, and giving him several strokes and bruises, whereof he died. Your lordships "found the libel only relevant to infer an arbitrary punishment;" yet the fact was not entirely casual, nor pled to be so: and you sustained the defence, "That the throwing down libelled was only a wrestling, out of no malice, and that previous thereto the defunct was valetudinary, and in the habit of spitting blood," relevant to elide the libel *in totum*.

The case of Govan, 3d March, 1710, is not so plain as the others above-mentioned; but yet it does assist in the question: for there your lordships sustained opprobrious language and invasion, by beating in a scuffle, though without mortal weapons, relevant to restrict the punishment of killing with a sword, even suppose the killing should be proved to have been without the door of the house, when the last beating was only pretended to have been within the house; and so the beating must have been over

before giving the wound, and the pannel employed in *prosequendo*, by way of retortion of the injury that had been given.

Another unanswerable case is that of Carlops, January 8th, 1711; the circumstances of which are so well known, that it is in vain to repeat them; sure it was neither accidental homicide, nor homicide in defence: but the lords sustained the defence, that the beating was *per plures commissum*, in conjunction with any two of the following defences, viz. "That any beating committed by them was in a tulzie or *rixa*, in which they mixed themselves, to relieve a youth in the defunct's grips, or in a struggle with him. Or, *separatim*, that they had swords about them, and only made use of staves or batons," relevant to restrict the libel to an arbitrary punishment.

There is another case likewise worth noticing; 18th December, 1712; the case of serjeant Davies, who was accused of the murder of Mr. Robert Park—where your lordships "found the pannel his being alone, time and place libelled, and a scuffle then happening betwixt the defunct, with two or three more in his company and the pannel, and after a beating with staves betwixt the said men and the pannel, the said pannel his retiring, and calling for the guard, and being mutilate in the hand before he gave the said mortal wound, relevant to restrict the libel to an arbitrary punishment."

Another very late case is that of Jasper Reysano, 14th December, 1724, where the pannel being accused of killing Robert Lamb, by throwing him over the stairs, without cause or provocation, whereby he was brained, your lordships sustained it only "relevant to infer an arbitrary punishment." Yet sure it was not accidental, far less in defence. All which cases plainly establish the point, that even since the act of parliament, 1661, the constant practice hath been to find culpable homicides only relevant to infer arbitrary punishment; and that there are homicides not punishable with death, though neither merely accidental, nor in self-defence.

There is also a case which deserves to be noticed as to that point, of a third party's being killed when interposing betwixt other two in a scuffle: which is the case of John Graham, 1st December, 1712, where Graham was accused of murdering David Cochran. But your lordship sustained the defence, "That while he was attacked by Blyth with a drawn dark, the pannel was in his own defence with a drawn bayonet; and that in the mean time, the defunct interposing as a redder betwixt them, did casually receive the wound libelled," relevant to restrict the libel to an arbitrary punishment.

This information having drawn to so great a length, we are unwilling to trouble your lordships with further references to the laws of other countries, particularly to the law of England; although we apprehend the law there does not differ substantially from our law in this particular, except it be in these; 1st, That manslaughter is in effect not punishable at all in England, otherwise than by a kind of elusory punishment; 2do, That in no case *dolus* is presumed only from the giving the wound, except upon the particular statute of stabbing: whereas, indeed, it is in several cases otherwise with us; culpable homicide is punishable arbitrarily, and no doubt in many cases, where contrary circumstances do not appear, the giving the wound presumes dole, and even by the statute of stabbing, the killer hath the benefit of his clergy, if the person killed give the first blow or real provocation, and that although the provocation did not immediately precede the act of killing, if it happened at any time of the quarrel.

That by the ancient law of England, slaying a man did not infer death, yet perhaps not what we call murder itself, seems plain from Assisa Henrici Regis apud Northampton, published by Selden, in his Janus Anglorum, page 120, of the last edition; by which it appears, that even murder itself and robbery, was punishable only by mutilation, such as cutting off the hand or foot: and all their law-books, as well as the daily practice, establishes the distinction betwixt forethought felony, and slaying on suddenty; yea of old, even a murderer by malice prepense seems to have had the benefit of the clergy, and that benefit only taken away from such murderers by the first act, 23rd Henry 8, and their books of reports are full of the examples that slaughter on suddenty is not murder or capital. In Coke's Reports it is stated, that several men playing at bowls, two of them quarrelled, and a third, in revenge of his friend, struck the other with a bowl, of which wound he died: this was held manslaughter; for it was done upon a sudden emotion, in revenge of his friend.

There likewise, two boys combating together, one of them was scratched in the face, and his nose run a great quantity of blood; he went three quarters of a mile off to his father; who seeing him all bloody, took in his hand a cudgel, and went three quarters of a mile to the place where the other boy was, and struck him upon the head, of which the boy died. This was held but manslaughter; for the ire and passion of the father was continued; and there was no time determined in the law that it was so settled, that it shall be adjudged malice prepense in law.

The case of Mawgridge, set down at length by lord chief justice Keyling in his Reports, makes strongly for us; and we beg leave to refer to the whole treatise there set down, and particularly to the first ground of provocation, which he declares to be sufficient so as to alleviate the act of killing, and to reduce it to a bare homicide: he says, "If one man, upon angry words, shall make an assault upon another, either by pulling him by the nose, or fillipping upon the forehead, and he that is so assaulted shall draw his sword, and immediately run the other thorow, that is but man-

slaughter; for the peace is broken by the person killed, and with an indignity to him that received the assault: besides, he that was so affronted might reasonably apprehend, that he that treated him in that manner might have some further design upon him." Your lordships see how close this is to the case: the insult and indignity done by Bridgeton was vastly stronger than any thing here mentioned, and having received such an affront, the pannel had reason to expect worse; more especially when, as we offered to prove, Bridgeton was endeavouring to pull out my lord Strathmore's sword.

We must likewise humbly refer to several cases set down by serjeant Hawkins, in his Pleas of the Crown, which fully agree with what we now plead; and particularly take notice of what he says, pag. 84. "If a third person happen, accidentally happen, to be killed by one engaged in a combat with another, upon a sudden quarrel, it seems that he who kills him is guilty of manslaughter only." And it would seem that there is even a difference made, betwixt killing a person that endeavours to interpose, if he tell that he comes for that purpose, and killing one who accidentally is interposed betwixt the two contending parties, which was my lord Strathmore's case. The killing him who interposes to separate, if he give notice what he is doing, is reckoned worse than the killing the other. And this observation shews that the present case is stronger than the above-cited case of Graham, where your lordships restricted it to an arbitrary punishment. And what that author observes, confirms a distinction we have made, betwixt a man quarrelling with another, and killing a third party, where it is proved the killer had a felonious intention to murder the other, and the case where that does not appear; for however, in the first case, he might be guilty of the murder of the third party, yet if a design to murder the person he quarrelled with is not proved, then he can never suffer capitally for killing the third party: and we have already endeavoured to prove, that that must be the case as to Bridgeton, where he gave the provocation, and no act followed against him sufficient in law to establish a design of murdering him.

The pursuers have cited the same books, and Mawgridge's Case, as for them; but that we submit. The particular cases of Holloway, and Williams the Welchman, spoke of by Keyling, are not at all to the purpose: the Welchman's case was no judgment; but neither in that nor in Holloway's was there any real personal injury, on which a great stress is laid in all these questions.

The pursuers mention another case stated, but never adjudged; a person shooting at fowls with an intent to steal them, accidentally kills a man; that will be murder. This perhaps may be justly doubted. Sure it would be too severe. But supposing it were so, it is of no importance: stealing, even of fowls, by the law of England, is felony of malice prepense; and where a man attempting to commit one felony, does another, there is little doubt but in strict law he is guilty of the felony committed.* But what is that to the case of a provocation by a real injury?

The pursuers have quoted the authority of Voet, and a decision observed by him from Sande, to prove, that where one man was intended to be killed, and another slain, the crime is capital: in which, no doubt, Voet differs from many as learned lawyers, who are of the other side. But his opinion, and that of Sande, is obviated by what is already said: it is only in the case of no provocation or real injury on the part of him who was designed to be killed. And 2do, It is always taken for granted by Voet, and all who are of that opinion, that the design of murdering the person intended to be invaded, do appear and is proved: but we have already shewn, that cannot be said in the present case.

The pursuers pretended, that there was a circumstance in the libel which implied malice against the earl of Strathmore, viz. "That the thrust given was followed by a second push." But as there is nothing in this fact, it may be the subject of imagination, but can never be the subject of proof, unless it were pretended, as it is not, that the pannel drew back or out his sword, and made a second thrust; which will appear not to be true, from the nature of the wound; and the thrust will be found to have been so momentary, that it was impossible. 2do, If any thing like that happened, it will appear, that there was no more in it, but the pannel's staggering, or moving the sword, by his weight leaning upon it. Stio, There is no relevancy in it at all; the fact being, that the pannel pushed as at Bridgeton: and no circumstance will make it appear, that he knew he had touched the earl of Strathmore till some time after the fatality was perfected.

The pursuers further pretended, "That as they had libelled malice, they would prove it from other antecedent facts that had happened some time before, whereby it would appear, that there was enmity betwixt the defunct and the pannel."

It is answered for the pannel, 1mo, That no such facts being libelled, nor, to this minute, condescended upon, either in the debate or information, they can by no means enter into

* At the Lent assizes at Chelmsford in Essex, 1763, two sailors were convicted for the murder of a farmer: the case was, the sailors came to steal the farmer's fowls; the farmer with his son pursued them; one of the sailors struck the farmer several blows on the arm, which (though not likely) killed him. This was held to be murder; because the act they were about was unlawful; but the sailors, after several respites from execution, received his majesty's most gracious pardon. *Former Edition.*

the proof, otherwise the highest injustice would be done to the pannel in this and every such case: for if the pretended facts, inferring malice, had been libelled, then it would have been competent to the pannel to have elided the same by a proper proof, to shew that they inferred no malice on his part; he might have proved dissimulation or reconciliation, and would have been prepared for that purpose. But where such facts are concealed, and may have happened at an unknown distance of time, it is impossible the pannel can be prepared with proper evidences. And though it is sufficient, in an indictment, to libel malice in general, in order to make a relevancy; yet then it is always understood that the pursuer intends no more than the presumed malice arising from the fact libelled: neither can such proof come in under the head of art and part, because that can only have regard to such facts as happened at the time of committing the action complained of, and such as import a share in the action; but cannot reach to pretended qualifications of malice that happened the Lord knows when.

In the next place, the pannel offers to exclude all pretence of former enmity, by proving, that, for some time before, they had met from time to time occasionally, without any marks of enmity, but all the seeming requisites of friendship and civility intervening; and particularly, that that very day they had dined together, afterwards drunk together for a considerable time, and visited together, in the lady Auchterhouse's, a common relation, with all appearances of friendship; and that the deceased earl had kindly invited the pannel and his family to come and visit him and his, and made a challenge of kindness of it, that he was too great a stranger. In the case of enmity, the divine law itself determines, when hatred is to be presumed, and when not: "Whoso killeth his neighbour ignorantly, whom he hated not in time past;" in the Hebrew, "from yesterday, the third day;" or, as in the Latin translation, "qui heri et nudius tertius nullum odium contra eum habuisse comprobatur." So that the very friendship that passed that day on which the unhappy accident happened, excludes all pretence of former enmity, suppose there had been any seeming differences, of which the pannel is not conscious, far less of malice, or any capital enmity that ever was.

Upon the whole, though this fatal and melancholy accident, which gives occasion to the trial, does and must lye heavy on the mind of the pannel, and produce the strongest sorrow and regret in all that had the honour to know the deceased earl; yet the punishing the pannel capitally for an offence which happened 'casu magis quam voluntate,' would be a very rigorous extension of the law. It is plain, from what is above said, that culpable homicide, both by our law and practice, is punishable only arbitrarily, and comes under the general description of casual homicide in the act 1661. No case can be more pitiful or favourable than this, where the death happened to a person nowise intended to be hurt: and therefore it is hoped your lordships will sustain the Defence pled, relevant to restrict the libel to an arbitrary punishment. RO. DUNDAS.

CURIA JUSTICIARIA, S. D. N. Regis, tenta in novo Sessionis domo Burgi de Edinburgh, primo die mensis Augusti, millesimo septingentesimo vigesimo octavo, per honorabiles viros Adamum Cockburne de Ormistoun, Justiciarium Clericum; Dominos Jacobum Mackenzie de Roystoun, et Gulielmum Calderwood de Poltoun, Magistrum Davidem Erskine de Dun, Dominum Gualterum Pringle de Newhall, et Magistrum Andream Fletcher de Miltoun, Commissionarios justiciariæ dict. S. D. N. Regis.

Curia legitime affirmata.

Intran'

James Carnegie, of Finhaven, Pannel, Indicted and accused *ut in die præcedenti.*

The Lords Justice Clerk and Commissioners of Justiciary, having considered the indictment, raised at the instance of Susanna countess of Strathmore, and Mr. James Lyon, brother-german and nearest of kin to the deceased Charles earl of Strathmore, with concourse and at the instance of Duncan Forbes, esq., his Majesty's Advocate, for his highness's interest, against James Carnegie of Finhaven, pannel, with the foregoing debate thereupon; they fand, and hereby find, that the pannel, at the time and place libelled, having by premeditation and forethought felony, with a sword or other mortal weapon, wounded the deceased Charles earl of Strathmore, of which wound he the said earl soon thereafter died, or that he the pannel was art and part thereof, relevant to infer the pains of law; but allowed, and hereby allow the pannel, to prove all facts and circumstances he can, for taking off the aggravating circumstances of forethought and premeditation: As also fand, and hereby find, That he, the said pannel, time and place foresaid, having, with a sword, or other mortal weapon, wounded the said deceased Earl, of which wound his lordship soon died, or that he the pannel was art and part thereof, *separatim*, relevant to infer the pains of law: And repelled, and hereby repell the defences proponed for the pannel: And remitted, and hereby remit him, and the indictment, as found relevant, to the knowledge of an assize. AD. COCKBURNE, I. P. D.

The Lords Justice Clerk and Commissioners of Justiciary continued the diet, at the instance of Susanna countess of Strathmore, and others, against James Carnegie of Finhaven, pannel, till to-morrow, at nine of the clock in the morning; and ordained witnesses and assizers to attend at that time, each person under the pain of law; and ordained the pannel to be carried back to prison.

CURIA JUSTICIARIA, S. D. N. Regis, tenta in novo Sessionis domo Burgi de Edinburgh, secundo die mensis Augusti, millesimo septingentesimo vigesimo octavo, per honorabiles viros Adamum Cockburne de Ormistoun, Justiciarium Clericum; Dominum Gulielmum Calderwood de Poltoun; Magistrum Davidem Erskine de Dun, Dominum Gualterum Pringle de Newhall, et Magistrum Andream Fletcher de Miltoun, Commissionarios Justiciariæ dict. S. D. N. Regis.

Curia legitime affirmata.

Intran'

James Carnegie, of Finhaven, pannel.

Indicted and accused *ut in diebus præcedentibus.*

The Lords proceeded to make choice of the following Assizers:

ASSIZE.

Sir Robert Dickson, of Inverask.
George Loch, of Drylaw.
*John Watson of Murrays.
Walt. Riddel, of Granton.
George Warrender, of Burntsfield.
Tho. Brown, of Bonington.
*George Haliburton, of Fordel.
James Balfour, of Pilrig.
Robert Dundas, merchant, in Edinburgh.
David Inglis, merchant, there.
David Baird, merchant, there.
Alex. Blackwood, merchant, there.
*John Couts, merchant, there.
John Steven, merchant, there.
James Ker, goldsmith, there.

N. B. Those of the Jury marked thus * protested against the verdict.

The above assize being all lawfully sworn, and no lawful objection in the contrary, the pursuers for probation adduced the witnesses after deponing, viz.

Robert Hepburne, hammerman, in Forfar, solemnly sworn, purged, examined and interrogate, deponed, That he was in the town of Forfar, the 9th day of May last, betwixt the hours of eight and nine o'clock at night, where he did see the deceased earl of Strathmore, lord Rosehill, and Mr. Thomas Lyon my lord Strathmore's brother, walking in the streets; and at the same time did see Lyon of Bridgeton, and Finhaven the pannel, standing near to the lady Auchterhouse her house, upon the street; what words passed betwixt them, he being at a distance could not hear; saw Bridgeton give Finhaven a push with his hand; and Finhaven fell in the gutter; and he saw a servant of the deceased earl of Strathmore help Finhaven up out of the gutter; and when Finhaven got up, he saw him draw his sword immediately; but that Bridgeton coming up faster than Finhaven, he saw Bridgeton offer to draw my lord Strathmore's sword; but does not know whether he got it drawn, or not, but saw Finhaven draw his sword before Bridgeton offered to draw my lord Strathmore's; and when Bridgeton was coming up from the place where Finhaven fell, he looked over his shoulder, and seeing Finhaven with his sword drawn, he went faster up to my lord Strathmore, as said is; and when Finhaven came up, my lord Strathmore being standing about a pair of butts from the place where Finhaven fell, and when Bridgeton came up, and endeavoured to draw my lord Strathmore's sword, as said is, my lord turned him about, and set Bridgeton aside, and made some steps towards Finhaven, who would be at that time about six or eight ells from my lord; and he did see my lord endeavour to take Finhaven in his arms when they met, and in a little after that, that he did see my lord withdraw himself aside from the rest of the company, and saw him put down his breeches, and lift up his shirt, and heard him say he had got a wound, and repeated these words three times, and saw him put up his shirt, and in a short time thereafter saw my lord fall to the ground. And being interrogate, if he saw Finhaven the pannel make a thrust at my lord Strathmore with a sword? Deponed, he did not see him make the thrust, but at that time did see no other sword drawn but Finhaven's; and after my lord retired he saw several other swords drawn. Deponed, That there was no other company standing with my lord but my lord Rosehill, and his own brother Mr. Thomas, before that Bridgeton and Finhaven came up: And that he saw all this that he has deponed upon, from his own shop-door, which was about seven or eight ells distance from that part of the street where my lord Strathmore was standing. And being interrogate, if he knows what came of Bridgeton, after he came up to my lord? Deponed, That he knew not what became of Bridgeton after my lord put him aside: And that there was as much day-light as he could see what he has deponed upon: And that Finhaven the pannel was in boots; and that he was coming fast up after Bridgeton, but Bridgeton went faster towards my lord; and that when my lord Strathmore fell, he saw Thomas Adam, maltman, take up my lord from the ground, and saw no other body assisting. Deponed, he saw the pannel's sword twisted out of his hand by Mr. Thomas, or my lord Rosehill; but which of them, he knows not; and that it was after my lord fell. And deponed, That he did see the wound in my lord's belly, a little below the navel; and that it was blooding. Deponed, That he saw Finhaven, after his sword was twisted out of his hand, walk in his ordinary way of walking, towards the lady Auchterhouse her house. *Causa scientiæ patet.* And this is the truth as he should answer to God.

ROBERT HEPBURNE.
AD. COCKBURNE.

Nota, The procurators for the pannel having (before purging) objected to the above-named

Robert Hepburne, why he ought not to be a witness in this case; because, since his citation to be a witness, he had expressed malice and ill-will against the pannel in thir words, viz. "That he thanked God, he had now an opportunity to hang him, and would do it if he could." And seeing these expressions were clearly proven against him, by two concurring witnesses, in presence of the court and jury, they desired the same might be so marked in the books of adjournal. Which, and this deposition, the lords left to the consideration of the jury.

David lord *Rosehill*, solemnly sworn, purged, examined and interrogate, deponed, (being interrogate for the pannel) That the time libelled, the deponent on the occasion of a burying, was brought in company with the deceased earl of Strathmore, the pannel, and others; and together they dined in Mr. Carnegie of Lours's house; and after dinner and the burying was over, they together went to the house of Mr. Dickson, clerk of Forfar, where they continued some considerable time, drinking a glass of wine together; and after they left that house, they assembled in the house of my lady Auchterhouse, in the same town, the pannel's sister, where the deceased Earl had gone to make a visit. Deponed, That during all that day, and in the several places where the deceased Earl, the pannel, and the rest of the company were, he, the deponent, observed nothing but great civility and friendship betwixt the deceased Earl and the pannel. Deponed, That before they parted from the lady Auchterhouse's, the pannel appeared to the deponent to be drunk, and far gone in drink, to the degree of staggering; and he observed the pannel drink plentifully in these several houses. Deponed, That he the deponent, during the time of his being with the said company, was mostly engaged in conversation with the deceased Earl, and had not the occasion to observe what passed in conversation betwixt the pannel and Mr. Lyon of Bridgeton: and being interrogate about what he knew of the character and temper of the pannel? Deponed, That, according to the deponent's knowledge of him, which had been of long continuance, and particularly according to the character he the pannel bore in the country, he was thought to be nowise quarrelsome in his temper, but to be of a peaceable and good disposition. *Causa scientiæ patet.* And this was the truth as he should answer to God.

ROSEHILL.
D. ERSKINE.

William Douglas, lawful son to William Douglas, late provost and chirurgeon-apothecary in Forfar, solemnly sworn, purged, examined, and interrogate for the pursuers, Deponed, That on that day whereon the deceast earl of Strathmore was wounded, he the deponent was at Forfar, and on the streets, where he did see the Earl with my lord Rosehill and Mr. Thomas Lyon his brother, and at the same time, he observed Finhaven and Mr. Lyon of Bridgeton standing together near to the lady Auchterhouse her lodging; and so on thereafter looking about, he observed Finhaven leaning and falling backwards into a kennel; and after getting out of it, which he appeared to the deponent to do very soon, he drew his sword, and with it went up to the company where the Earl, Bridgeton, and the rest were; and at the first sight, upon the pannel's approaching to the Earl, Bridgeton and the rest, Bridgeton was then interposed betwixt the Earl and the pannel; but all of a sudden and a clap, the Earl came to be interposed betwixt Bridgeton and the pannel; and at the time of the said Earl's interposition, the pannel was within the length of his sword at the place where Bridgeton was standing; that is to say, had been standing. Deponed, That he did observe the pannel make a thrust with his sword, and at the time of so doing, the Earl was standing next the pannel, and his face towards him. Deponed, That the Earl received a wound in his belly, and after receiving it, he saw him pull his shirt from under his breeches, and at the same time saw him blooding, and soon thereafter his lordship fell down, and he heard him say, that he had got it; and before the Earl fell, and while he was upon the ground, he did observe his brother Mr. Thomas, with his drawn sword, twist Finhaven's sword out of his hand, after seeing and hearing some clashing of their swords: but at the time when Finhaven made the push, as said is, he observed no other sword drawn but Finhaven's; and at the time when the pannel recovered his thrust, the pannel and the Earl were very near one another: and all this time, the deponent was about the length of this room, or some more, distant from the said Earl and the pannel, whose sides were opposite to the deponent; and after the earl of Strathmore's fall, and that his brother Mr. Thomas twisted the sword out of the pannel's hand, the pannel, who was in boots, ran towards his sister's door: after the deceased Earl was carried to a house, and his wound was drest, he heard his lordship say, that after the sword entered his belly, he the pannel gave it a second thrust. Deponed, That when he observed Finhaven falling into the puddle, as abovesaid, there was none standing with him or by him but Mr. Lyon of Bridgeton. And what he has above deponed, happened on the 9th day of May last, about the hour of nine at night. *Causa scientiæ patet* And this was truth as he should answer to God.

WILL. DOUGLAS.
DA. ERSKINE.

Andrew Douglas, also lawful son to the said William Douglas, solemnly sworn, purged, examined and interrogate, Deponed, That the time and place libelled, the deponent saw John Lyon of Bridgeton push the pannel upon the breast, whereby the pannel fell in the gutter, which the deponent apprehended would have taken him up to the knee; that it was a very nasty gutter; and that he saw the pannel arise out

[illegible] Finhaven ran away to his [illegible]'s lodging, and [illegible] after him. *Causa scientiæ* [illegible] the truth as he should [illegible]

ANDREW DOUGLAS.
AND. FLETCHER.

[illegible], residenter in Forfar, solemnly [illegible] examined and interrogate, deponed, That at the time and place libelled, the deponent having occasion to go to water his [illegible] horse, he saw Bridgeton and the pannel as they came out from the lady Auchterhouse's lodging, about the bridgestone near the chamblies, and there heard Bridgeton say to the pannel, You must give me an answer to my question, which the deponent heard was, If the pannel would give his daughter to the lord Rosehill? And upon the pannel's saying, No; Bridgeton asked him, If he would drink a bottle of wine, and if he would drink the king's health? And upon the pannel's refusing to do either, the deponent saw Bridgeton take hold of the pannel by the breast, and violently push him into the kennel; and heard Bridgeton at the same time, say, Go, and be damned, and your king George, whom you love so well. And thereafter Bridgeton walked towards my lord Strathmore, Mr. Thomas Lyon, and my lord Rosehill, who were standing upon the street at some little distance; and that Finhaven was helped out of the gutter by a footman of my lord Strathmore's: and that upon the pannel's getting upon the streets again, he immediately drew his sword, and ran up the street after Bridgeton; and before Bridgeton had come the length of the place where the lord Strathmore and others were standing, he looked over his shoulder, and seeing Finhaven following him in manner above mentioned, he run up to my lord Strathmore, who, and the rest of the company, had still their backs turned to the place from whence Finhaven and Bridgeton were coming: and that Bridgeton, upon his coming up to [illegible]thmore, laid hold upon my lord Strathmore's [illegible] and endeavoured to pull it out; upon [illegible] lord Strathmore turning about pushed Bridgeton off, and in the mean time Finhaven made a push with his sword at Bridgeton, and at that instant he observed my lord Strathmore pushing Bridgeton aside, and make a step towards Finhaven; and observed at same time Finhaven, going on with his push, to stagger forward with the thrust upon my lord Strathmore; and thereafter the company went all through other, so that the deponent could not see where the thrust landed: and very soon thereafter the deponent saw Mr. Thomas Lyon with his sword ca' Finhaven's sword out of his hand, which lighted at a good distance upon the street: upon which Finhaven run off, staggering, towards the lady Auchterhouse's lodging, and had almost fallen upon the street before he got in at the gate; and much about the same time the deponent saw the earl of Strathmore fall down upon the street, and afterwards carried off, and that Thomas Adam and Janet Binnie were the first that came to his assistance. Deponed, That the kennel was deep and dirty, and that the pannel was deep in it, but not freely covered: that when he arose, his face was almost as black as his black coat; and that while these things past, the deponent was riding upon the side of the street, betwixt the gutter and the place where the earl of Strathmore and others were standing; and upon seeing the beginning of this accident, he stopped his horse a little, till he saw as above-mentioned. *Causa scientiæ patet.* And this was the truth as he should answer to God. JOHN FERRIER.
AND. FLETCHER.

David Barclay, lawful son to David Barclay, brewer in Forfar, solemnly sworn, purged, examined and interrogate, Deponed, That at the time and place libelled he saw Bridgeton push the pannel into a gutter, and saw a servant raise him out of the gutter: and when the pannel got to the street, he saw him draw his sword, and go towards the rest of the company, and Bridgeton was beyond the earl of Strathmore, his brother and lord Rosehill, who were interposed betwixt the pannel and Bridgeton, and did not see the pannel push with the sword, and saw a little after my lord Strathmore fall upon the street; and immediately after that saw Mr. Thomas Lyon, with a naked sword, beat the pannel's sword out of his hand, and the pannel immediately run toward the lady Auchterhouse's house, and got in at the door. And deponed, That when Bridgeton thrust the pannel into the gutter, the servant who lifted him up, said to Bridgeton, or some other servant standing by, that he was uncivil, though he was a gentleman: and that what the deponent saw and heard, as aforesaid, was betwixt eight and nine o'clock of the evening of the day foresaid. *Causa scientiæ patet.* And this was the truth as he should answer to God. DAVID BARCLAY.
WA. CALDERWOOD.

Elisabeth Binnie, spouse to Andrew Gray, baxter in Dundee, solemnly sworn, purged, examined and interrogate, deponed, That the

time and place libelled, she saw John Lyon of Bridgeton give a push to the pannel, whereby he fell in the gutter, and was raised out of it by the lord Strathmore's servant; and when he got to the street, saw him draw his sword, and heard him utter an oath, but did not know what the words were: and then the deponent turned her back, and did not see Finhaven push with the sword. *Causa scientiæ patet.* And this was the truth as she should answer to God: and declared she could not write.

W. Calderwood.

John Macky, servant to Mr. Robert Nairn, brother-german to —— Nairn of Drumkilbo, solemnly sworn, purged, examined, and interrogate, deponed, that at the time and place libelled, he did see William Macgfish, my lord Strathmore's servant, take Finhaven the pannel out of the gutter, where the deponent saw him lie; and did see Finhaven draw his sword after he was out: and did hear one of the gentlemen, standing in the place where my lord Strathmore was wounded, call out to Finhaven, Stand off, Sir; and a little space thereafter he saw the deceased earl of Strathmore taken up. *Causa scientiæ patet.* And this is the truth as he should answer to God; and deponed he could not write.

Wa. Pringle.

James Barrie, servant to James Carnegie of Finhaven, solemnly sworn, purged, examined, and interrogate, deponed, That at the time and place libelled, the deponent was holding his master's horses upon the streets of Forfar, near to the lady Auchterhouse's lodging: that he had seen the said earl of Strathmore, and other company with him, go along the street from the said lodging, and his master and Bridgeton followed at a little distance; heard them conversing together, and thought that Bridgeton lookt and spoke angry at his master, and demanded that he should give him an answer: did not well hear what his master said, except these words, That he intended to be of that resolution still: whereupon Bridgeton with his two hands, pushed his master into the gutter, at the same time expressing himself, Go be damn'd, and let that man take him up for whom he had so great a favour. And the deponent seeing his master lying in the gutter, quit his horses, and came to relieve him, but found that my lord Strathmore's servant had helped him out before he came, and then he did see his master draw his sword, and go pretty fast forward, staggering, and saying, This cannot be suffered; then his master came up to the company, and saw him make a push at Bridgeton; but that before his master came up to them, he did see Bridgeton make an attempt to draw my lord Strathmore's sword; and as Bridgeton was going toward my lord Strathmore, he did see Bridgeton look over his shoulder to Finhaven, and lookt as if he had been laughing. Observed, that when his master made the push, as before-mentioned, he seemed as if he had been falling, and saw him close upon lord Strathmore: but before this, my lord Strathmore had put Bridgeton aside, and my lord Strathmore had advanced a step or half a step toward Finhaven; and then they were all in a crowd through other, and he did not know what was doing amongst them, but did see his master's sword struck out of his hand by another sword, and then did see his master go down to his sister's lodging. Deponed, that as his master was thrown upon the back in the gutter, and was covered near over the ankle, and saw his face all besmattered with dirt, and saw the same run out of his boot-tops as he went up the street; and deponed his master at that time was very drunk. Being interrogate further, deponed, That he has frequently seen his master drunk, and propone the deceased earl of Strathmore's health at his table, and this a short time before the unlucky accident happened. Deponed, that about a month before, the late earl and his master was together at Burnside's burial, and heard the Earl invite his master to his house, and heard him answer, That he intended that very soon. Deponed, that his master rode with pistols that day, but deponed there was not so much as a sense in them. Deponed, that eight or ten days before this unlucky accident, his master bid the deponent go to the taylor, and get his clothes ready, for he intended as soon as he got his chaise home, to go with his lady and make a visit to my lord Strathmore at Glamis. *Causa scientiæ patet.* And this is the truth as he should answer to God.

James Barrie.
Wa. Pringle.

Elizabeth Vilant, servant to Margaret Carnegie, relict of the deceast Mr. Patrick Lyon, of Auchterhouse, solemnly sworn, purged, examined and interrogate, deponed, That, on the 9th of May last, she did see my lord Strathmore and Finhaven in the lady Auchterhouse's house, and did see nor hear nothing pass between them but what was kind and civil; and she was much of the time in the room before Bridgeton came in: but after he came in, she was but coming and going; and when my lady called for a glass of brandy, the deponent brought it in, and my lady set it by, and saw nobody drink it, and that my lady told in the company, That Bridgeton had taken her by the wrist, and that she had not been so ill used by any man, and complained of pain. And deponed, that that afternoon Finhaven appeared to be very drunk. *Causa scientiæ patet.* And this is the truth as she should answer to God.

Elizabeth Vilant.
Ad. Cockburne.

Isabel Meik, servant to the before-named and designed Margaret Carnegie, solemnly sworn, purged, examined and interrogate, deponed, That in the evening on the 9th of May last, Finhaven came up to the lady Auchterhouse's house, and the door being shut after him, she came up after into the said house; and she turning about upon some people knocking at the door, and opening the same, there came in two or three noblemen or gentlemen with drawn swords; and Finhaven being then

in the trance, [passage from the kitchen to the chambers,] she took him by the sleeve, and put him in the peat-house, and lockt the door of the peat-house; and when the bailie came in search of him, she delivered the key to the bailie, who took him out. And deponed, that Finhaven was mortally drunk, and when she saw him, he was all bespattered with dirt. *Causa scientiæ patet.* And this is the truth as she should answer to God. And deponed she could not write.

AD. COCKBURNE.

William Dickson, shoemaker in Forfar, solemnly sworn, purged, examined and interrogate, deponed, That the time and place libelled, the deponent being at his own stair-foot, saw two gentlemen standing together whom he then did not know, and one of them did throw the other in the puddle; and that gentleman who was thrown in the puddle was taken forth thereof by another whom he did not know: and when he got up, he drew his sword, and went up towards other three that were standing together, and the gentleman who threw him in the puddle was nigh them; he did not see the said gentleman push with his sword at any. Deponed, that my lord Strathmore was one of the three that was standing there, did not see him fall, but saw him carried away. Deponed, that after the mob rose, he then saw Finhaven the pannel, whom he knew to be the gentleman that was thrown in the puddle, and that he was chased back by two gentlemen with drawn swords to my lady Auchterhouse's house. *Causa scientiæ patet.* And this is truth as he should answer to God; and cannot write.

W. CALDERWOOD.

David Cauty, merchant, and one of the bailies of Forfar, solemnly sworn, purged, examined and interrogate, deponed, That upon the 9th of May last, about nine o'clock in the evening, the deponent being in a house near to the lady Auchterhouse's lodgings, there came a servant, and told that there was very bad news that night; that the earl of Strathmore was killed by Finhaven: upon which the deponent went to the streets, and there found a great mob, who told the same which he had heard before. Whereupon the deponent went towards Mr. Dickson's house, to which place the earl of Strathmore was carried; and then the deponent met with, at least did see, Mr. Thomas Lyon and Bridgeton, but cannot be sure if my lord Rosehill was with them, who went towards the lady Auchterhouse's lodgings: and Mr. Fletcher of Balinshow told the deponent, That he wanted a fore hammer to break open the lady Auchterhouse's door; whereupon the deponent being a magistrate, told, that it was his duty to preserve the peace, and prevent any illegal proceedings, or bad consequences therefrom. Thereafter the deponent went towards my lady Auchterhouse's lodgings, and there found Mr. Thomas Lyon and Bridgeton, and demanded their arms, which they delivered to the deponent; and thereafter went to the said lodgings, got access, my lady Auchterhouse's servant delivering the key of the peat-house, where he found Finhaven lying upon lint spread above the peats, notwithstanding at first the lady and her servants denied he was there; and the deponent told Finhaven, he was his prisoner; and he asked the deponent, how the earl of Strathmore was? And the deponent told he was very bad, as he was informed. And the deponent having dispersed the mob, caused carry Finhaven to the prison; and when he came to prison, he fell a crying to a great extremity, as if he had been distracted, and said, It was the greatest misfortune that could happen him; and said, That he deserved to be hanged for wounding such a worthy earl: and deponed, that Finhaven appeared to the deponent to be in liquor, and drunk; but he did regret his misfortune in the same manner as if he had been sober. Deponed, that he was frequently in prison with Finhaven, and in two or three days after he was imprisoned, he heard him say, That there had been some grudge or misunderstanding betwixt the earl of Strathmore and him, but that afterwards it was better cultivate, and in a manner done away; but did not hear the cause of the said grudge or misunderstanding exprest. Deponed, that when he heard Finhaven regret the misfortune that had happened the earl of Strathmore, he said the design was against another, namely, Lyon of Bridgeton. *Causa scientiæ patet.* And this is the truth as he should answer to God.

DAVID CAUTY.
W. CALDERWOOD.

Alexander Binnie, provost of Forfar, solemnly sworn, purged, examined and interrogate, deponed, That while the pannel was in prison within the tolbooth of Forfar, he the deponent did frequently visit him, and he did hear Finhaven say, That there had been some mistakes and misunderstandings betwixt him and my lord Strathmore, on account of a process of bastardy that was depending before the lords of session, but did not hear him speak as if he was under any grudge or resentment on that account. Deponed, that about a month before the said Earl's death, he the deponent was occasionally at a burial with the said deceased Earl and the pannel, betwixt whom the deponent observed nothing like misunderstanding, but that their carriage to one another was civil; and particularly remembers, that at the time Finhaven drunk a glass to the health of the countess of Strathmore, and after drinking, threw up the glass, which broke with its fall; and this happened in the house of clerk Dickson in Forfar: and when the earl of Strathmore went to take his horse, the pannel and the deponent waited of him. And being interrogate, if on that day he heard the earl of Strathmore invite the pannel to visit him? Deponed *negative;* and from a letter put into the clerk's hands, apprehends that they were not in a course of visiting. *Causa scientiæ patet.* And this is the truth as he should answer to God.

ALEX. BINNIE.
DA. ERSKINE.

Follows the Letter relative to the above Deposition:

"Sir; we propose to have a meeting at your house, on Tuesday next, to finish that affair of Mr. Martine's; wherefore, if your conveniency could allow, I wish you would make a visit to my lord Strathmore, to satisfy him, and that he may send one mandate, so as that every thing may go on as was proposed. Your answer is expected by, Sir, your most humble servant, JA. CARNEGIE."

"*Finhaven*, 3*rd May*, 1728."

Directed on the back thus: "To Provost Alexander Binnie, in Forfar."

Edinburgh, 2*nd Aug.* 1728.

This is the Letter to which Alexander Binnie, provost of Forfar, his Deposition of this day relates. AD. COCKBURNE.

Charles Carnegie, brother-german to Patrick Carnegie of Lours, solemnly sworn, purged, examined and interrogate, deponed, That he knew that there was not a very good understanding betwixt the deceased earl of Strathmore and the pannel, and for the space of two years they had not visited one another; but he never did hear the pannel express any grudge or resentment against my lord Strathmore. Did hear that about two years ago or thereabouts, there fell out some mistakes in discoursing about a bargain of meal; and that the pannel was, as he heard, that night at Glammis, but went away next morning about four o'clock; but he the deponent was not present with them at said time; but did hear, that what happened betwixt them at that time, gave rise to some misunderstandings. *Causa scientiæ patet.* And this is the truth as he should answer to God.

CHARLES CARNEGIE.
DA. ERSKINE.

Sir *Alexander Wedderburn* of Blackness, solemnly sworn, purged, examined and interrogate, deponed, That about the end of October, 1726, there was a meeting of the gentlemen of the shire of Angus, concerning their affairs, in the town of Forfar, where the deceased earl of Strathmore was chosen preses of the meeting; and that the laird of Finhaven, who was there also, called down the deponent to the street, and exprest himself to this purpose: That he had met with several disobligations from the earl of Strathmore, of which there was just now an instance, that the Earl being preses of the meeting, had kept him out of a committee that was then chosen; that the Earl was his debitor, and was owing him several years annual rents; that he did not much notice, but that he would resent, or make the Earl repent what he had met with, or words to that purpose: and this he said with an asseveration, and desired the deponent to acquaint the Earl with what he had said: but the deponent refused it, and said they were all friends together, and he would forget it against to-morrow. And deponed, that he, the deponent, that same night did speak to my lord Gray, to speak to my lord Strathmore, to get Finhaven added to the committee, saying, That would make all things right; but my lord Gray returned no answer to the deponent. *Causa scientiæ patet.* And this is the truth as he should answer to God.

ALEX. WEDDERBURN.
WA. PRINGLE.

William Douglas, late provost and chirurgeon-apothecary in Forfar, solemnly sworn, purged, examined and interrogate, deponed, That upon the 9th of May last, at nine o'clock at night, the deponent was called to the earl of Strathmore, who had got a wound; and having passed and dressed the wound, he found it went in about three inches and a half above the navel, and came out to the back-bone, about two inches below; that he first dressed the wound in the belly, and then that in the back; that the Earl having asked his opinion of it; he said he was not without great hazard, and desired more assistance; whereupon an express was dispatched to Dundee for physicians; that the deponent thought the wound mortal, and did not think any could recover of that wound; the Earl lived about forty-nine hours thereafter, and died upon the Saturday's night, at ten o'clock, of the foresaid wound. Deponed, that the Earl said to him, That Finhaven had given him that wound, and that after he gave the first thrust, he pressed the pomel of the sword forward with his breast; and that it was the deponent's opinion, from what he observed, whatever sword had given that wound, was either rusty or had a nitch in, which brought out the *omentum* without the belly; and the deponent afterward having seen the sword, which was called Finhaven's sword, he perceived a nitch in it, some more than a hand-brode from the hilt. *Causa scientiæ patet.* And this is the truth as he should answer to God.

WILLIAM DOUGLAS.
WA. PRINGLE.

Thomas Crichton, chirurgeon-apothecary in Dundee, solemnly sworn, purged, examined and interrogate, deponed, That upon the evening of the 9th of May last, the deponent was sent for from Dundee, to wait on the now deceased earl of Strathmore, and arrived at Forfar next morning about one o'clock, and there saw the wound the Earl had received, which appeared to the deponent to have been by a sword, which had entered about three inches and a half above the navel, and had gone out at the back, about four inches from the back-bone, a good deal lower than where the sword entered; and the deponent said the wound was mortal to his apprehension; and that the earl of Strathmore died thereof, in about two days after the receiving of it. And deponed, That the defunct told the deponent, that Finhaven had given him that wound; that he did not believe he designed it for him, and yet there was one circumstance which he could not account for, viz. That after the sword had entered his body, Finhaven pressed it forward,

till their bodies were close together. Deponed, That Bridgeton is a good deal taller than my lord Strathmore was: and that my lord Strathmore wore a fair wig, and Bridgeton wore a black one usually. *Causa scientiæ patet.* And this is truth as he should answer to God.

THO. CRICHTON.
AND. FLETCHER.

Dr. *John Wedderburn*, physician in Dundee, solemnly sworn, purged, examined and interrogate, deponed, That he was called to wait on the earl of Strathmore, when he received the wound upon the 9th of May last; and the deponent saw him next morning early; and upon viewing the wound, it appeared to the deponent to have been given by a three-cornered sword, which had entered about three inches above the navel, and went out in the back on the left side, some inches from the back-bone, and about two inches lower than where it had entered; and the wound was to the deponent's apprehension mortal; and accordingly the earl of Strathmore died of that wound upon Saturday night, about two days after he had received it; and the deponent thereafter saw the defunct opened, whereby it appeared, that the weapon had passed through the caul, the gut-colon, and the *plexus mesentericus*. And deponed, that the defunct told him, that he had an impression, that the person who gave him the wound, had, by applying his belly to the pomel of the sword, pushed it forward upon him. Deponed, that Bridgeton is of a much taller stature, than my lord Strathmore was; and that my lord Strathmore usually wore a fair wig, and Bridgeton a black one. *Causa scientiæ patet.* And this is the truth as he should answer to God.

JOHN WEDDERBURNE.
AND. FLETCHER.

Dr. *Charles Fotheringhame*, physician in Dundee, solemnly sworn, purged, examined and interrogated, deponed conform to Thomas Crichton, the former witness, *in omnibus. Causa scientiæ patet.* And this is the truth as he should answer to God.

CHA. FOTHERINGHAME.
AD. COCKBURNE.

Follows the Witnesses for the Pannel's Exculpation:

Margaret Carnegie, lady Auchterhouse, solemnly sworn, purged, examined and interrogate, *ut supra*, deponed, That on the afternoon of the 9th of May last, the earl of Strathmore, Bridgeton, and Finhaven, were in the deponent's house; she observed no manner of difference betwixt the earl of Strathmore and Finhaven; and that the pannel and the other company drunk my lady Strathmore's health twice over, and the pannel tossed up the glass; during that time Bridgeton was using rough expressions to the pannel, and was taking him by the breast, and very rude to him; and that when a glass of brandy was brought, she desired Bridgeton to take a dram, and he desired it should be given to Finhaven, her brother; but she said no, for it did appear to her he did not want it, for he was then very drunk; and that Bridgeton took her the deponent by the wrist, and squeezed it hard, and said it would be no difficulty to break it; and during the same time, Bridgeton took Finhaven by the arm, and struck his hand down to the table, and said, Will ye not agree to give one of your daughters to Rosehill? And Bridgeton further said, If he was a young man, and if Finhaven refused him one of his daughters, he would maul him, and with that shook his hand over him. And deponed, she never knew nor heard of her brother's being quarrelsome. *Causa scientiæ patet.* And this is the truth as she should answer to God.

MARGARET CARNEGIE.
AD. COCKBURNE.

Dr. *John Kinloch*, physician in Dundee, solemnly sworn, purged, examined and interrogate, *ut supra*, deponed, That on the 9th of May last, after Loure's daughter's burial, the deponent was in clerk Dickson's house in Forfar, in a room with the pannel, who asked the deponent, if he would go into another room, where the earl of Strathmore was, to see his lordship; and accordingly they went into the room where the Earl was, and stayed there about an hour, and drunk several bottles of wine together; and during that time he saw nothing but mutual civilities in the company, without the least appearance of quarrels. *Causa scientiæ patet.* And this is the truth as he should answer to God.

JOHN KINLOCH.
W. CALDERWOOD.

David Denune, sadler, in Canongate, solemnly sworn, purged, examined and interrogate, *ut supra*, deponed, That, in the end of February, or beginning of March last, the deceased Charles earl of Strathmore, and Finhaven the pannel, with another gentleman, whom the deponent did not know, came to the deponent's house, called for a dram, which the deponent served them with himself: and the Earl first drunk to Finhaven and his family, and then Finhaven drunk the earl of Strathmore's health and his family's; and at several other times, when the Earl was not present, the deponent saw and heard Finhaven drink to the said earl of Strathmore's health. Deponed, he has had occasion often to see Finhaven, and be in company with him, and observed him always to be of a good temper, and no ways inclined to quarrels. *Causa scientiæ patet.* And this is the truth as he should answer to God.

DAVID DENUNE.
W. CALDERWOOD.

David Ogilvie, son to sir John Ogilvie of Inverquharrity, solemnly sworn, purged, examined and interrogate, *ut supra*, deponed, That he has had frequent occasions of being in company with the pannel, and has oft-times heard him testify his respect and regard for the late earl of Strathmore, by naming and drinking to his health; and particularly did hear him do so at his own house; in the month of March or April last, when the deponent was visiting him; that

is to say, did hear him drink both to the Earl's health and his countess's. Deponed, That for these three or four years past, he has been intimately acquainted with the pannel, and observed him always to be of a good and peaceable temper; and the character he always heard him get in the country, was, That he was of a peaceable and good temper, and no ways quarrelsome. *Causa scientiæ patet.* And this is the truth as he should answer to God.

DAVID OGILVIE.
DA. ERSKINE.

Mr. *John Martine*, minister of the gospel at Othlo, solemnly sworn, purged, examined and interrogate, *ut supra*, deponed, That he the deponent having had some affair to do with the deceased earl of Strathmore, as one of the heritors within the deponent's parish, on which account the deponent went to wait of his lordship at his house of Glammis, but had the misfortune to miss him; and upon his return, having waited of the pannel, and spoke to him of the affair, telling him how he had missed my lord, and desired that the pannel would fall upon some expedient to bring either his lordship, or some from him, to meet with the rest of the heritors. Upon which the pannel advised the deponent once more to wait of his lordship at Glammis; and for his recommendation and introduction, he would write a letter to the Earl, and acquaint him in it, that he was the bearer. Accordingly the pannel did write a letter to the Earl to the foresaid purpose, which he delivered to the deponent; and with it he the deponent did again go to Glammis, and at that time also had the misfortune to miss his lordship; upon which he the deponent delivered the letter to one Mr. Greenhill, the Earl's servant; and the meeting of the heritors holding upon the Wednesday thereafter, the said Mr. Greenhill came from his lordship, and attended the meeting: and deponed, That the writing of the foresaid letter, and delivering of it, was about the end of March, or beginning of April last. Deponed, That the deponent has for these three years past been intimately acquaint with the pannel; and during the whole course of his acquaintance, he observed him always to be regular in his life, and of a peaceable temper and disposition, which is the character he bears in the country. *Causa scientiæ patet.* And this is the truth as he should answer to God.

JOHN MARTINE.
DA. ERSKINE.

Mr. *James Maxwell*, minister of the gospel at Forfar, solemnly sworn, purged, examined and interrogate, *ut supra*, deponed, That soon after the earl of Strathmore received his wound, the deponent waited of him, and from him he went to the prison and visited the pannel, whom he found in great disorder, and under the impressions of drunkenness, his cloaths being all covered with mire, and his face bemired with dirt; the deponent helped him to take off his clothes, and sent for a coat and some linens of his own to put on, at least the coat was his own, which he helped to put on him, and to wash and clean his face. The deponent spoke to him suitably to the occasion of his visit, both in respect to his drunkenness, and what was published abroad he had committed upon the earl of Strathmore, by giving him a wound; upon hearing whereof, and the deponent further saying, That he had to his great satisfaction heard the earl of Strathmore pray to God to forgive him: upon this the pannel fell into the greatest disorder, tossing himself backwards and forwards upon a table, and hanging his head downwards, cried out, Good God! have I wounded the earl of Strathmore, a person for whom I had great kindness, and against whom I had no design? *Causa scientiæ patet.* And this is the truth as he should answer to God.

JA. MAXWELL.
DA. ERSKINE.

The Lords Justice Clerk and Commissioners of Justiciary, ordained the Assize to inclose instantly, and return their Verdict, in this place, against to-morrow at twelve o'clock, and the haill fifteen to be then present, each under the pain of law, and the pannel to be carried back to prison.

CURIA JUSTICIARIA, S. D. N. Regis, tenta in novo Sessionis Domo Burgi de Edinburgh, tertio Die Mensis Augusti, Millesimo septingentesimo vigesimo octavo, per honorabiles Viros Adamum Cockburne de Ormistoun, Justiciarium Clericum; Dominum Gulielmum Calderwood de Poltoun, Magistrum Davidem Erskine de Dun, Dominum Gualterum Pringle de Newhall, et Magistrum Andream Fletcher de Miltoun, Commissionarios Justiciarie dict. S. D. N. Regis.

Curia legitime affirmata.

Intran'

James Carnegie, of Finhaven, pannel,
Indicted and accused, as in all the former sederunts.

The foregoing persons who passed upon the Assize of the above pannel, returned their Verdict in presence of the said lords, and whereof the tenor follows:

Edinburgh, the 3rd of August, 1728.

The above Assize having inclosed, did choose sir Robert Dickson of Inveresk to be their chancellor, and George Haliburton of Fordel to be their clerk: And having considered the indictment pursued at the instance of Susanna, countess of Strathmore, and Mr. James Lyon, brother-german and nearest of kin to the deceased Charles earl of Strathmore, with concourse, and at the instance of Duncan Forbes, esq. his majesty's advocate, for his highness's interest, against James Carnegie of Finhaven, pannel; the lords justice-clerk and commissioners of justiciary their interlocutor there-

upon, with the witnesses' depositions adduced for proving thereof; with the witnesses' depositions adduced for the pannel's exculpation: They, by plurality of voices, find the pannel Not Guilty. In witness whereof thir presents are subscribed by our said chancellor and clerk, in our names, place, day, month and year of God above-written.

"Ro. Dickson, Chancellor.
"Geo. Halliburton, Clerk."

The Lords Justice-Clerk and Commissioners of Justiciary, having considered the foregoing Verdict of Assize returned against James Carnegie, of Finhaven, pannel: They assoilzied, and hereby assoilzie him simpliciter, and dismissed, and hereby dismiss him from the bar.

Ad. Cockburne.

ABSTRACT OF SOME ACTS OF PARLIAMENT, IN THE VERY WORDS OF THE STATUTES THEMSELVES, REFERRED TO IN THE FOREGOING ARGUMENTS.

James 1, parl. 3, act 51, intitled, "Of forethought Felony and chaud mella;" statutes, "That as soon as any complaint is made to justices, sheriffs, baillies, &c. they shall enquire diligently (i. e.) without onie favour, gif the deed was done upon forethought felony, or throw sudden *chaud mella*: and gif it be found forethought felony—the life and goods of the trespasser to be in the king's will:—and gif the trespass be done of sudden *chaud mella*, the party skaithed shall follow, and the party transgressor defend, after the course of the old laws of the realm."

James 1, parl. 6, act 95, intitled, "The Manslayer suld be pursued until he be put furth of the Realm, or brought again to the Place of the Slaughter;" (the act appointing the method of pursuing manslayers) statutes, "That quhairever he happenis to be takin, that schireffe, stuart, or bailie of the regality, sall send him to the schireffe of the nixt schireffdom, the quhilk sall receive him, and send him to the nixt schireffe, and swafoorth from schireffe to schireffe, quhill he be put to the schireffe of the schire where the deede was done, and there sall the law be ministred to the party: and gif it be forethought felony, he sall die therefore."

James 1, parl. 6, act 95, intitled, "Of Inquisition of forethought Felony to be taken by an Assize;" it statutes, "That the officiars (i. e. the judges ordinary) shall give them the knowledge of an assize, whether it be forethought felony, or suddenly done: and gif it be suddenly done, demain them as the law treats of before:—and gif it be forethought felony,—demain them as law will."

James 3, parl. 5, act 35, intitled, "Of Slauchter, or forethought Felony, of Suddantie, and Flying to Girth." Item, "Because of the eschewing of great slauchter quhich has been right commoun amongst the king's lieges, nowe of late, baith of forethought felony, and of suddantie: and because monie persons commit slauchter upon forethought felony, in truste they sall be defended throw the immunitie of the halie kirk and girth, and passis and remainis in sanctuaries; it is thought expedient in this present parliament for the stanching of the said slauchters in time coming, quhairever slauchter is committed on forethought felony, and the committer of the said slauchter passis and puttis him in girth, for the saftie of his person, the schireffe sall come to the ordinar, in places quhair he lies under his jurisdiction, and in places exempt to the lords maisters of the girth, and let them wit, that sick a man has committed sick a crime, on forethought felony, "tanquam insidiator et per industriam," for quhilk the law grants not, nor leaves not sick persons to joyis the immunities of the kirk. And the schireffe sall require the ordinar to let a knowledge be taken be an assize on 15 days, quhidder it be forethought felony, or not: and if it be founden forethought felony, to be punished after the king's laws: and if it be founden suddantie, to be restorid again to the freedome and immunity of halie kirk and girth."

James 4, parl. 3, act 38, intitled, "Anent Manslayers taken or fugitive;" statutes, "That where any happens to be slain within the realm, the manslayer shall be pursued (in a certain manner), and wherever he happens to be overtane, that the schireffe sall incontinent send him to the nixt schireffe, and so furth, quhill he be put to the schireffe of the schire quhair the deed was done; and there sall justice be incontinent done. And gif it be forethought felony, to die therefore."

James 5, parl. 4, act 23, intitled, "The Maisters of the Girth suld make depute, quha suld deliver Malefactures, that may not bruik the priviledge thereof;" statutes, "That they should be holden in all time comeing, to deliver all committers of slauchter upon forethought felony, that flies to girth, and others trespassers that breaks the same, and may not bruik the priviledge thereof, conform to the common law and the act of parliament made thereupon of before, to the king's officiars, askand and desireand them to underly the law."

Follows the intire act of Charles 2, parl. 1, chap. 22, intitled, "Concerning the several Degrees of casual Homicide."

"Our sovereign lord, with advice and consent of the estates of this present parliament, for removing of all question and doubt that may arise hereafter in criminal pursuits for slaughter; statutes and ordains, That the cases of homicide after following, viz. casual homicide, homicide in lawful defence, and homicide committed upon thieves and robbers breaking houses in the night; or in case of homicide the time of masterful depredation, or in the pursuit of denounced or declared rebels for capital crimes, or of such who assist and defend the

rebels and masterful depredators by arms, and by force oppose the pursuit and apprehending of them, which shall happen to fall out in time coming, nor any of them, shall not be punished by death; and that notwithstanding of any laws or acts of parliament, or any practic made heretofore, or observed in punishing of slaughter: but that the manslayer, in any of the cases aforesaid, be assoilzied from any criminal pursuit, pursued against him for his life, for the said slaughter, before any judge criminal within this kingdom. Providing always, That in the case of homicide casual, and of homicide in defence, notwithstanding that the slayer is by this act free from capital punishment; yet it shall be leisum to the criminal judge, with advice of the council, to fine in his means, to the use of the defunct's wife and bairns, or nearest of kin, or to imprison him. And his majesty, with advice foresaid declares, that all decisions given conform to this act, since the 13th of February, 1649 years, shall be as sufficient to secure all parties interested, as if this present act had been of that date: and that all cases to be decided by any judges of this kingdom, in relation to casual homicide in defence, committed at any time heretofore, shall be decided as is above expressed."

470. The Case of Edmund Curll,* Bookseller, in the King's-Bench, for publishing a Libel: 1 George II. A. D. 1727.

Mich. Term. 1 Geo. 2.

Dominus Rex *v.* Edmund Curll.†

Information exhibited by the Attorney General against the Defendant, Edmund Curll, for that he "existens homo iniquus et sceleratus, ac nequiter machinans et intendens bonos mores subditorum hujus regni corrumpere et eos ad nequitiam inducere, quendam turpem, iniquum et obscœnum libellum, intitulat Venus in a Cloyster, or, The Nun in her Smock, impie et nequiter impressit et publicavit, ac imprimi et publicari causavit," (setting forth the several lewd passages) "in malum exemplum," &c. and of this the defendant was found guilty.

And in Trinity Term last, it was moved in arrest of judgment by Mr. Marsh, that however the defendant may be punishable for this in the Spiritual Court as an offence "contra bonos mores," yet it cannot be a libel for which he is punishable in the Temporal Court. *Libellus* is a diminutive of the word *liber*, and it is *libellus* from its being a book, and not from the matter of its contents. In the Case De Libellis famosis, my lord Coke says, that it must be against the public, or some private person, to be a libel, and I do not remember ever to have heard this opinion contradicted. Whatever tends to corrupt the morals of the people, ought to be censured in the Spiritual Court, to which properly all such causes belong. What their proceedings are I am a stranger to: But for me it is sufficient to say, I do not find any case, wherein they were ever prohibited in such a cause. In the reign of king Charles 2, there was a filthy run of obscene writings, for which we meet with no prosecution in the Temporal Courts; and since these were things not fit to go unpunished, it is to be supposed that my lords the bishops animadverted upon them in their courts. In the case of the Queen *v.* Read, 6 Ann. B. R. there was an information for a libel in writing an obscene book, called, The Fifteen Plagues of a Maidenhead; and after conviction, it was moved in arrest of judgment, that this was not punishable in the Temporal Courts; and the opinion of chief justice Holt was so strong with the objection, that the prosecutor never thought fit to stir it again.

Attorney General contra. I do not observe it is pretended there is any other way of punishing the defendant: for if the Spiritual Court had done it, instances might be given; and it is no argument to say, we meet with no prohibitions: such a way of argument would construe them into all sorts of jurisdictions. What I insist upon is, that this is an offence at common law, as it tends to corrupt the morals of the king's subjects, and is against the peace of the king. Peace includes good order and government, and that peace may be broken in many instances without an actual force. 1. If it be an act against the constitution or civil government. 2. If it be against religion. And, 3. If against morality.

1. Under the first head, fall all the cases of seditious words or writings, 2 Roll. Abr. pl. 2; Vent. 324; 3 Keble 841, and the Case of the Queen *v.* Bedford, Mich. 12 Ann. whose treatise of Hereditary Right was held to be a libel, though it contained no reflection upon any part of the government.

2. It is a libel, if it reflects upon religion, that great basis of civil government and liberty; and it may be both a spiritual and temporal offence, Cro. Jac. 421; 2 Roll. Abr. 78, pl. 2; 1 Vent. 293. 3 Keble 607, 621. In Tremayne's Entries, 226, there is a sentence to have a paper fixed upon the defendant's head, intimating, that he had uttered blasphemous words, tending to the subversion of government.

* Probably the notorious bookseller. As to whom, see the Dunciad. See, also, vol. 15, p. 806.

† Strange's Reports, vol. 2, p. 788. See 1 Barn. 29. See Annett's Case, 1 Blackst. 395, Burn's Ecclesiastical Law, tit. Profaneness, Ecnomus Dialogue 3, p. 112. See, also, East's Pleas of the Crown, c. 1, § 1, and Wilkes's Case for publishing the Essay on Woman.

There is one Hall now in custody on a conviction as for a libel, intituled, 'A sober Reply to the merry Arguments about the Trinity.' And Pasch. 10 Ann. Regina *v.* Clendon, there was a special verdict on a libel about the Trinity, and it was not made a doubt of in that case.

3. As to morality. Destroying the peace of the government; for government is no more than public order, which is morality. My lord chief justice Holt used to say, Christianity is part of the law: And why not morality too? I do not insist that every immoral act is indictable, such as telling a lie, or the like: But if it is destructive of morality in general; if it does, or may, affect all the king's subjects, it then is an offence of a public nature. And upon this distinction it is, that particular acts of fornication are not punishable in the Temporal Courts, and bawdy houses are. In sir Charles Sedley's case * it was said, that this court is the *custos morum* of the king's subjects, 1 Sid. 168, and upon this foundation there have been many prosecutions against the players for obscene plays, though they have had interest enough to get the proceedings stayed before judgment, Tremayne's Entries, 209, 213, 214, 215. Lord Grey's Case, [Vol. 9, p. 126, of this Collection.]—Mich. 10 Will. 3, Rex. *v.* Hill, the defendant was indicted for printing some obscene poems of my lord Rochester's, tending to the corruption of youth; upon which he went abroad, and was outlawed; which he would not have done, if his counsel had thought it no libel. The Spiritual Courts punish only personal spiritual defamation by words; if it is reduced to writing, it is a temporal offence, Salk. 552; Mo. 627, and it is punishable as a libel. My lord Coke, in the case De Libellis famosis, had nothing in view but scandalous, defamatory libels. *Libellus* is not

* Sir Charles Sedley was indicted at common law for several misdemeanors against the king's peace, and which were to the great scandal of Christianity; and the cause was, for that he shewed his naked body in a balcony in Covent Garden to a great multitude of people, and there did such things, and spoke such words, &c. mentioning some particulars of his misbehaviour, as throwing down bottles (pissed in) *vi et armis* among the people, Keble's Reports, vol. 1, p. 620. Fortescue's Reports, 99, 100. And this indictment was openly read to him in court; and the justices told him, that notwithstanding there was not then any Star-chamber, yet they would have him know, that the Court of King's-bench was the *custos morum* of all the king's subjects; and that it was then high time to punish such profane actions, committed against all modesty, which were as frequent, as if not only Christianity, but morality also had been neglected. After he had been kept in court by recognizance from Trinity term to the end of Michaelmas term, the Court required him to take his trial at bar: but being advised, he submitted himself to the Court, and confessed the indictment, 15 Car. 2, 1663. The Michaelmas term following, the Court considered what judgment to give; and inasmuch as he was a gentleman of a very ancient family (in Kent,) and his estate incumbered, (not intending his ruin, but his reformation) they fined him only 2,000 marks, and to be imprisoned a week without bail, and to be of good behaviour for three years, Sid. 168, pl. 29. Digest of the Law, p. 60 and 116. *Former Edition.*

See the Case of Wilkes, in this Collection, *post.*

Wood (Athenæ p. 1100) reports, with evident incorrectness however, the case of sir Charles Sedley, as follows:

"In the month of June, 1663, this our author, sir Charles Sedley, Charles lord Buckhurst (afterwards earl of Middlesex)" [more commonly mentioned by his title of earl of Dorset] "sir Thomas Ogle, &c. were at a cook's house at the sign of the Cock in Bow-street, near Covent Garden, within the liberty of Westminster, and being inflamed with strong liquors, they went into the balcony belonging to that house, and putting down their breeches they excrementized in the street: which being done, Sedley stripped himself naked, and with eloquence preached blasphemy to the people; whereupon a riot being raised, the people became very clamorous, and would have forced the door next the street open; but being hindered, the preacher and his company were pelted into their room, and the windows belonging thereunto were broken. This frolic being soon spread abroad, especially by the fanatical party, who aggravated it to the utmost, by making it the most scandalous thing in nature, and nothing more reproachful to religion than that; the said company were summoned to the court of justice in Westminster-hall, where being indicted of a riot before sir Robert Hyde, lord chief justice of the Common Pleas were all fined, sir Charles being fined five hundred pounds."

After relating the insolent and shameless behaviour of Sedley in court, Wood concludes thus:

"The day for payment being appointed, sir Charles desired Mr. Henry Killegrew, and another gentleman, to apply themselves to his majesty to get it off; but instead of that, they begged the said sum of his majesty, and would not abate sir Charles two-pence of the money." "Mark," exclaims Johnson in his Life of Dorset, "the friendship of the dissolute!"

Sir John Reresby in his Memoirs (A. D. 1675-7) indicates that at that period persons of the highest rank and station were in the habit of begging from the crown the estates of persons accused of forfeitable offences in anticipation of their conviction: and from his account it seems likely, that false accusations of the most atrocious offences were fabricated in the hope of obtaining such forfeitures. The historians and

always to be taken as a technical word; in this case it may stand as an obscene little book. And as to the case of Read,* there was no judgment, but it went off upon the chief justice's

the records of Scotland, bear ample testimony to the prevalence of practices of this sort in that kingdom, during the reigns of Charles the 2d, and James the 2d.

By stat. 21 Jac. cap. 3, it is declared and enacted, That all commissions, grants, &c. theretofore made or granted, of any grant or promise of the benefit, profit or commodity, of any forfeiture, penalty or sum of money, that is or shall be due by any statute before judgment thereupon had, are altogether contrary to the laws of this realm, in no wise to be put in execution. What was said by the judges in the case of penal statutes (Hil. 2 Jac. 7 Co. Rep.) will readily be believed; that in their experience such grants made the more violent and undue proceeding against the subject, to the scandal of justice, and offence of many. 'Therefore,' says lord Coke (3 Inst. 187,) 'such beggars are offenders worthy of severe punishment:' and to "these hunters for blood" he applies the exclamation of Micah, "They all lie in wait for blood, and every man hunteth his brother to death." [Our translation says, with a net.]

* In the case of the Queen against Read, 11 Mod. 142, it was held that a crime that shakes religion (see 1 Hawk. ch. 5,) as profaneness on the stage, [as to this, see stat. 3 Jac. 1, c. 21,] &c. is indictable; but writing an obscene book is not indictable; but punishable only in the Spiritual court.

This case of the Queen *v.* Read (Fortesc. 98,) was an indictment for printing a lascivious and obscene libel, entitled, "The Fifteen Plagues of a Maidenhead." The defendant was tried before lord chief justice Holt, and convicted: and upon motion in arrest of judgment, it appears, that judgment was given by the whole court for the defendant. And by Holt, C. J. "There are ecclesiastical courts: why may not this be punished there? If we have no precedent we cannot punish. Shew me any precedent." Powell, J. "This is for printing bawdy stuff, that reflects on no person: and a libel must be against some particular person or persons, or against the government. It is stuff not fit to be mentioned publicly. If there is no remedy in the Spiritual court, it does not follow there must be a remedy here. There is no law to punish it: I wish there were; but we cannot make law. It indeed tends to the corruption of good manners, but that is not sufficient for us to punish. As to the case of sir Charles Sedley, there was something more in that case than shewing his naked body in the balcony; for that case was *quod vi et armis* he pissed down upon the people's heads." And he cited lady Purbeck's case, which was in the Star-chamber, where they "quashed the indictment because it was for matters of bawdry." Holt. saying, Why don't you go to the Spiritual Court? Which was giving a false reason for that sudden opinion: Now it appears there is no instance of the spiritual court's intermed-

"Who is libelled here? This may be said to be a temptation to incontinence; and therefore why not punishable in the ecclesiastical court? This tends to bawdry, as well as soliciting of chastity; but they do it only to get money."

Lord Fortescue, at the end of his Report, mentions this case of the King and Curll, "which" he says "was an indictment for printing and publishing a libel, called, The Nun in her Smock; which contained several bawdy expressions, but did contain no libel against any person whatsoever: the Court gave judgment against the defendant, but contrary to my opinion; and I quoted this case. And, indeed, I thought it rather to be published, on purpose to expose the Romish priests, the father confessors, and Popish religion."

But since this case of the King *v.* Curll, the Court of King's-bench without hesitation exercises jurisdiction over such publications, and over other offences *contra bonos mores*, which are not attended with breach of the peace.

Upon an attempt (2 Geo. 2,) to move in arrest of judgment in the case of Woolston, who was convicted on four informations, for his blasphemous discourses on the miracles of our Saviour, the Court declared they would not suffer it to be debated, whether to write against Christianity in general, was not an offence punishable in the Temporal courts at common law: it having been settled so to be, in Taylor's case, 1 Vent. 293; 3 Keb. 607, 621; and in the case of the King *v.* Hall (see 1 Str. 416, [419, ed. of 1781-2.]) They desired it might be taken notice of, that they laid their stress upon the word 'general,' and did not intend to include disputes between learned men, upon particular controverted points. 2 Str. 834, [829 ed. of 1781-2.]

In the case of the King against sir Francis Blake Delaval, and others, which was a prosecution for a conspiracy to transfer a female infant apprentice for the purpose of prostitution, lord Mansfield said: "I remember a cause in the Court of Chancery, wherein it appeared, that a man had formerly [qu. formally] assigned his wife over to another man: and lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners. And so is the present case.—"It is true, that many offences of the incontinent kind fall properly under the jurisdiction of the ecclesiastical court, and are appropriated to it. But if you except those appropriated cases, this court [B. R.] is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores*: and upon this ground both sir Charles Sedley and Curll, who had been guilty of offences against good manners, were prosecuted here."

dling, where it is reduced to writing, or in print.

Chief Justice *Raymond*. I think this is a case of very great consequence; though, if it was not for the case of the Queen *v.* Read, I should make no great difficulty in it. Certainly the Spiritual Court has nothing to do with it, if in writing: And if it reflects on religion, virtue, or morality; if it tends to disturb the civil order of society, I think it is a temporal offence. I do not think *libellus* is always to be taken as a technical word. Would not Trover lie "de quodam libello" intituled the New Testament, and does not the Spiritual Court proceed upon a libel?

Fortescue, J. I own this is a great offence; but I know of no law by which we can punish it. Common law is common usage, and where there is no law there can be no transgression. At common law, drunkenness, or cursing and swearing, were not punishable; and yet I do not find the Spiritual Court took notice of them. This is but a general solicitation of chastity, and not indictable. Lady Purbeck's case was for procuring men and women to meet at her house, and held not indictable, unless there had been particular facts to make it a bawdy-house. To make it indictable there should be a breach of the peace, or something tending to it, of which there is nothing in this case. A libel is a technical word at common law; and I must own the case of the Queen *versus* Read sticks with me, for there was a rule to arrest the judgment *nisi*. And in sir Charles Sedley's case there was a force, of throwing out bottles upon the people's heads.

Reynolds, J. It is much to be lamented, if this is not punishable: I agree there may be many instances, where acts of immorality are of spiritual cognizance only; but then those are particular acts, where the prosecution is *pro salute animæ* of the offender, and not where they are of a general immoral tendency; which I take to be a reasonable distinction. Read's case is indeed a case in point: but I confess I should not have been of that opinion. *Libellus* does not *ex vi terminis* import defamation, but is to be governed by the epithet, which is added to it. This is surely worse than sir Charles Sedley's case, who only exposed himself to the people then present, [naked,] who might chuse whether they would look upon him or not; whereas this book goes all over the kingdom. Drunkenness and swearing were punishable in the Spiritual Court, before the acts which made them temporal offences, and in which the jurisdiction of the Spiritual Court is saved.

Probyn, J. inclined this to be punishable at common law, as an offence against the peace, intending to weaken the bonds of civil society, virtue, and morality.

But it being a case of great consequence, it was ordered to stand over for a further argument.

And this term *Page*, J. came into the King's-bench, in the room of Justice Fortescue; It was to have been spoke to by Mr. Solicitor General and myself. But Curll not having attended me in time, I acquainted the Court I was not prepared; and as my want of being ready proceeded from his own neglect, they refused to indulge him to the next term. And in two or three days, they gave it as their unanimous opinion, That this was a temporal offence. They said, it was plain the force used in Sedley's case was but a small ingredient in the judgment of the Court, who fined him 2,000*l.* (Q. marks,) and if the force was all they went upon, there was no occasion to talk of the Court's being *censor morum* of the king's subjects. They said, if Read's case was to be adjudged, they should rule it otherwise: and therefore, in this case, they gave judgment for the king. And the defendant was afterwards set in the pillory, as he well deserved.

This Edmund Curll stood in the pillory at Charing-Cross, but was not pelted, or used ill; for being an artful, cunning (though wicked) fellow, he had contrived to have printed papers dispersed all about Charing-Cross, telling the people, he stood there for vindicating the memory of queen Anne; which had such an effect on the mob, that it would have been dangerous even to have spoken against him: and when he was taken down out of the pillory, the mob carried him off, as it were in triumph, to a neighbouring tavern.

471. The Trial of WILLIAM HALES, for forging* a Promissory Note for 6,400*l.* in the Name of Thomas Gibson, esq. and Partners,† and for publishing the same as a true one, knowing it to be false and counterfeit, at the Session of the Peace, and Oyer and Terminer, for the City of London, held at the Old Bailey, before Mr. Justice Page,‡ and Mr. Baron Carter: 2 GEORGE II. A. D. 1728.

December 9, 1728.

Crier. OYEZ! Oyez! Oyez! All manner of persons, that have any thing to do at this session of Oyer and Terminer, holden for the city of London, and gaol-delivery of Newgate, holden for the city of London, and county of Middlesex, draw near, and give your attendance.—Oyez! You good men of the city of London, summoned to appear here this day, upon the trial between our sovereign lord the king and William Hales, answer to your names, on pain and peril that shall come thereon.

James Seymour, Samuel Cranmer, &c. called.

Clerk of the Arraigns. William Hales, look to your challenges. Samuel Cranmer——

Serj. *Baynes.* My lord, I have a paper delivered to me. There are three worthy persons on this pannel, we desire may be set aside.

Just. *Page.* You know what the law is‖: if Mr. Attorney consent they should be withdrawn, very well.

Serj. *Baynes.* We know there are enough, my lord.

Cl. of Arr. Richard Knollys.

Serj. *Baynes.* He is related to Mr. Gibson.

Serj. *Whitaker.* Prove it.

Baron *Carter.* Pray, how is Mr. Gibson concerned?

Serj. *Darnell.* It is for a note of Mr. Gibson's.

Just. *Page.* I would recommend it to Mr. Attorney. I would have this trial without any colour of unfairness whatsoever; and as Mr. Gibson is concerned, if he be really a-kin, I would advise Mr. Attorney to waive him.

Attorney General, (sir Philip Yorke.) My lord, I am sure it is our desire that this trial should proceed with all the fairness imaginable; therefore, without entering into the question how far Mr. Gibson is concerned, or, if he is, what consequence that may have, I waive this gentleman.

Then the twelve Jurors, who were sworn, were counted, and their names were as follow, viz.

Samuel Cranmer,	John Pott,
William Howard,	Richard Chauncy,
Thomas Swayne,	James Coulter,
Thomas Port,	Harvey Spragge,
Ralph Knox,	Joseph Jackson,
Cornelius Mason,	Robert Knaplock.

Cl. of Arr. Crier, make proclamation.

Crier. If any one can inform, &c.

Cl. of Arr. opened the Indictment, which is as follows, viz.

"London, *ss.* Juratores pro Domino Rege super sacramentum suum præsentant, quod Willielmus Hales, nuper de London, Aurifaber, Anglicè *Goldsmith*, existens persona maloram nominis et famæ, ac conversationis inhonestæ, ac injustè et fraudulenter machinans et intendens quendam Thomam Gibson, necnon quosdam Johannem Jacob et Robertum Jacomb, participes ejusdem Thomæ Gibson, ac diversos alios dicti Domini Regis nunc ligeos et subditos, de magnis denariorum summis fraudulenter et iniquè decipere et defraudare, septimo die Septembris, anno regni Domini Georgii Secundi, nunc Regis Magnæ Britanniæ, &c. secundo, apud London prædict, scilicet, in parochiâ Sancti Dunstani in Occident', in wardâ de Farringdon extra, vi et armis, &c. falso, fraudulenter, et deceptivè fabricavit et contrafecit, et fabricari et contrafieri causavit, quoddam scriptum in verbis et figuris sequentibus, videlicet,

"*August* 27, 1728.

"I promise to pay to George Watson, esq. or bearer, the sum of six thousand four hundred pounds, at demand, the like value received. For myself and partners,

"THO. GIBSON."

"£. 6,400.

* See East's Pl. Cr. ch. 19, ss. 7, 52; see, also, the following cases relative to the transactions which gave rise to this Trial.

† "This Trial was taken in short hand by order of Mr. Gibson."—*Former Edition.*

‡ See New Parl. Hist. vol. 7, p. 691; and Johnson's Lives of Pope, and of Savage, as there cited. See, too, in Tom Jones, (book 8, ch. 11,) Partridge's story about my lord justice Page's trying the man who stole farmer Bridle's horse.

‖ As to this, see the celebrated 'Letter concerning Libels, Warrants, Seizure of Papers,' &c. which has been ascribed to lord chancellor Camden, and also to the first lord Ashburton. See also Junius's Letters.

ad grave damnum præfat' Thomæ Gibson, et prædict' Johannis Jacob et Roberti Jacomb, participum ejusdem Thomæ Gibson, in malum exemplum omnium aliorum in hujusmodi casu delinquentium, ac contra pacem dicti Domini Regis, coron' et dignitat' suas, &c. Et juratores prædicti super sacramentum suum prædictum ulterius præsentant, quod prædictus Willielmus Hales nequiter et deceptivè machinans et intendens præfat' Thomam Gibson, necnon prædict' Johannem Jacob et Robertum Jacomb, participes ejusdem Thomæ, ac diversos alios subditos et ligeos dicti Domini Regis nunc, de magnis denariorum summis fraudulenter et iniquè decipere et defraudare, postea, scilicet prædicto septimo die Septembris, anno secundo supradicto, apud London prædict', scilicet, in parochiâ et wardâ prædict', vi et armis, &c. quoddam scriptum falso fabricatum et contrafactum in verbis et figuris sequentibus, videlicet,

"*August* 27, 1728.

"I promise to pay to George Watson, esq. or bearer, the sum of six thousand four hundred pounds, at demand, the like value received. For myself and partners,

"THO. GIBSON."

£. 6,400.

scienter, illicitè, et fraudulenter produxit et publicavit, et produci et publicari causavit, tanquam verum et legitimum scriptum, (dicto Willielmo Hales adtunc et ibidem benè sciente scriptum ult' mentionat' per ipsum Willielmum Hales sic ut præfertur product' et publicat', falso fabricat' et contrafact' fuisse) ad grave damnum præfat' Thomæ Gibson, et prædict' Johannis Jacob et Roberti Jacomb, participum ejusdem Thomæ, in malum exemplum omnium aliorum in hujusmodi casu delinquentium, ac contra pacem dicti Domini Regis nunc, coron' et dignitat' suas, &c. Et juratores prædicti super sacramentum suum ulterius præsentant, quod prædictus Willielmus Hales machinans et fraudulenter intendens præfat' Thomam Gibson, necnon prædict' Johannem Jacob et Robertum Jacomb, participes ejusdem Thomæ Gibson, ac diversos alios dicti Domini Regis nunc subditos, de magnis denariorum summis fraudulenter et iniquè decipere et defraudare, prædicto septimo die Septembris, anno secundo supradicto, apud London prædict', scilicet, in parochiâ et wardâ prædict', vi et armis, &c. falso, fraudulenter, et deceptivè fabricavit et contrafecit, et fabricari et contrafieri causavit, quoddam scriptum gerens dat' vicesimo septimo die Augusti, anno Domini millesimo septingentesimo vicesimo octavo, in se purportans, quod prædictus Thomas Gibson pro seipso et participibus promisit solvere Georgio Watson, arm', aut latori, summam sex mille quadringent' librarum, super demand', consimili valore recept' ad grave damnum præfat' Thomæ Gibson, et prædict' Johannis Jacob et Roberti Jacomb, participum ejusdem Thomæ Gibson, in malum exemplum omnium aliorum in hujusmodi casu delinquentium, ac contra pacem dicti Domini Regis, coron' et dignitat' suas, &c. Et juratores prædicti super sacramentum suum ulterius præsentant, quod prædictus Willielmus Hales nequiter et deceptivè machinans et intendens præfat' Thomam Gibson, ac prædict' Johannem Jacob et Robertum Jacomb, participes ejusdem Thomæ Gibson, ac diversos alios subditos dicti Domini Regis nunc, fraudulenter et injustè decipere et defraudare de magnis denariorum summis, postea, scilicet, prædicto septimo die Septembris, anno secundo supradicto, apud London prædict', scilicet, in parochiâ et wardâ prædict', vi et armis, &c. quoddam scriptum falso fabricat' et contrafact', gerens dat' vicesimo septimo die Augusti, anno Domini millesimo septingentesimo vicesimo octavo, in se purportans, quod prædictus Thomas Gibson pro seipso et participibus promisit solvere Georgio Watson, Arm', aut latori, summam sex mille quadringent' librarum, super demand', consimili valore recept', scienter, illicitè, et fraudulenter produxit et publicavit, et produci et publicari causavit, tanquam verum et legitimum scriptum, (prefato Willielmo Hales adtunc et ibidem benè sciente scriptum ult' mentionat', per ipsum Willielmum Hales sic ut præfertur product' et publicat', falso fabricat' et contrafact' fuisse) ad grave damnum præfat' Thomæ Gibson, et præfat' Johannis Jacob et Roberti Jacomb, participum ipsius Thomæ Gibson, in malum et perniciosum exemplum omnium aliorum in consimili casu delinquentium, ac contra pacem dicti Domini Regis nunc, coron' et dignitat' suas," &c.

N. B. This Indictment was found under the commission of Oyer and Terminer, and not upon the gaol-delivery.

Cl. of Arr. Upon this indictment the defendant hath been arraigned and pleaded Not Guilty; and for his trial he puts himself upon God and his country, which country you are. Your charge is to inquire, &c.

Mr. *Strange.* May it please your lordship, and you gentlemen of the jury; this is an indictment against William Hales, of London. The indictment sets forth, that he being a person of ill fame and reputation, and intending to deceive and defraud Thomas Gibson, John Jacob, Robert Jacomb, and divers others, did, on the 7th of September, forge and counterfeit, and caused to be forged and counterfeited, a certain note, viz. "August 27, 1728. I promise to pay," &c. This is laid to be to the great damage of the said Thomas Gibson, &c. and to the evil example of others in like case offending, against his majesty's peace, &c. It sets forth, that, from the same evil intentions, he did produce and publish, and caused to be produced and published, a certain note following, viz. "August 27, 1728, I promise to pay," &c. That he published this as a true and lawful writing, knowing the same to be false, forged, and counterfeit. It sets forth, that he forged and counterfeited, and caused to be forged and counterfeited, a certain writing,

dated August 27, 1728, purporting that the aforesaid Thomas Gibson, for himself and partners, promised to pay George Watson, or bearer, 6,400*l.* Gentlemen, the indictment sets forth, That on the same 7th of September, in this city, the said William Hales did produce, and caused to be produced, a writing, which purported that the said Thomas Gibson had promised to pay George Watson, or bearer, 6,400*l.* and published this, knowing it to be forged at the same time. And this is laid to be to the great damage of the said Thomas Gibson, &c. and to the evil example of all others in like case offending. To this indictment he hath pleaded Not Guilty. But if we prove the fact, it becomes your duty to convict him thereof.

Att. Gen. May it please your lordship, and you gentlemen of the jury; I am of counsel in this case for the king. The Charge against the defendant Mr. William Hales, is for forging a note in the name of Mr. Gibson, payable to George Watson, esq. or bearer, for no less a sum than 6,400*l.* and publishing this note as a true one, knowing it to be false and counterfeit: for, though the fact is laid different ways in the indictment, yet it is upon one and the same note, and the difference consists only in the form of alleging it.

This, gentlemen, is the first case of the most extraordinary scene of forgery that hath come under examination in this place, committed in such a manner, and attended with such circumstances, as make it necessary to be prosecuted with the greatest weight and solemnity, for an example and terror to others. All kinds of forgery are crimes of a most pernicious nature, as they tend to weaken and destroy that faith and commerce which ought to be maintained amongst men: but forgery in the case of negociable notes, which have a particular currency given to them by act of parliament, whereby private credit is greatly assisted, and trade carried on, is one of the most dangerous; and, if it should prevail, the consequences, though not easy to be foreseen, would certainly be extensive and destructive. Such is the nature of the offence whereof the prisoner stands accused: but howsoever heinous that may be, his guilt will depend entirely upon the evidence of the fact.

Gentlemen, the advantage taken to commit this forgery was from an act of kindness and civility done to the defendant. He some time ago prevailed with one Mr. Booth, book-keeper to Mr. Gibson, to accommodate him with two covers for letters franked by Mr. Gibson, in order (as he pretended) to send news into the country: a practice which I fear is too common; but I hope this instance will have some effect to make it less frequent. It will appear to you, from several circumstances, that the note in question was made on one of these covers: For, gentlemen, it is a promissory note, subscribed, For myself and partners, Thomas Gibson. The body of the note is all of one hand-writing, not pretended to be Mr. Gibson's. When we come to the subscription, there is a rasure at the end of the word 'for,' which, upon holding the paper against the light is plainly to be seen. The manner of Mr. Gibson's writing being pretty wide and loose, the letter *o* in the word 'for' appears to have been crowded between the other two letters *f* and *r*, and is of a remarkably different character and fresher ink than the others. From hence the manner of making the forgery seems to have been, by rasing out the two *e*'s at the end of the word 'free,' or at least the greatest part of them, and inserting an *o* in the manner I have mentioned, and then adding in the same line, after this word thus made to be 'for,' these other words, 'Myself and partners;' which standing a little above the name, Tho. Gibson, serve as a proper subscription to this note. It will appear likewise, that the stroke at the beginning of the *m* in the word 'my' is of the older kind of ink, and probably was at first part of one of the *e*'s in the word 'free.' There is something observable in the figure and appearance of the paper itself: the old folding, which is most worn, answers to that which probably might have been the fold of a cover of a letter, and the paper is torn off at one side and at the top.

This, gentlemen, being the nature of the writing, and the manner in which it was transformed from the direction of a letter to a note of this value, we shall, in the next place, lay before you the use which was made of it. And, gentlemen, the time pitched upon for this purpose will be material for your consideration. Mr. Gibson was gone to Bath, and it was thought proper to date the note the day before he went. No use was made of it till some time after he was gone, that there might be no room for applying to the person himself. The day, and time of the day, which were chosen to put it off, were Saturday at night; when probably there would be no opportunity of making inquiries till the Monday morning following, and consequently a whole day might be gained. This being the opportunity resolved upon, it will appear that on Saturday the 7th of September, Mr. Hales made use of an instrument, that hath confessed himself to have been drawn in by him, one Thomas Rumsey, a young fellow bred to the sea, who was absolutely under his influence; told him he must go with him into the city, bid him put on a particular suit of clothes, and observing that he had a laced hat upon his head, advised him to leave that behind him, and gave him a plain one. To make him appear still more like a man of business, Mr. Hales, as they went along the Strand, bought him a pocket-book or letter-case. Thence he carried him to Middle-row, and bought him a dark perriwig, bid him put it on, and said, it became him very well. Thus equipped, he took him to John's coffee house in Shire-lane; and when they were there, Rumsey not knowing about what he was to be employed, a porter came in with a letter.

Without the porter's saying one word, Hales asked, If he did not want Rumsey? The porter answered, Yes; and produced a letter directed to Rumsey, which Mr. Hales took, and readily found inclosed in it this note for 6,400*l.* payable to George Watson or bearer. In the letter were two names written with sums against them thus, lady Harriot Elliot 4,300*l.* Sir John Hynde Cotton 2,100*l.* and underneath, 'payable to them or bearer.' These names only being in the letter, Mr. Hales took upon him to order Rumsey to write under them, 'James Moreton, esq. or bearer;' and when this was done, that part of the letter with the names was torn off, and put into the pocket-book (which had been bought for the purpose), together with the note for 6,400*l.* and a Bank-note of 20*l.* and two of 25*l.* each. Then the prisoner gave it to Mr. Rumsey, with directions to carry these notes to the shop of Mr. Snow and Poltock without Temple-bar, and there take their cash-note payable to James Moreton, esq. or bearer, for 70*l.* the produce of the Bank-notes; and in exchange for this forged note, to take one of their notes, payable to the lady Harriot Elliot, or bearer, for 4,300*l.* and another to sir John Hynde Cotton or bearer, for 2,100*l.* The prisoner gave strict instructions to Rumsey, that, if at Mr. Snow's he should be asked where he lived, he should answer, at the upper end of Bond-street; if he should be asked his name, he should say, Thomas Fowler, or any other name besides his true name; that it was indifferent what, so it was not the right name. Rumsey, thus instructed, went immediately to the house of Mr. Snow and Poltock, which Hales took care to shew him. Mr. Poltock took the small Bank-notes, and gave his note for them; but observing the appearance of the note for 6,400*l.* that it was written on a dirty scrap of paper, and the difference of hand-writings in it, would have nothing to do with that. During this time Hales kept at a little distance; and Rumsey returning without success, he directed him to go to Mr. Hoare's, and (as he had concerted in the former instance) to pay in a small sum of money not exceeding 70*l.* and take their note for it, and to exchange the note of 6,400*l.* for their notes. The names of the persons to whom the notes were to be made payable were then to be changed; for the stratagem was, to make use of the names of persons that dealt at the several shops, in order to gain credit to the transaction. Therefore the names of two honourable persons, well known at Mr. Hoare's, were pitched upon; and the new direction which the prisoner gave to Rumsey was, to take one of Mr. Hoare's notes for 4,300*l.* payable to sir Richard Grosvenor or bearer; and another for 2,100*l.* payable to sir John Hynde Cotton or bearer; and there also if he was asked to give in his name, Thomas Fowler. When it was near dark, Rumsey went to Mr. Hoare's, and exactly pursued his orders. They made him out a small note for the cash, and gave such credit to Mr. Gibson's name, as to give him the notes he desired, in lieu of the 6,400*l.* note: all which Mr. Rumsey delivered immediately to Mr. Hales, who waited for him at a fruit-stall not far from the shop.

Gentlemen, Mr. Hales being now possessed of three notes of Mr. Hoare's, one for 70*l.* another for 2,100*l.* and a third for 4,300*l.* the next part of his scheme was to negociate and exchange them for other notes from hand to hand, in order to entangle the affair, and make it difficult to trace out the cheat: therefore his next orders to Rumsey were, to carry the note for 4,300*l.* payable to sir Richard Grosvenor or bearer, to Mr. Brassey's and exchange it for smaller notes. Rumsey went thither that night, and took four smaller notes of Mr. Brassey's, in lieu of Mr. Hoare's, viz. two of 1,000*l.* each, one of 1,200*l.* and another of 1,100*l.* But though these notes of Mr. Brassey's were given out on Saturday Sept. 7th at night, they were made to bear date on Monday the 9th; because, it being late in the evening, the cash-book was made up for that day. These four new notes Mr. Rumsey delivered to Mr. Hales, who waited for him again at a very small distance from Mr. Brassey's-shop.

The next part of the scheme was to change these notes into negociable securities equal to cash, in which there was probably a double view; partly to intricate the affair still farther, and partly for the greater convenience of carrying off the fruits of their iniquity, when that should become necessary: therefore the prisoner sent Rumsey to Mr. John Hals, a broker in Exchange-alley, and directed him to acquaint him, that he came from Mr. Samuel Palmer, in Mansel-street, Goodman's-fields, with orders to buy South-Sea and India bonds to the value of 3,400*l.* against Monday morning following.

Thus the matter rested till Monday the 9th of September: but on the Sunday the prisoner was not wanting in making his preparations. He then appointed one Robert Hall, his taylor, to meet him at Lloyd's coffee-house in Lombard-street, at eight o'clock the next morning, without letting him into the secret of what he was to do. Hall went accordingly, and there found one Samuel Lee waiting for Mr. Hales; an instrument made use of by the prisoner in another transaction, which will one day appear as rank a forgery as this. About nine Hales came, and gave to Hall Mr. Brassey's note for 1,200*l.* directing him at the same time to go and receive 650*l.* in guineas, and have it indorsed off. He told Hall, that if he was asked, he should tell them he lived in the Hay-market, or any where else except the real place of his dwelling, and that his name was John Roberts. So here is another sham name and place of abode. He obeyed these orders, received the money, not in gold, but in three Bank-notes; and when the persons in Mr. Brassey's shop enquired his name, he told them John Roberts. Whilst Hall was in the shop, he observed that Mr. Hales walked by; so jealous was he of his agents, or at

least so vigilant to see how things succeeded. Hall delivered the Bank-notes, together with Mr. Brassey's note, on which the 650*l.* was indorsed off, at Lloyd's coffee-house; and afterwards met him again at Janeway's coffee-house in Cornhill. There Hales returned these Bank-notes to Hall, and ordered him to go to the Bank, and there receive the money upon them in gold. Mr. Hales was still so jealous or impatient, that whilst Hall was at the Bank receiving the money, he took occasion to come in there upon pretence of changing a guinea, and taking no notice of Hall, went away; after which Hall went with him to a tavern, and paid him the 650*l.* which he received at the Bank.

Gentlemen, thus far the design succeeded well. Here are several good notes obtained, and some cash got, without discovery: but the occasion of that will arise out of the part which Rumsey was to act on the Monday morning.

Gentlemen, you observe there are two notes of Mr. Hoare's behind, whereof no account hath been yet given, viz. that of 70*l.* and that of 2,100*l.* payable to sir John Hynde Cotton, to put off which Mr. Rumsey was employed. It will appear, that Mr. Hales kept Rumsey continually with him, and lodged him in his house on Saturday and Sunday; and on Monday morning, when he went into the city, brought Rumsey with him, took care to shew him Mr. Alderman Hankey's shop, and directed him to exchange these two notes for 70*l.* and 2,100*l.* for Mr. Hankey's notes. Rumsey went to the shop, and they having no difficulty about exchanging Mr. Hoare's notes, accepted them, and gave him two of their own, one for 1,100*l.* and another for 1,050*l.* both payable to Samuel Palmer or bearer; and the remaining 20*l.* was paid in money. As to the note for 1,100*l.* the whole was received upon that at Mr. Alderman Hankey's the same day, by a person who called himself Samuel Lane.

Gentlemen, the next part of the transaction relates to the South-Sea and India bonds for 3,400*l.* which had been ordered to be procured by Hals the broker. On Monday morning Rumsey received the money of Mr. Hales, with directions to carry it to Hals, and pay for these bonds. Whilst Rumsey was gone to transact this, it appears that Mr. Hales was upon this occasion also uneasy and impatient, thought Rumsey stayed too long, and sent a porter for him to Hals's office, by the name of Thomas Fowler; and that Rumsey answered to that name, and went along with the porter.

Gentlemen, we shall next produce to you the account made up by Mr. Hals or Mr. Cole his partner, which will appear to have been made out in these feigned names, Samuel Palmer, esq. per Thomas Fowler; whereas no such persons had any thing to do in the transaction, but the whole was negociated by Hales and Rumsey. And it will be proved, that whenever the prisoner sent Rumsey upon any of these errands, he considered the questions which were likely to be asked, and gave him instructions how to make proper answers, and some of them in writing.

While these things were transacting, the accident happened that led to the discovery. About eleven o'clock on Monday morning, Mr. Humphreys, a servant of Mr. Hoare and his partners, who carries out notes and receives money abroad, carried the note for 6,400*l.* to Mr. Gibson's, and, Mr. Phillips the cash-keeper being abroad, left it with Mr. Cramlington, another of the servants, with directions to pay the money upon it to Mr. Bromfield at the Bank, who was to place it to Mr. Hoare's account. When Mr. Phillips came home, he was surprised to find such a note with Mr. Gibson's hand to it; the note not of his own writing, though it is always his practice to write the body of his notes as well as the subscription. And no notice having been given of it by Mr. Gibson, upon this he conceived a suspicion, and resolved not to pay it till he had first spoke to Mr. Jacomb. The note was shewn to Mr. Jacomb, who, upon finding out the rasure, and observing the other circumstances which I at first mentioned to you, immediately suspected it to be a forgery, and took methods for the discovery. He found out, that one of Mr. Hoare's notes had been exchanged for Bank-notes, and traced out the numbers; upon which notice was immediately given at the Bank, that if any of those notes were brought for payment, they should be stopped, and the person secured. It happened soon after this, that Mr. Hales designing to get the remainder of the effects into his pocket, carried Rumsey within sight of the Bank, (who was so ignorant a person, that he asked him whether it was a church) and directed Rumsey to receive money there on two Bank-notes, each for 200*l.* part of the Bank-notes given out by Mr. Brassey; and thereupon the officers of the Bank stopped Rumsey, and enquired into the matter. Mr. Rumsey was first interrogated how he came by these notes; and after much hesitation and difficulty, at last said, he had them from a gentleman that stayed for him at Robin's coffee-house in the Old Jewry. Upon this they sent a constable, and found Mr. Hales there, having in his hand Mr. Brassey's note for 1,100*l.* This note he endeavoured to conceal, but was prevented. They brought him to the Bank, and upon search found about him the very effects which were the whole produce of Mr. Hoare's three notes, except about the sum of which was wanting. He was asked, how he came by them, and by the note signed with Mr. Gibson's name, payable to Watson, with which he procured them. The account he gave was, that he had them from one Mr. Samuel Palmer: but he there declared, that all the effects that he had about him were the produce of this note, and wrote down in a paper how he had disposed of the rest.

Gentlemen, this will appear to you to be the nature of the case; and upon this Mr. Hales

was committed, and Rumsey secured. And, gentlemen, I apprehend, that, though this be a long series of facts, yet it will amount to a clear evidence against the prisoner. No reasonable man can expect proof to be made of the very act of forgery. Such iniquities are deeds of darkness, and those who commit them do not call witnesses to attest the performance: but next to that we have the strongest evidence. What arises out of the note itself is of great weight: the circumstance of the rasure and alterations, which I will not repeat: the body of the note not of Mr. Gibson's writing, whereas it is his constant practice to write the whole note with his own hand, and that too in a different form of expression from the present note: there is no person of the name of George Watson, with whom he hath any dealings. Another circumstance material to be taken into consideration is the immediate exchanging all these effects, without any apparent occasion. One banker's note exchanged for another, Mr. Hoare's, Mr. alderman Hankey's, Mr. Brassey's—all of them persons of great credit—What account can be given, without any reason appearing, why one of these gentlemen's notes should be exchanged for another, but to darken and intricate the affair?

Add to this the consideration of the persons concerned: Mr. Hales, a bankrupt not discharged, employing such agents as I have described to you; himself lurking about in a concealed manner; all these circumstances shew the man was doing a wicked thing, which would not bear the light, nor his appearing in it. But what amounts to a demonstration, is his directing these agents to take upon them feigned names and places, to dress themselves in masquerade, and to take notes in the names of other persons, who were absolute strangers to the transaction.

As this is evidence of the prisoner's publishing a forged note knowingly, it is evidence likewise that he forged it: for, if a person hath a forged note in his custody, and taketh such methods to put it off and give it a currency, it is a strong proof against him of the forgery itself; and properly turns it upon the defendant to give a clear account how he received it, upon what consideration, and in what way of business; more especially in this case, where the note is for so great a sum of money, that nobody can pretend to be at a loss or under any difficulty to shew how they came by it.

Gentlemen, when the witnesses shall have given you an account of these things upon their oaths, I apprehend there can remain no doubt but the charge of forgery against the prisoner is just, and this prosecution necessary.

Call *Philip Booth.* [Who was sworn.]

Solicitor General. (Hon. Mr. Talbot,) Mr. Booth, do you know the prisoner at the bar, Mr. Hales?—*Booth.* Yes, Sir, I do know him.

Sol. Gen. How long have you been acquainted with him?

Booth. Ever since the year 1703.

Sol. Gen. Can you remember the time—how was he brought up at that time?

Booth. I remember him at the shop of sir Stephen Evance several years before their failure.

Sol. Gen. Do you remember any thing of a franked letter?

Booth. About a year and a half ago he came to me, desiring me (Mr. Gibson being a member of parliament, and his other friends out of town), that I would do him the favour to give him two franks. He brought two sheets of paper; I desired Mr. Gibson to frank them, who wrote on them, To Robert Booth, esq. Bristol. Free Tho. Gibson.

Sol. Gen. How did he write his name?

Booth. Tho. Gibson.

Sol. Gen. What did you do with them?

Booth. I gave them to Mr. William Hales.

Sol. Gen. Sir, look on that note. Are you acquainted with the hand of Mr. Gibson? See whether you take any part of the note to be of his hand-writing?—*Booth.* The name is his.

Sol. Gen. Is there any other part of the note which you take to be his hand-writing?

Booth, The *F* I take to be part of the word 'Free'—the *F* I take to be Mr. Gibson's handwriting.

Sol. Gen. What is the *r*? Look carefully upon it.

Booth. The *r* may be Mr. Gibson's; but the *o* seemeth to be crowded in between the *F* and the *r*.

Sol. Gen. Do they seem to be of the same hand, or of a different one?

Booth. Crowded in irregularly.

Sol. Gen. Are they of the same ink?

Booth. I take them to be of a different ink. The *r* is his letter; but I take it there is some alteration: here is a plain rasure, where the letters 'my' are written.

Sol. Gen. What distance from the r?

Booth. The rasure is probably where the two *c*'s stood.

Sol. Gen. The 'my,' and the word following, do you take them to be Mr. Gibson's writing?

Booth. No, Sir.

Sol. Gen. Take notice of the fold.

Booth. This seems to be the fold of a letter.

Sol. Gen. If you take that to be the fold of a letter; Is that the usual place for the folding of a letter?

Booth. There must be some alteration on the left-hand corner.

Sol. Gen. Make your own observations. Look on the top of it; doth that seem the fold of the paper as at first, or cut or torn off from any other paper?

Booth. I believe it is not the original fold of the paper as it is now.

Sol. Gen. Look on that side next me; doth it seem cut or torn off?

Booth. Yes, it is not the original selvedge of the paper.

Sol. Gen. Is the original selvedge of the paper in any other part? Is it cut off, or the original selvedge?

Booth. The original selvedge is not there.

Sol. Gen. Is it cut off?

Booth. I cannot tell; I query, whether cut or torn off.

Sol. Gen. Have you lived with Mr. Gibson long?—*Booth.* Eight years.

Sol. Gen. Have you seen any notes of his giving?—*Booth.* Yes, Sir.

Sol. Gen. What is his common manner of signing notes?

Booth. 'For myself and Co.'

Sol. Gen. Read that note, and give an account to the jury, wherein you think it agrees with his ordinary way of writing notes, and wherein it differs.

Booth. Mr. Gibson generally begins with I promise to pay, and concludes his notes For Self and Co. but never mentions value received.

Just. *Page.* Consider of what avail this is to prove that it is not written by Mr. Gibson, because it is different from the manner of his stile. It is certainly allowed by all not to be a note written by Mr. Gibson.

Sol. Gen. My lord, this is a forgery, the proof whereof depends upon a vast variety of circumstances, and every one of them is corroborating.

Just. *Page.* I submit it, whether it be of any avail or not; the cause will be long enough.

Sol. Gen. My lord, this is one circumstance. We know not what reply they will make, and this is our time to give in our evidence—We hope therefore your lordship will bear with us, and permit us to take our own method.

Just. *Page.* Go on then your own way.

Sol. Gen. We shall ask but one question more; those notes that are signed by Mr. Gibson, of whose hand-writing are they?

Booth. All his own.

Sol. Gen. Did you ever see any promissory note signed by Mr. Gibson, where the body of it was wrote by any other hand?

Booth. Never, to the best of my knowledge.

Sol. Gen. As to Self and Partners, do you ever remember his writing in his notes these words, or always Self and Company?

Booth. Self and Company always.

Sol. Gen. In what part of the note? In a straight line, or under?

Booth. In a straight line.

Sol. Gen. Do you know that he ever signed a promissory note written by any other?

Booth. Never, to my knowledge.

Sol. Gen. How long have you been with him?—*Booth.* Eight years.

Sol. Gen. In what place?

Booth. Book-keeper.

Sol. Gen. Did you see the note when first brought to Mr. Gibson's? Had it the same creases in it?—*Booth.* Yes, Sir.

Sol. Gen. One question more I would ask; Are the letter *o*, and the words following, of the same ink?

Booth. Here seems to be an accidental dash of the pen, as if the hand shook.

Sol. Gen. I apprehend the gentleman mistakes my question: Sir, I ask, whether you take the letter *o* to be of the same ink with the word *my* and the following words? Sir, I desire you will look once more distinctly on it, and tell us whether you apprehend the letter *o* to be of the same ink with the word *my* and the following words?

Booth. There seem to be some fragments of a letter?

Sol. Gen. Might there be the fragments of the letter *e*?

Booth. There are the remains of the letter *e*.

Sol. Gen. Then I ask you, whether these remains of the letter *e*, appear of the same ink with the word *my* and following words?

Booth. No, nothing like it.

Sol. Gen. You have observed (I suppose) his manner of franking—Pray, Is it Free or Frank?

Booth. Free always.

Sol. Gen. One question more; have you observed, in his general way, that the space between the *F* and the *r* is so great? Suppose the *o* was out, would there be more room between the *F* and the *r* than Mr. Gibson usually makes? You seem to be a very sensible person, Sir; Is it farther between the *F* and the *r*, than the distance that Mr. Gibson usually makes?

Booth. I believe that he might make that distance of space, but cannot say that he always doth so; he often writes close.

Sol. Gen. This frank (I think you say) was directed To Mr. Robert Booth, Bristol; I ask you, whether that direction was not written over the words Free Thomas Gibson?

Booth. Yes, it was.

Sol. Gen. What distance was there?

Booth. It was on a large sheet of paper: the direction was very small, being only To Mr. Robert Booth, Bristol; and could not fill up a large space.

Sol. Gen. What distance do you think between the top of the word Free, and the bottom of these words of superscription immediately over it?

Booth. I believe there might be an inch.

Sol. Gen. The question that I ask is, whether, after this direction To Mr. Robert Booth, Bristol, Free Thomas Gibson was not perpendicularly?

Booth. I cannot say on what part of the letter.

Sol. Gen. Was Free Thomas Gibson wrote so much on the side, that it was possible that any other words should be wrote above it?

Booth. I believe that it might be so.

Sol. Gen. Here is a direction To Mr. Robert Booth, Bristol; Where was the word Bristol? Was it towards the left hand, or was it towards the bottom of the superscription?

Booth. I cannot say how much to the bottom; but I know that Mr. Gibson generally wrote loose.

Sol. Gen. Whereabout was the word Free wrote?

Booth. Towards the left-hand corner, and Bristol towards the right-hand corner.

Sol. Gen. I ask one question more; did Mr. Gibson ever give franks, without writing himself the superscription?

Booth. I know not but that sometimes he may.

Mr. *Strange.* I desire he may fold it thus, (producing a sheet of paper which he had folded.) This half sheet as large as you can:—Suppose you see where the name Thomas Gibson is wrote, I enquire whether, when the direction was over it, there was room to tear off such a paper as this, (shewing the note) and have none of the direction? You see the distance from Free Thomas Gibson to the top of the paper; was the folding so large, that there might be the direction torn off, and yet this (the note) remain?

Booth. As I remember, it was a very large sheet of paper, and very largely folded. This I remember the more particularly, because Mr. Hales hath endeavoured the same thing since, and I have some of them by me. I believe the paper was large enough that there might be the direction torn off.

Sol. Gen. Pray, will you look where Mr. Gibson's name is wrote, and tell me whether you apprehend that end is torn or cut?

Booth. This was the torn end, and the other answers exactly.

Mr. *Robert Booth* called and sworn.

Att. Gen. Sir, have you ever had any letter by the post from Mr. William Hales?

R. Booth. No, Sir; I never had any letter from him by the general post.

Att. Gen. Can you recollect that you ever had a letter from any body, franked with the name of Thomas Gibson?

R. Booth. I never had, I am positively sure of that.

Att. Gen. Do you live at Bristol?

R. Booth. Yes, Sir.

Att. Gen. Do you know of any other person there of your name?

R. Booth. None at all.

Att. Gen. Pray, had you ever any letter from Mr. Hales, either franked or otherwise?

R. Booth. No, nor ever any correspondence with him.

Thomas Rumsey called and sworn.

The Note proposed to be read, and read accordingly.

"*August* 27, 1728.

"I promise to pay to George Watson, esq. or bearer, the sum of six thousand four hundred pounds, at demand, the like value received. For myself and partners,

"THO. GIBSON."

"£. 6,400

Then the Note was handed about amongst the jury.

Att. Gen. Now, gentlemen, it is proper for you to take notice of the observations that have been made by the witnesses upon the appearance and view of the note, the size and folding of the paper, the rasure, the difference of the ink, the letter *v* in the word 'For,' and the other letters. I desire that you will look on it, and judge whether the side of the paper next to the name hath been torn off from something else, or is as it was originally. We shall, in the next place, shew the use that was made of this note.——Mr. Rumsey, do you know the defendant, William Hales?

Rumsey. Yes, Sir.

Att. Gen. How long have you known him?

Rumsey. I knew him above a twelve-month agone.

Att. Gen. Did you see him at all in September last?—*Rumsey.* Yes, Sir.

Att. Gen. What trade or business are you of yourself?

Rumsey. I have been at sea ever since six years of age, except when in harbour.

Att. Gen. Well, Sir; What time was it in September that you saw Mr. Hales, and what business did he employ you in?

Rumsey. I saw him every day.

Att. Gen. Did you see him September the 7th?—*Rumsey.* Yes, Sir.

Att. Gen. What day of the week was it?

Rumsey. Saturday.

Att. Gen. What did he say to you?

Rumsey. He bid me go into the city, and to dress me in these clothes.

Att. Gen. What clothes had you on before?

Rumsey. A lightish-coloured coat, with a red waistcoat and breeches.

Att. Gen. Did he say any thing about your hat?

Rumsey. When he spoke to me to go into the city with him, I had then a laced hat on, a new hat, with a broad open lace.

Att. Gen. What did he say to you about it?

Rumsey. He told me, he had rather I should wear a plain one, and asked if I had one: I told him, No: he then desired me to take his own.

Att. Gen. What time of the day was this?

Rumsey. About four or five in the afternoon as near as I can guess.

Att. Gen. Did he tell you on what business you were to go into the city?

Rumsey. No, Sir.

Att. Gen. Whence did you set out?

Rumsey. From his own house in Duke-street, Westminster.

Att. Gen. When you came into the Strand, did you do any thing there?

Rumsey. He went into a shop, and bought me a pocket book. [Produces the pocket-book.]

Att. Gen. Let us see it. When you had bought that, where did you go afterwards?

Rumsey. To Holborn, to a place where they sell perukes.

Att. Gen. Was it Middle Row?

Rumsey. I believe it might be; but I never was there before.

Att. Gen. Did he tell you he would present you with one?—*Rumsey.* Yes, Sir.

Att. Gen. What sor of one was it?

Rumsey. I have it in my pocket. [Pulls out a dark-coloured peruke.]

Att. Gen. Put it on; I do not observe that you wear now a dark peruke. Did you use to wear one?

Rumsey. No, Sir.

Att. Gen. What peruke had you on before, when he made you change it?

Rumsey. This, Sir, that I have here. [A light-coloured peruke.]

Att. Gen. After he had fitted you with a peruke, whither did he carry you?

Rumsey. To John's coffee-house in Shire-lane. He did not tell me whither we were going, nor for what.

Att. Gen. What happened there?

Rumsey. We went into a back room, and had pen and ink brought us. Immediately a porter came in.

Att. Gen. Did the porter speak to you?

Rumsey. No; he asked the porter, if he wanted me? He said, Yes. The porter produced a letter directed to me, and he bid me open it.

Att. Gen. What did you find in it?

Rumsey. I found a note for 6,400*l.* payable to George Watson, esq. or bearer.

Att. Gen. Look on that; tell us whether you believe that to be the note?

Rumsey. Yes, Sir; I take that to be the same note, to the best of my knowledge.

Att. Gen. What else did you find in the letter?

Rumsey. I found written, "Lady Harriet Elliott 4,300*l.* sir John Hynde Cotton 2,100*l.* payable to them or bearer."

Att. Gen. Where was it written?

Rumsey. In the body of the letter.

Att. Gen. Was there any thing written to you in the letter?

Rumsey. No, Sir; I remember only these two names and sums.

Att. Gen. What did he order you to write under these names?

Rumsey. "James Moreton, or bearer."

Att. Gen. After he had bid you write this name, what did he do with the paper?

Rumsey. Tore these names off.

Att. Gen. What did he do with the rest of the letter?—*Rumsey.* I know not.

Att. Gen. When he had torn off these names, together with what you had added, what did he do with that part?

Rumsey. He put it in the pocket-book, with the note of 6,400*l.* and a 40*l.* note and two other notes. He then ordered me to go to Mr. Snow and Pollock's shop, to give them the 40*l.* note and the two other notes, and to take their note, payable to James Moreton, or bearer.

Att. Gen. For what sum?

Rumsey. I cannot tell exactly the sum, but suppose about 70*l.* If I was asked, what Moreton, I was to tell them that he lived at the upper end of Bond-street; but I never knew him. He ordered me to desire for the 6,400*l.* note, their notes for 4,300*l.* payable to lady Harriot Elliott, and 2,100*l.* payable to sir John Hynde Cotton, or bearer.

Att. Gen. What further directions did he give you?

Rumsey. If my name was asked, he bid me say that it was Thomas Fowler, or any other; it was an indifferent thing, and I might make use of any name but my own. He had been so very kind to me, and I had so good an opinion that he designed no ill, that I readily did as he ordered me.

Att. Gen. After he had given you this pocket-book with these notes and instructions, whither did you go?

Rumsey. To Mr. Snow and Pollock's.

Att. Gen. Whither did Mr. Hales go?

Rumsey. A little way to shew me the house.

Att. Gen. What happened at this shop?

Rumsey. I asked for their note for the small notes, which they readily gave me. I then produced the other note, and desired their notes; the gentleman said, he did not care to accept it, because it was not all of Mr. Gibson's own hand-writing.

Att. Gen. Did he mention any other reason?

Rumsey. I remember not.

Att. Gen. Did he ask your name?

Rumsey. I think he did, and I told him Thomas Fowler.

Att. Gen. Did any thing further happen there?—*Rumsey.* No, Sir.

Att. Gen. What did you do then?

Rumsey. I went back; Mr. Hales met me a little way off, on that side of Temple-bar next the shop.

Att. Gen. Had he appointed to meet you there?—*Rumsey.* No, Sir.

Att. Gen. Was it within view of the shop?

Rumsey. Yes, Sir.

Att. Gen. What did you say to him, when you came back?

Rumsey. He asked me what I had got, and I told him; then we went back to John's coffee-house, where I gave him the note; he then bid me write, sir Richard Grosvenor, instead of lady Harriot Elliott.

Att. Gen. On the same paper, or another?

Rumsey. I cannot say.

Att. Gen. Did he bid you strike out the name, "Lady Harriot Elliott?"

Rumsey. No; but write on a plain paper, "To sir Richard Grosvenor 4,300*l.* To sir John Hynde Cotton 2,100*l.* payable to them or bearer."

Att. Gen. After this, what further directions did he give you?

Rumsey. He ordered me to go to Mr. Hoare's in Fleet-street; he went opposite to the shop, and shewed me the shop.

Att. Gen. What time of the afternoon was it?—*Rumsey.* A little before it was dark.

Att. Gen. What o'clock?

Rumsey. Half an hour or three quarters before it was dark.

Att. Gen. What instructions did he give you to observe at that shop?

Rumsey. To receive for this note their notes

for 4,300*l.* to sir Richard Grosvenor, and 2,100*l.* to sir John Hynde Cotton, payable to them or to the bearers.

Att. Gen. Did he give you directions about taking any other note?

Rumsey. I have a notion of some other note, but I cannot say positively what it was, but it did not exceed 70*l.*

Att. Gen. Did he give you any thing in notes or cash?

Rumsey. Much the same as before.

Att. Gen. You say you had a note from Mr. Poltock; did Mr. Hales return that to you?

Rumsey. I cannot say positively; but it was that, or some other notes, not exceeding 70*l.*

Att. Gen. Did he give you any directions as to your own name?

Rumsey. The same as before, Thomas Fowler.

Att. Gen. When you went to this shop, what peruke had you on?

Rumsey. The dark one, and the other in my pocket.

Att. Gen. What passed at Mr. Hoare's shop?

Rumsey. I received their notes, one for 4,300*l.* payable to sir Richard Grosvenor or bearer, the other for 2,100*l.* payable to sir John Hynde Cotton or bearer.

Att. Gen. What did you give for them?

Rumsey. The note of 6,400*l.*

Att. Gen. What for the smaller note?

Rumsey. I cannot tell.

Att. Gen. For what sum was that?

Rumsey. I remember not, but it did not exceed 70*l.*

Att. Gen. Where did you find Mr. Hales?

Rumsey. He told me he would wait for me at a fruit-stall at the end of a court about six doors further. I went thither, and delivered the notes.

Att. Gen. Did you deliver him the notes at the fruit-stall?

Rumsey. I cannot be positive whether there, or at the coffee-house.

Att. Gen. Do you know the court where the fruit-stall was? Was it Mitre-court?

Rumsey. I know not, not being acquainted with the town.

Att. Gen. How far from Mr. Hoare's?

Rumsey. About six doors.

Att. Gen. When you gave him the notes, did you deliver them with the pocket-book, or without?—*Rumsey.* Pocket-book and all.

Att. Gen. Where did you go afterwards?

Rumsey. He took a coach, and bid the coachman drive to the Royal-Exchange.

Att. Gen. Whither did he go when he came there?

Rumsey. He went out of the coach, went a little way with me to Janeway's coffee-house, called for pen, ink, and paper, and bid me write "1,200*l.* 1,100*l.* 1,000*l.* 1,000*l.* to Samuel Palmer or bearer."

Att. Gen. What instructions did he give you about Samuel Palmer?

Rumsey. To say that he lived in Mansel-street, in Goodman's-fields.

Att. Gen. After you had done this, whither did you go next?

Rumsey. Next he carried me to Mr. Woodward's, a banker in Exchange-alley. It was then dark. He bid me desire their notes for these sums, payable to Samuel Palmer or bearer, in lieu of the 4,300*l.* note of Mr. Hoare's.

Att. Gen. What happened there?

Rumsey. They said they could not do it.

Att. Gen. Where did you go next?

Rumsey. I went to him, who was close by the door. He took me to Mr. Brassey's, bade me desire their notes for the same sum, in lieu of Mr. Hoare's note payable to sir Richard Grosvenor. They gave me the notes; they asked me, what Mr. Palmer it was? I said, that he lived in Mansel-street, Goodman's-fields.

Att. Gen. Did you say any thing further of him?

Rumsey. I think not; if I did, it was what Mr. Hales directed me.

Att. Gen. Did they ask your name?

Rumsey. I am not positive; if they did, I told them as elsewhere, Thomas Fowler.

Att. Gen. Whither did you carry the notes?

Rumsey. I carried them to Mr. Hales.

Att. Gen. Where was he?

Rumsey. He was by a shop at the corner of a court; he was in the court, and came to me there. This was a little beyond Mr. Hals's door. He bid me ask the price of South-sea bonds, and ask them, whether they could get 1,000*l.* worth by Monday morning? They said, they believed they could. We then went to Janeway's coffee-house.

Att. Gen. What did he then?

Rumsey. He called for something, paid for it, went to Stocks-market, thence took coach, and went home.

Att. Gen. Where did you go? Did you leave him there?

Rumsey. No, I supped with him.

Att. Gen. Did he make any further appointment with you?

Rumsey. He bid me be ready on Monday morning in the same clothes.

Sol. Gen. Where were you?

Rumsey. I was at his house; he lodged me there.

Sol. Gen. Did any thing else happen on Saturday?—*Rumsey.* No, Sir.

Sol. Gen. Were you to put on the same hat and peruke?

Rumsey. Yes, Sir; and he ordered the man to comb and powder it.

Sol. Gen. On Monday morning did you do as directed?

Rumsey. Yes, and he then told out twenty broad pieces and ten guineas.

Sol. Gen. Those notes that you received at Mr. Brassey's, do you know the date of them?

Rumsey. Yes, Sir; Monday morning, September the 9th,

Sol. Gen. What did you with them?

Rumsey. I delivered them to Mr. Hales.

Sol. Gen. What did you do on Monday morning?

Rumsey. He then walked to Janeway's coffee-house; he did not tell me whither he was going, nor what I was to do.

Sol. Gen. What happened there?

Rumsey. He read the news, bid me call for what I wanted, he would pay for it; I drank two dishes of chocolate.

Sol. Gen. What did you there?

Rumsey. He told me, that it was too soon to go to Mr. Hals's for the bonds, it being then between eight and nine o'clock; so he told me, that he would send me with some notes to Mr. Alderman Hankey's.

Sol. Gen. What directions did he give you?

Rumsey. He went opposite to Mr. Alderman Hankey's.

Sol. Gen. What notes did he give you?

Rumsey. One note of 2,100*l.* another of Mr. Hoare's for 70*l.* payable to Samuel Palmer or bearer.

Sol. Gen. What did you do after you received these directions?

Rumsey. I went to Janeway's coffee-house, and there delivered the notes to him.

Sol. Gen. But first did you not carry them to alderman Hankey's?

Rumsey. I got them changed there, delivered them to Mr. Hales at Janeway's coffee-house, one of 1,050*l.* and another of 1,100*l.* both payable to Samuel Palmer or bearer, and 20*l.* in money. He gave me these again, and the 20*l.* in money.

Sol. Gen. What did you do with the money?

Rumsey. He bid me keep it in my pocket with the rest of the money that I had received of him. He then sent to Mr. Hals's for the bonds.

Sol. Gen. What quantity?

Rumsey. A thousand pounds worth.

Sol. Gen. In whose name did you buy them?

Rumsey. In Mr. Samuel Palmer's.

Sol. Gen. Who directed you to buy them?

Rumsey. Mr. Hales.

Sol. Gen. What name did you take?

Rumsey. Thomas Fowler, as before.

Sol. Gen. What did you do with the bonds?

Rumsey. I delivered them to Mr. Hales; he sent me to see for 2,400*l.* worth more; I came back and told him, that I could get no more than 400*l.* worth more.

Sol. Gen. What then?

Rumsey. He sent me for 2,000*l.* of India bonds, and gave me notes to pay for them all.

Sol. Gen. Do you know what the notes were that he gave you?

Rumsey. I cannot tell; but I believe that they were some of the notes that I had received before.

Sol. Gen. What did you do with them?

Rumsey. I went and bought the bonds. The notes coming to more, they gave me the balance in money; and I desired them to give me a bag, which they did.

Sol. Gen. Was there any account made up by Mr. Hals?

Rumsey. His clerk cast it up on a paper, and gave me a note what they came to.

Sol. Gen. Have you that note by you?

Rumsey. No; I gave it with the bonds to him.

Sol. Gen. What were you directed next?

Rumsey. I told him, that I was to go to Mr. Edward Jasper to receive my pay. He bid me put it off. I told him that I could not. He bid me, when I had received it, to return to him. I went and received it, 35*l.* odd money. I then came to him, and desired him to take the remaining money. He said, that he had not time to reckon it, but bid me come to him at Janeway's. He bid me not go through Fenchurch-street.

Sol. Gen. For what reason?

Rumsey. He did not tell me the reason.

Sol. Gen. Was any shop that you were at there?

Rumsey. Yes, Mr. Alderman Hankey's.

Sol. Gen. Did you observe his directions?

Rumsey. Yes, I came back to Janeway's coffee-house through Leadenhall-street.

Sol. Gen. Was he there?

Rumsey. Not at first, but I stayed for him.

Sol. Gen. What time of the day was it?

Rumsey. About two o'clock, Monday noon.

Sol. Gen. What directions did he give you then?

Rumsey. He bid me dine with him. I thought he was going home directly; but he turned aside to the Bank, which I asked him if it was a church. He told me, it was the Bank. He gave me two notes of 200*l.* each, bidding me, when I had received the money, to come to him at Robin's coffee-house in the Old Jewry. He peeped through the sash-door, and directed me to a gentleman at the left-hand side. I went to him, who directed me to the other side. They bid me stay a little. One of them went out and called a constable, and stopt me.

Sol. Gen. What did they ask you?

Rumsey. I was so confused and surprized, that I could not give a sensible answer.

Sol. Gen. Had you any name given you to go by at the Bank, if asked your name there?

Rumsey. Yes, Sir; at every place I was to say Thomas Fowler.

Sol. Gen. I would have you recollect yourself, whether when you were receiving the money, Mr. Hales came in to do any thing?

Rumsey. No, not at all.

Sol. Gen. Afterwards were you present when Mr. Hales was brought in?

Rumsey. I saw him carried up stairs, but spake not to him.

Sol. Gen. Were you present at his examination?—*Rumsey.* No, Sir.

Sol. Gen. Did you receive any more money than what you have mentioned?

Rumsey. No, Sir, nor knew nothing till he gave me directions.

Sol. Gen. You say, that they seized you

at the Bank; did you acquaint them where the person was that gave you the notes?

Rumsey. I told them at Robin's coffee-house, in the alley near the Bank.

Sol. Gen. Did they go to find him according to your directions?—*Rumsey.* Yes, Sir.

Sol. Gen. Did you see them bring any body back in custody?

Rumsey. They brought him secured, and carried him up stairs.

Sol. Gen. Did you see him?

Rumsey. Yes, Sir.

Sol. Gen. Was that person, that you saw in the room, the same that gave you the bills (that you brought to the Bank) at the coffee-house?—*Rumsey.* Yes, Sir.

Sol. Gen. Pray, will you look on that note? Is that the note that you received of Mr. Hales?

Rumsey. Yes, I take it to be the same note; that was for 6,400*l.* and the name was Gibson; it was payable to George Watson, esq. or bearer.

Serj. *Darnell.* Mr. Rumsey, pray were not you engaged to go a journey somewhere with Mr. Hales?

Rumsey. He told me on Monday morning, that he was about going into the country.

Serj. *Darnell.* Where were you to go?

Rumsey. He told me not where; but asked me to ride out with him, and directed me where to get a pair of boots.

Serj. *Darnell.* On your oath, was not the peruke bought for riding in?

Rumsey. No, Sir.

Serj. *Darnell.* What was your apprehension of these things?

Rumsey. He having been so kind to me, I had a good opinion of him.

Sol. Gen. What of this transaction?

Rumsey. I thought that there was nothing wrong in it.

Serj. *Darnell.* When was it that he told you first of his going into the country?

Rumsey. On Monday.

Serj. *Darnell.* Did he not mention it on Saturday?—*Rumsey.* No, Sir.

Serj. *Darnell.* Did not he mention Harlow?

Rumsey. No, Sir.

Serj. *Darnell.* You say, that this note was sent inclosed to you when at John's coffee-house; were there no names in the letter but those two you mentioned, nor no directions what to do with it?—*Rumsey.* No, Sir.

Serj. *Darnell.* You say, that you have been acquainted with Mr. Hales ever since the 8th of June; between that and September did you transact affairs for him?

Rumsey. No; he desired me once before to write a promissory note, but no name to it.

Serj. *Darnell.* You say, that you lay at Mr. Hales's house on Saturday night September the 7th; did not you lie there the month before?

Rumsey. I lay there from the 8th of June, or thereabouts.

Serj. *Darnell.* Sir, you say, that you went in disguise; did any then know you? What occasion was there for this disguise?

Just. *Page.* A person in this town every body may know; therefore it was proper to go in a disguise that no one might know him in. I find that they would have it thought that these clothes (the red waistcoat and breeches and peruke) were for riding out: when you went first, did you go with them?

Rumsey. Yes, my lord.

Serj. *Darnell.* When did he talk of riding out?

Rumsey. On Monday morning he said, he had business to ride out on Tuesday or Wednesday.

Serj. *Darnell.* When you lay at his house on Saturday or Sunday night, did he bid you be ready on Monday morning, and have on the same clothes?—*Rumsey.* Yes.

Serj. *Whitaker.* Give me leave to propose to the Court a question, to ask the witness, whether he had ever been concerned in negociating bills, or doing such business for any body?

Just. *Page.* He saith, he never did do any thing for Mr. Hales, but this job of these bills, except once writing a promissory note.

Serj. *Whitaker.* My lord, that question was confined to Mr. Hales: but I would desire, that he may be asked the same question in general.

Just. *Page.* No, but he shall not indeed.

Serj. *Whitaker.* My lord, we will now call other witnesses to confirm the several steps that were afterwards taken.

Mr. *Poltock* sworn.

Serj. *Whitaker.* Sir, look on that paper; Have you ever seen that before? Tell us who brought it to you?

Poltock. A young man on a Saturday came to my shop; he said that he had money to pay; he pulled out a Bank note for 50*l.* I apprehended that it might be for some customer. I asked him where the person lived; he told me about Bond-street. I looked on the note, and saw it was signed For Wanly and Company. Afterwards he produced this note; said he, I have another note. I looked upon it wistfully, and told him thereupon, that I would not take it. Why not? (said he.) Because (said I) not wrote by Mr. Gibson. It is (said he) signed by him. I told him that I would not meddle with it. He said, it was late, and he should have a good deal of trouble with it; and was going to shew me some paper to confirm its being Mr. Gibson's hand. I told him, that as I would not receive the note, I would not regard it. He laid before me a paper with two names and sums, lady Elliott's and another name.

Serj. *Whitaker.* Pray, Sir, mind the folds, and see whether or no it is the very same paper.

Poltock. Yes; I told the young man, when he shewed it me, that Mr. Gibson on such a paper as this would not write a note for such a sum; therefore I would not meddle with it.

Serj. *Whitaker.* You saw the witness that was last examined; Is he the same person that brought you the note, or not?

Poltock. If he had the same wig on, I believe I might know him.

Serj. *Whitaker.* Let him put the wig on. (Rumsey puts on the dark wig.)

Poltock. Yes, I verily believe that that is the same person, though I never saw him before nor since. He was a good genteel young man, with a dark wig.

Serj. *Whitaker.* What clothes had he on?

Poltock. I cannot directly say, not knowing.

Sol. Gen. Now we are going to Mr. Hoare's shop.

Mr. *Turner* called and sworn.

Sol. Gen. Mr. Turner, look on that paper; When did you see it first?

Turner. On Saturday evening, September the 7th last.

Sol. Gen. Pray, can you recollect with yourself, who it was that brought it you?

Turner. Sir, I did not see Mr. Rumsey when he came into the shop first.

Mr. *Richard Hoare* called and sworn.

Sol. Gen. Mr. Richard Hoare, pray tell us when you saw that bill first?

Hoare. On the 7th of September last, about 7 o'clock in the evening. That gentleman (as I take it) produced Mr. Snow's note, and a Bank-note of 25*l.* for which I gave him our note for 70*l.* After which he produced this note of Mr. Gibson's hand, and another paper, desiring our notes for that sum. I had not been long in the business, and not knowing Mr. Gibson's hand-writing, called Mr. Turner to transact that affair, after I had given the 70*l.* note.

The Note read:

Sir Richard Grosvenor, bart. 4,300*l.*
Sir John Hynde Cotton, 2,100*l.*

Sol. Gen. Whose hand-writing is this?

Rumsey. It is mine, Sir.

Sol. Gen. Do you remember what you did with that note, or where you delivered it?

Rumsey. At Mr. Hoare's.

Sol. Gen. Mr. Turner, will you give us an account what was done upon the producing that bill?

Turner. Mr. Hoare sent for me. I think there lay upon the counter both the note Mr. Rumsey brought for 6,400*l.* and this little direction. I made these notes payable accordingly, knowing that sir John Hynde Cotton did business at Mr. Hoare's shop.

Sol. Gen. Doth he?

Turner. Yes, Sir, he frequently doth.

Sol. Gen. Produce the three notes given at Mr. Hoare's shop.

Turner. These are the notes (producing the notes) which I gave in exchange for Mr. Gibson's note, and the 70*l.* note Mr. Hoare wrote, and I signed them, and gave them to Mr. Rumsey.

Sol. Gen. You say, these are the notes that you gave in exchange for that note; do you know what became of that bill afterwards?

Turner. After that I had delivered these notes, I had this note (Mr. Gibson's 6,400*l.* note) in exchange, brought into Mr. Hoare's cash, in lieu of the other.

Sol. Gen. Did you send it out?

Turner. Yes, upon Monday morning.

Sol. Gen. Will you give us an account what was done upon this?

Turner. I know nothing farther.

Sol. Gen. These notes which you have produced, can you give an account what became of them, or when they were brought back to Mr. Hoare's?

Turner. I did nothing farther about them.

The Notes read:

"I promise to pay sir John Hynde Cotton, or bearer, two thousand one hundred pounds, on demand, for Mess. Benjamin and Henry Hoare and partner. WILLIAM TURNER."

"*September* 7, 1728.

"I promise to pay to sir Richard Grosvenor, or bearer, four thousand three hundred pounds, on demand, for Mess. Benjamin and Henry Hoare and partner. WILLIAM TURNER."

"*September* 7, 1728.

"I promise to pay James Moreton, esq. or bearer, seventy pounds, on demand, for Mess. Benjamin and Henry Hoare and partner.

"WILLIAM TURNER."

Mr. *George Lee* called and sworn.

Sol. Gen. Where is it that you live?

Lee. At Mr. Brassey's in Lombard-street?

Sol. Gen. Did you ever see that note before? (Mr. Hoare's note for 4,300*l.*)—*Lee.* Yes, Sir.

Sol. Gen. Upon what occasion or when was it?

Lee. It was on Saturday Sept. 7th brought by Mr. Rumsey to Mr. Brassey's in Lombard-street, near seven o'clock in the evening.

Sol. Gen. What passed upon it?

Lee. Being brought there by him, he pulled a paper out of his pocket, desiring four notes payable to Samuel Palmer. I have three of them by me, and an account of the other. One was for 1,200*l.* two for 1,000*l.* each, the other for 1,100*l.*

Sol. Gen. What did you give him them in exchange for?

Lee. Mr. Hoare's note for 4,300*l.*

Sol. Gen. Did you ask who Palmer was?

Lee. He told me that he lived in Mansel-street, in Goodman's-fields. I asked him, whether he was a merchant? He said, that he could not tell. We had a person dealt with us before of that name. I asked, whether it was he? He said, that he could not tell. I enquired at Woodward's, where Mr. Hoare doth business; they said that there had been a person there of the same name. I began to suspect something. I then went to Mr. Hoare's, to inquire whether it was their note; they acquainted me that it was, and shewed me Mr. Gibson's. I said that I believed the name was Mr. Gibson's hand, but not the body of the note.

Sol. Gen. This transaction was on the Saturday, Sept. 7th; how came the bills to be dated the 9th?

Lee. Our accounts were balanced for that day, it being late in the evening; therefore they were dated the 9th.

Sol. Gen. What became of them afterwards?

Lee. They came back again: two of them came the same day, the other the next morning.

Sol. Gen. Who brought them?

Lee. The most of the money was paid to Mr. Hals the broker; there was 650*l.* paid to a person who brought one of the notes in the morning; I believe that it was about ten o'clock. We asked him his name; he said, it was John Roberts. He wanted to have 650*l.* to be wrote off from one of the notes, and wanted the money for it. As I had some reason to suspect on the Saturday night, and he coming so soon on the Monday morning, I asked him whom he came from? He said, Mr. Mansel. I hesitating, he said, the gentleman that it was to; I said, Palmer; he said, Palmer in Mansel-street. I did not know but that there might be some demur on Mr. Hoare's note; therefore, to protract time, I told him that he might receive the money at the Bank. I gave him Bank-notes:

No. 11, payable to Mr. Hankey, 100*l.*
106, payable to Mr. Collett, 50*l.*
131, payable to Mr. Charles Shales 500*l.*
Which together made up 650*l.*

Sol. Gen. You wrote off, 650*l.* Did you deliver the note, when indorsed, to the person that brought it?—*Lee.* Yes, Sir.

Sol. Gen. This was a 1,200*l.* note; How was the other 500*l.* paid?

Lee. The other part was paid off at several payments to Mr. Hals.

Sol. Gen. As you have given an account of that note, can you give an account of the other?

Lee. Two to Mr. Hals, Sir, at several payments.

Sol. Gen. How much was each for?

Lee. A thousand pounds.

Sol. Gen. Well then, of these notes two for 1,000*l.* each have been paid; Hath the 1,100*l.* note been paid?

Lee. Four hundred and twenty pounds have been paid as part of the 1,100*l.* and the rest is out-standing still.

Sol. Gen. Do you remember the form of the person that came to you by the name of Roberts? Is that man the person? (Pointing to Robert Hall.)

Lee. Yes, Sir, I believe that is the person.

Robert Hall called and sworn.

Sol. Gen. Mr. Hall, pray what trade are you of?—*Hall.* A taylor, Sir.

Sol. Gen. Did you ever work for Mr. Hales?

Hall. Yes, Sir, several years.

Sol. Gen. Do you know him?

Hall. Yes, very well, Sir.

Sol. Gen. Had you any conversation with him in September last?—*Hall.* Yes, Sir.

Sol. Gen. Did he send for you?

Hall. He sent his footman for me, September 8th, Sunday night.

Sol. Gen. What message did the footman bring you?

Hall. He came and knocked at the door; my wife opened the door. He desired to speak with me; she said that I was in bed. He came up, opened the curtain, told me he had a message for me, I must be with his master at nine o'clock on Monday morning at Lloyd's coffee-house in Lombard-street; I said, that I must be with Mr. Rumsey at that time to take orders for clothes; he told me, that I should meet Rumsey there. I went to Lloyd's, and walked in the coffee-room. Whilst I was there, there came up one Leigh, who asked me what business I came about? I said, That I could not tell, but waited for 'squire Hales. I asked him what his business was? He said, that he had a letter to meet him there. I drank something there before Mr. Hales came, which was the best part of an hour. He first mentioned something to Leigh; he then asked me to stay one half hour more. Accordingly I sat down. He talked awhile with Leigh. When Leigh was dismissed (whither I cannot tell) he took me up. In the passage he gave me a note, and desired me to go to Mr. Brassey's, and receive 650*l.* upon that note.

Sol. Gen. What note was it?

Hall. About 1,200*l.*

Sol. Gen. What directions did he give you?

Hall. He told me to go to Mr. Brassey's the banker, at the Acorn; he told me to receive 650*l.* on this note; he told me to mind that there was no mistake. If (said he) they offer to pay you silver, give them half a crown to pay it you in gold. He told me that 619 guineas and one shilling would make just 650*l.* I took these notes (the Bank-notes he received at Mr. Brassey's:) he looked them over, and said that it was all very right.

Sol. Gen. Look on that paper: did you ever see that paper before? Is that the note that you delivered to Mr. Brassey?

Hall. Yes, Sir.

Sol. Gen. You say, that you had instructions to receive it in gold: did they pay it in gold?

Hall. No, Sir, three Bank-notes.

Sol. Gen. What was the amount of them?

Hall. Six hundred and fifty pounds.

Sol. Gen. What did you do with them?

Hall. I gave them to Mr. Hales.

Sol. Gen. Did they write upon the note?

Hall. Yes, they discounted this 650*l.*

Sol. Gen. When sent by Mr. Hales, had you instructions what name you should go by?

Hall. Yes, John Roberts.

Sol. Gen. Of what place?

Hall. The Hay-market, or any place where I pleased that way?

Sol. Gen. Did you see him while you were in the shop?

Hall. Yes, I saw him pass by, and turn again.

Sol. Gen. Where was he when you gave him the Bank-notes?

Hall. In the passage in Lloyd's coffee-house.

Sol. Gen. These Bank-notes for 650*l.* which you delivered to Mr. Hales, did you ever see them again afterwards?—*Hall.* Yes, Sir.

Sol. Gen. Upon what occasion?

Hall. He told me, that if I would take a walk under the piazza by the Royal Exchange, he would come to me. Accordingly he came to me, and at the coffee-house (Janeway's coffee-house) gave me them again. He asked me, whether I was ever at the Bank? I told him, that I had been within it, but never received any money there for myself or any body else. He bid me go and receive this in gold, or if I should be offered silver, to do as directed before.

Sol. Gen. What were you to do with it?

Hall. To bring it to him at this coffee-house (Janeway's).

Sol. Gen. Did you go to the Bank?

Hall. I went to one there; he bid me go to another gentleman, and he would sign my bills. I went to him, he signed them; I then went again to the same person, who paid me the money for them.

Sol. Gen. Were they the same bills which you had received at Mr. Brassey's?

Hall. Yes, Sir.

Sol. Gen. Did you receive it in gold or silver?—*Hall.* In gold.

Sol. Gen. Did you see him when you were at the Bank?—*Hall.* Yes, Sir.

Sol. Gen. Whereabouts?

Hall. Within one or two of the tellers whom I received my money of.

Sol. Gen. Did he take any notice of you?

Hall. No, Sir.

Sol. Gen. Nor you of him?

Hall. No, being busy receiving the money.

Sol. Gen. He saw you, did not he?

Hall. Yes, Sir.

Sol. Gen. What did you do with it?

Hall. I took it at the Bank.——As I was going down Grocer's-alley, Mr. William Hales was standing by the alley, we turned into a tavern (the Globe and Sceptre tavern); he rang for the drawer, and called for an half pint of wine. I gave him the money, he counted it over, and we had done.

Sol. Gen. Did he give you any reason why he came into the Bank?

Hall. No; but said, you were a long time at the Bank.

Sol. Gen. Did he offer you any thing for your pains?

Hall. Yes; but I said that I would have nothing from a gentleman that I had served so long. He said, if I would call on him the next day, he would lend me 10*l.* and I should work it out.

Sol. Gen. Why did you go by the name of Roberts?

Hall. I thought I might do any thing for Mr. Hales.

Sol. Gen. Did he give you any reason for it?

Hall. No, Sir.

Mr. *Hankey* called and sworn.

Sol. Gen. Mr. Hankey, will you give an account whether any bills were brought to you, what they were, and by whom brought?

Hankey. Mr. Rumsey (this gentleman here) came to me on Monday morning, September the 9th, with two notes, for which I gave him my notes, payable to Samuel Palmer or bearer, one for 1,100*l.* the other for 1,050*l.* which with 20*l.* amounted to Mr. Hoare's notes of 2,100*l.* and 70*l.*

Sol. Gen. Did you ask him his name?

Hankey. No; but I asked him who Samuel Palmer was, because we had a gentleman of that name that had a drawing account with us, and I thought that this was to be put to his account: but he told me, that it was a gentleman in Mansel-street in Goodman's-fields. When he had done his business, he went out of the shop. He brought a little bit of paper, wherein was written to go to alderman Hankey's and get the two notes figured down 1,100*l.* 1050*l.* and 20*l.* in money.

Sol. Gen. You have looked on Rumsey; is that the very man?

Hankey. Yes, Sir; I was with him, when, having been apprehended at the Bank, he was examined.

Sol. Gen. Do you remember any thing of one Lane's fetching any money?

Hankey. If you will favour me with the notes, I can tell the better. The 1,100*l.* note was hardly dry, when he sent a porter-like fellow, who came to a servant of ours, and desired that he would indorse 550*l.* and give it him in guineas; he did it; he had it, and went out of the shop. I believe that it was not an hour before the same person came again, and said that Mr. Palmer begged pardon for giving us such trouble, he did not know he should so soon have occasion for it, desired that we would give him the remainder in Bank. I said, that we had not just the sum in Bank, but I would give it him in money; he said, then he must go and fetch a bag. He went accordingly, and fetched a bag. We asked his name; he said, that it was Samuel Lane, and that he lived in Marine-square. I gave him 523 guineas and an half, and 6*s.* 6*d.* which completed that note. As to the other note, it had not been written long, but a servant to Mr. Hals, or he himself, came and desired that I would give him a note for 853*l.* 14*s.* 5*d.* payable to him. I indorsed it, and gave him a note for the sum that he would have.

Sol. Gen. There are three notes that complete the sum of 1,050*l.* Do you remember any Bank-bills?

Hankey. I paid none at all.

Sol. Gen. Do you know any thing of the residue being paid? Give an account what you know of it.

Hankey. The remainder was thus paid: 1,100*l.* was paid to Samuel Lane; 1,050*l.* by in-

dorsement for Samuel Palmer, for which the person had a note payable to Mr. John Hals for the same sum; for the remainder of that note, two notes were given, payable to James Hickman.

Sol. Gen. Were you present at the Bank, Sir, when Mr. Hales and Mr. Rumsey were seized?

Hankey. No; but I was there, Sir, when he was examined.

Mr. *Benjamin Cole* called and sworn.

Sol. Gen. Mr. Cole, do you know Mr. Hals?

Cole. I live with him, Sir.

Sol. Gen. Are you his servant, or partner?

Cole. His servant.

Sol. Gen. Do you know any thing of Mr. Rumsey?

Cole. On Saturday September 7th, he came about seven o'clock to me, and enquired the price of South-sea bonds. He said, that he should want a large parcel. I promised to get him them as cheap as I could.

Sol. Gen. What name did he use?

Cole. None till Monday the 9th of September. I then bought ten South-sea bonds of 100*l.* each; I asked him what name they should be entered in? He said, Samuel Palmer in Mansel street, in Goodman's-fields. The amount was 1,058*l.* 14*s.* 4*d.* for which he gave me Mr. Brassey's note for 1,000*l.* and the rest in money.

Sol. Gen. Did you observe the date of that note?—*Cole.* I did not observe the note.

Sol. Gen. Were there any other bonds?

Cole. He said that he should want more. This happening when there were but few came to market, I told him I could not procure him so many as he mentioned. Then he desired as many South Sea bonds as I could get, and the rest India. I procured four more South Sea bonds, and twenty India bonds. He paid me a note of Mr. Brassey's for 1,000*l.* and another note of Mr. Brassey's upon which there remained 550*l.* and one note of Mr. Hankey's for 1,050*l.* which made 2,600*l.* upon which Mr. Hals paid him 41*l.* 2*s.* 3*d.* which made the balance.

Sol. Gen. What name did he take?

Cole. He said that his name was Thomas Fowler, and that he lived with Mr. Palmer.

Sol. Gen. Was there an account drawn up?

Cole. Yes, Sir, this is the abstract of the account.

Debtor, Samuel Palmer, esq.

	£.		
To ten South Sea Bonds -	1,000	0	0
Interest 3 Months, 75 Days	18	4	4
Premium 4*l.* per Cent. - -	40	0	0
Commission - - - - -	0	10	0
	1,058	14	4
To twenty India Bonds - -	2,000	0	0
Interest 5 Months 9 Days -	35	6	0
Premium 4*l.* 19*s.* per Cent. -	99	0	0
Commission - - - - -	1	0	0
	2,135	6	0
To four South Sea Bonds - -	400	0	0
Interest 3 Months, 75 Days -	7	5	9
Premium on 200*l.* at 4*l.* per Cent. - - - - - - -	8	0	0
Ditto on 200*l.* at 4*l.* 1*s.* per Cent. - - - - - - -	8	2	0
Commission - - - - -	0	4	9
	2,558	17	9
To Cash paid Thomas Fowler -	41	2	3
	2,600	0	0

Per Thomas Fowler, Creditor.

Sept. 9th, 1728.

By Brassey's Note - - - -	1,000	0	0
By Bank Note, No. 123 - - -	25	0	0
By Cash received - - - - -	33	14	4
	1,058	14	4
By Hankey's Note - - - -	1,050	0	0
By Brassey's ditto - - - -	1,000	0	0
By Ditto, Part of 1,200*l.* - -	550	0	0
	2,600	0	0

For Mr. John Hals,
Benjamin Cole, jun.

Sol. Gen. How came you to make it up in this manner, since he told you that it was for Samuel Palmer?

Cole. Yes, Sir, he did so; but we always mention also the name of the person that comes to us. This was the particular of the account.

Sol. Gen. Pray, Mr. Cole, do you remember that any body came to enquire for Mr. Rumsey?

Cole. There was a person came and asked for him by the name of Fowler; to the best of my memory, it was the prisoner at the bar. He came and asked Mr. Hals, if he had any thing to do in South Sea bonds.

Sol. Gen. Was this Mr. Hales that asked him this question?—*Cole.* Yes, Sir.

Then Mr. *Lightfoot*, a porter, was called and sworn.

Sol. Gen. Do you remember, Sir, any time in September last, that you were sent to Mr. Hals's office to inquire for Mr. Thomas Fowler?

Lightfoot. Yes, Sir.

Sol. Gen. When?

Lightfoot. September the 9th.

Sol. Gen. What day of the week was it?

Lightfoot. Monday.

Sol. Gen. Who sent you?

Lightfoot. Mr. William Hales.

Sol. Gen. Is that the gentleman?

Lightfoot. Yes, Sir.

Sol. Gen. What was the message that he sent you on?

Lightfoot. He sent me to inquire for Mr. Thomas Fowler, and to tell him that the gentleman wanted him as soon as he could dispatch his business, to come immediately away with me to him.

Sol. Gen. Did you see any body at Hale's that answered the name? Shew him Mr. Rumsey: was that the person?

Lightfoot. Yes, Sir.

Sol. Gen. Did he come with you?

Lightfoot. Yes, Sir, he came with me directly to the piazza under the Royal Exchange.

Sol. Gen. Whom did he meet there?

Lightfoot. Mr. Hales.

Sol. Gen. You had known Mr. Hales before, had you not?

Lightfoot. Yes, Sir, for 20 years: I knew him when he was partner with sir Stephen Evance.

Sol. Gen. And are you sure that that was the young man that answered to the name of Fowler?—*Lightfoot.* Yes, Sir.

Mr. *Humphreys* called and sworn.

Sol. Gen. Let him see the note. Mr. Humphreys, look upon that note; have you seen that note before?—*Humphreys.* Yes, Sir.

Sol. Gen. Upon what occasion?

Humphreys. By direction from Mr. Hoare, I went to receive it September the 9th.

Sol. Gen. Whither did you carry it?

Humphreys. To Mr. Gibson's house. His cashier not being at home, I left it there, desired that the money should be left with Mr. Bromfield, one of the tellers at the Bank, to be placed there to Mr. Hoare's account. I went about one o'clock to see if the money was left there; finding that it was not, I went to Mr. Gibson's. The cashier was at dinner. I got one to go for him, and left word that I should be back in a quarter of an hour. I went to the Royal Exchange, where Mr. Hoare met me. We went to Mr. Brassey's afterwards. We stopped the payment of the two Bank-notes, which we found there had been delivered out. I had been returned not above ten minutes, before we had an account that a person was stopped with the two notes.

Sol. Gen. What is your business?

Humphreys. It is my business to go with Mr. Hoare's notes into the city.

Sol. Gen. When you came the second time to Mr. Gibson's, what answer had you?

Humphreys. None, but that the cashier was gone to dinner.

Sol. Gen. Who was the person that you left the note with?

Humphreys. I do not know the gentleman's name; there were three of them there, who were servants to Mr. Gibson. One of them asked, where it should be left? I thereupon named Mr. Bromfield, one of the the tellers of the Bank.

Mr. *Cramlington* called and sworn.

Sol. Gen. Do you remember that you ever saw that note before?

Cramlington. Yes, Sir.

Sol. Gen. When, and upon what occasion?

Cramlington. This note was brought to Mr. Gibson's office Sept. 9th by Mr. Humphreys, an agent or out-teller to Mr. Hoare. He desired, that when Mr. Phillips (Mr. Gibson's cashier) came in, he would leave a note or money for the same with Mr. Bromfield at the Bank.

Sol. Gen. What became of it?

Cramlington. I put it into Mr. Phillips's seat between the banisters, for him to see when he came in.

Sol. Gen. Are you concerned or employed for Mr. Gibson about book-keeping?

Cramlington. No, Sir.

Mr. *Phillips* called and sworn.

Sol. Gen. Look on that note, Sir: Have you ever seen it before?

Phillips. Yes, Sir, on Monday the 9th of September last. I happened to be at the Bank; and on my return from thence, which was about twelve o'clock, Mr. Harwood, one of the clerks in our office, told me, that Mr. Humphreys (Mr. Hoare's servant) had been there with a note for 6,400*l.* and that I not being at home, he had left it with Mr. Cramlington, desiring that when I returned I would leave a money-ticket for it with Mr. Bromfield, one of the tellers of the Bank, for Humphreys. I asked him, where was the note? He said, that it was left with Mr. Cramlington. I opened my seat door, and saw the note there. I was very much surprised, it being wrote by a strange hand; and knowing, by many years experience, that Mr. Gibson never signed any promissory notes without writing the whole notes. I observed a difference in the note, that the last words, "For myself and partners," were wrote with a nearer resemblance to his hand than the other part of the note. I observed that this note was dated the 27th of August, and that he went to the Bath on the 28th: I had the honour to attend him several days. He concluded his business relating to the office on the 26th: On the 27th he did nothing of that business, but prepared for his journey. I endeavoured to recollect, whether he had any transactions then with any George Watson, to whom it was made payable. I could not remember that he had, nor did I remember that I had ever before heard of the name, nor had I any directions from any of my masters, that there was any such note stood out. I observed also that there was a difference between the stile of this note and Mr. Gibson's: He always writeth, in a straight line, "For myself and Co. Tho. Gibson," never "Partners." And then as to the "value received," he never useth these words. I carried it to Mr. Harwood, whom Mr. Humphreys spoke to. I told him, that I did not like it, it being written in a strange hand; I would not therefore take notice of it. We observed that there was the *F* and *r*, in "For myself and partners," wrote in a different hand. I thought that there might be some wickedness at the bottom; I went therefore myself into Mr. Booth's office; and he and Mr. Phippes being there, I desired

Mr. Phippes to look into the books, and see whether one Mr. Watson had credit for such a sum. Not finding any such thing, I then desired them to look into the kalendars of the ledgers. They looked, and saw that there was no such name there. I said then to Mr. Booth, I have a note for 6,400*l.* which I do not like, and will not pay, without enquiring into it, and acquainting Mr. Jacomb (Mr. Jacomb was then above stairs, which I knew not). I told Mr. Booth the circumstances which made me suspect a forgery; Foh! (said he) this is a villainy, a forgery; this looks like one of Hales's tricks. I waited for Mr. Jacomb's coming down; I said to him, Sir, here is a note for 6,400*l.* which I believe to be forged. It is (said Mr. Jacomb) very plain; here is a rasure on a frank. (Mr. Booth having recollected that Mr. Hales some time before had two franks from him, one of which he now suspected to be thus abused, acquainted Mr. Jacomb therewith.) He enquired where we had it? We told him, of Mr. Humphreys, Mr. Hoare's servant. He hereupon took me out with him. We went to the Bank. I staid in the outer office, whilst he went in and acquainted the directors, that such a thing had happened. Mr. Bromfield was sent for, and examined, what the reason was of this direction, that it should be left with him? He said, he could give no reason, but that Mr. Hoare's man used to transact affairs with him; Mr. Jacomb took the note to Mr. Hoare's, and I went to dinner.

Sol. Gen. Is it not usual for Mr. Gibson to enter notes in the book when he makes them out, and give you notice of them?

Phillips. Yes, Sir.

Sol. Gen. Sir, look on the *F* and *r*, and tell us what you think of them?

Phillips. This is certainly Mr. Gibson's *F*, the *o* seems thrust in irregularly, two *e*'s erased, and then follows "Myself and partners."

Sol. Gen. You have seen his franks; doth he make such a distance between the *F* and the *r*? Cast your eye again on it, and see whether the distance between the *F* and *r* be such as is usual in his franking.

Phillips. Much as usual, for I have compared it with some franks, and they are there at the same distance: but I observe the *o* is not of the same letter, but crowded in irregularly: And the *o* is of a blacker ink.

Sol. Gen. Please, Sir, to look on the beginning of the *m*: What observations do you make on that?

Phillips. There is the stroke before the first minim of the *m* that seems of lighter ink.

Sol. Gen. What do you make of that?

Phillips. It seems to me to be the tail or bottom of the *e*.

Mr. *Maddox* called and sworn.

Sol. Gen. I think, Mr. Maddox, you belong to the Bank?—*Maddox.* Yes, Sir.

Sol. Gen. Pray, Sir, will you give us an account, whether any notice was given you to stop any Bank-bills?

Maddox. Mr. Brassey, with Mr. Humphreys, (Mr. Hoare's man) came to the Bank to desire me to stop five notes, with the numbers, dates, and names. I looked and saw that three of them of 350*l.* were already paid. I took the numbers of those not paid, and gave directions to all the tellers, that the minute any brought any of them, they should give me notice. In a little time after I was gone up, I was called down again. Pewtress (one of them) came to me, and told me that two hundred pound notes were brought and demanded. I asked him, who brought them? He told me, that person (Rumsey). I bid him bring a constable, and not come back again till he had brought one. When he had brought one, I charged him with him. I asked him, where he had those notes? He would not tell me where he had them, nor who he was, but was very obstinate. One of the officers of the Bank said, that he knew him, that his name was Rumsey, that he belonged to the Eagle galley. He asked me to let him write a letter; I let him, but would myself appoint the messenger. He wrote a letter, signed it Thomas Fowler, and directed it to Mr. at Robin's coffee-house. I called some officers of the Bank, and directed them to go there with the constable, and see what suspicious person was there. They went into the coffee-house, and enquired of the master of the house what company was there. He said there were only three neighbours, and a fourth person whom he did not know. Whereupon one of the officers of the Bank said, I know that person; that is Mr. Hales. They went and seized him. As they brought him into the Bank, Rumsey said, that is the person that I had the notes of; and would fain have spoke with him. I kept them apart, carried the one up stairs kept the other below. They searched Rumsey, found about him 60*l.* and 25*l.* in different bags, and two notes were stopped below, before they went up to Mr Hales. They found upon him above stairs thirty-six South-Sea and India bonds, a bill of parcels for some of them from Mr. Hals, five hundred and odd pounds in money, a note of Mr. Brassey's, and Mr. Shales's note.

Sol. Gen. What account did Rumsey give of the money found upon him?

Maddox. Thirty five pounds and odd money he said were his own wages. There was about 60*l.* besides, which he said was Mr. Hales's.

Sol. Gen. What notes had Mr. Hales about him?

Maddox. He had a note of Mr. Brassey's of 680*l.* the remainder of the 1,100*l.* note; note of Mr. Shales's of 120*l.* A note of Mr. Thrupp's he had received, and had procured the money for it, as he owned when he came upon his examination.

Sol. Gen. Was his examination in writing or not?

Maddox. It was taken before sir Edward Bellamy. I cannot say whether it was in writing or not.

Sol. Gen. Go on, and give us an account

what Mr. Hales said when examined at the Bank, upon making up the account of what was taken from him.

Maddox. It wanted about 4 or 500*l.* of the 6,400*l.* Mr. Hales having that day (as he said) redeemed two East-India bonds, which he had pawned with Mr. Brassey; and had also taken up a note of Mr. Thrupp's for 400*l.* which he had discounted with Mr. Shales. Among the papers that were found upon Mr. Hales, there was an account of the particular produce of the note.

Sol. Gen. What did Mr. Hales say?

Maddox. He owned that he employed Rumsey; but said, that he himself was employed by one Samuel Palmer, a person whom he had been acquainted with for some months, and that this note was left by him with him to invest in something that would turn to account.

Sol. Gen. Was there any notice then taken of Rumsey's going by a sham name?

Maddox. I remember not that.

Sol. Gen. Was there any one that told Mr. Hales, that he was a man of figures, and desired him therefore to give a more particular account?

Maddox. Yes, Mr. Moses Raper.

Just. *Page.* Is it not enough that Mr. Hales himself owned that what he had was the produce of the 6,400*l.* note? Did not Rumsey manage all this? And came he not from him to the Bank? Hath he not owned it?

Maddox. That was one of the notes found upon Mr. Hales.

Just. *Page.* Had you any discourse with him about the import of it?

Maddox. No, my lord. This paper, one of those found in the pocket of Mr. Hales, contains a particular account of the produce of the 6,400*l.* note, and a little more.

The paper read:

One of Mr. Henry Hoare's for 2,100*l.* payable to sir John Hynde Cotton.
One of 70*l.* payable to James Moreton, esq.
One of 1,000*l.* of Mr. Nathaniel Brassey's.
Bank-notes, N°. 412, for 1,000*l.*
413, for 1,000*l.*
414, for 1,200*l.*
415, for 25*l.*
23*l.* received in Gold.

Att. Gen. In case of forgery, every circumstance is corroborating of the fact, and therefore this was proper to be laid before the jury.

Just. *Page.* Whose writing is that paper?

Maddox. I believe it to be his? I knew him when a goldsmith.

Serj. *Darnell.* Mr. Maddox, I desire to ask you one question. We have a very good opinion of you: Pray, do you not know one Samuel Palmer? Had you never any transactions in your books between Mr. Hales and Samuel Palmer, with relation to a 10,000*l.* note, payable to one Dymer?

Maddox. No, Sir.

Serj. *Darnell.* Nor have you never heard of him?

Maddox. No, only by the paper found on Mr. Hales.

Serj. *Darnell.* Did not the defendant Mr. Hales bring you a draught from Mr. Jacomb upon a particular occasion, payable to Dymer?

Maddox. I cannot remember this. We never had any account, that I know of, with Palmer.

Moses Raper, esq. sworn.

Att. Gen. Mr. Raper, will you look on that paper? Have you seen it before? Do you know upon what occasion it was wrote, and by whom?

Raper. I was at the Bank the 9th of September last. Alderman Bellamy was then examining Mr. William Hales: he was then giving an account of the produce of that note of 6,400*l.* of Mr. Gibson's. He was a long time before he could cast it up. He seemed not much concerned. I said to him, I wonder that you, who are a man of figures, should be so much at a loss: you want about 400*l.* He at length mentioned a note of one Thrupp's. They asked him, where he had that note? He said, of one Palmer of Mansel-street.

Att. Gen. Did you see him write that note?

Raper. I saw him sum up that, as the produce of the 6,400*l.* note.

Att. Gen. Do you remember that the question was asked him, why Rumsey went by the name of Fowler?

Raper. I know no reason that he gave. He was asked the question several times, but gave no answer.

Att. Gen. The evidence, my lord, hath been so extreme long, and every part so well connected, that I shall not trouble your lordship with any observations thereupon. If there be occasion given by the reply, your lordship will then give us leave.

Serj. *Darnell.* My lord, and gentlemen of the jury; I am counsel in this case for Mr. Hales. And indeed, according to the misrepresentation that they have laid him under, he is a very unfortunate person. And really they have given a great deal to lead into a suspicion of the truth of what he is charged with; but we think a good deal of it is owing to the misfortune he lay under. Having been a bankrupt many years, and not having obtained a certificate, it was therefore impossible for him to carry on any thing in his own name; therefore, in the whole course of his traffic for many years, he hath been forced to use fictitious names, and thereby conceal all receipts and payments. And the consequence of his doing otherwise is very obvious. Till he hath obtained a certificate, whatsoever he received in his own name would be subject to the commissioners. Therefore (according to my instructions) Mr. Hales hath concealed his dealings. I am instructed, that he had considerable dealings with one Samuel Palmer,

and that he was indebted to Mr. Hales in the sum mentioned; and having had great transactions for many thousands of pounds, they came to a balance of the account, and Mr. Palmer gave him this note in payment. It is difficult for us to clear things in such affairs as require privacy: but it appears, that he hath transacted great affairs. He hath books, whereby it appeareth that he hath traded for upwards of 300,000*l.* and that he hath traded with this Samuel Palmer for upwards of 10,000*l.* To prove that this is not a forged note, will be extremely difficult; and I think that it matters not any thing to Mr. Hales, whether it be so or not. If it be so, if this note came from Mr. Palmer to Mr. Hales, the forgery falls not upon Mr. Hales. The only thing for us to establish is, that it came from Mr. Palmer to Mr. Hales. They own, that he said, when the thing was recent, that he had it from Palmer. It happens (I suppose from a certainty that the note was a forged note) that Mr. Palmer is gone out of the kingdom. It is impossible therefore to produce him; and if he was here, he could not be a witness. And, if my instructions are true, that Palmer is gone, it leaves Mr. Hales without the assistance of Palmer. Taking it for granted that he hath forged the note, we submit it that Mr. Hales cannot be guilty of the forgery.—Another part of the indictment is, that he hath published this note, knowing it to be forged. If he received it in satisfaction of a debt or demand that he had upon Palmer, that excuseth him. Mr. Palmer being gone, it is only possible for us, first, to establish Mr. Hales's character, then shew that he is a great dealer, and produce his books, in which these things are entered. There are several transactions therein, some many years ago, some later, that will be verified by witnesses. If there be such transactions which we can verify, we leave it to the Court how far that will avail. Under these circumstances we beg leave to submit it to your lordship.

Serj. *Baynes.* My lord, and gentlemen of the jury; I am counsel on the same side. The first thing that lies under consideration is, whether this note was forged by Mr. Hales? That it was a forgery, they have given strong evidence; but the only question is, first, Whether Mr. Hales did forge it? In the next place, whether he published it, knowing it to be forged? These are the two charges laid against him in the indictment. We hope, that upon the evidence we shall give, you will think him clear of what is charged. It is well known, that he hath dealt for as great sums as most in Lombard-street: he had the misfortune afterwards to fail; therefore he was obliged to act in a different way from others. We shall shew that Mr. Gibson himself gave him such credit, that he trusted him with great sums of money, and with receiving rents in Kent. For us to prove a negative, that he did not forge this note, cannot be but by circumstances. In order to charge us, they have gone a great way with circumstances; and the question is, what validity these circumstances will have with you? They lay a stress upon this, that he gave directions to Rumsey to transact these affairs, to change his cloaths, his wig, and to put on another hat. As to that, that will depend a great deal upon the credit of Rumsey's evidence which he gives. Mr. Rumsey appears to be *particeps criminis*: therefore, though I cannot say but this evidence is legal, yet it affects his character and credit: it is not such as if he was an indifferent person. As to the wig, they made a great noise, as if it was bought with a design to impose on persons in that disguise. We shall shew that it was not, but with another design. Mr. Hales and Rumsey had an intention, before Monday, to go into the country. He himself saith, that he only had the fine light wig which he had upon his head. It was very proper at that time of the year, that he should have another wig to travel in. Therefore it seems probable, that it was bought with that view, and not to impose upon persons; since that could not make an alteration in his countenance. As to his acting under a different name, that seems upon this account; Mr. Hales had the misfortune to have a commission of bankruptcy awarded against him; and after long soliciting for a certificate, could not get it: therefore, although he transacted great affairs, all the sums which he negociated were forced to be under feigned and borrowed names; because if his creditors knew that he had such credit, and negociated such affairs, they would be the harder upon him. Therefore there was such a direction given, that Mr. Hales might not be known to be concerned in such an affair.—It is incumbent upon us, first, to give an account how we came by that note: there was one Samuel Palmer indebted to Mr. Hales between 6 and 7,000*l.*; he came to him, offered this note as a security, that he might pay himself upon receiving this money; thereupon Mr. Hales very innocently took the note, not questioning its goodness. Mr. Gibson being a man very well known, Mr. Hales knew that the signing was his hand, though the body of the note was not written by him; and he might be easily imposed upon, and take this as a good note. No wonder that it should be thought so. Though Mr. Pollock suspected this note, because it was not written by Mr. Gibson's own hand; yet it is plain, that at Mr. Hoare's shop, Mr. Turner made no scruple at all to exchange this note, and give other notes for it. Therefore, though they saw that this note was written on a different piece of paper from what a note of such a value used to be, it is plain that Mr. Turner did not think this of so much weight. No wonder, therefore, that Mr. Hales should be so imposed on. The next part of the consideration is, Whether he published this note, knowing it to be forged? For otherwise it is not criminal. Therefore the indictment runs, "Knowing it to be forged." Now, in case that we prove this first part

which is in my brief, and I hope that the witnesses will come up to, the other part will fall to the ground. If he came fairly by it, he cannot be said, knowing it to be forged, to publish it. We shall call our witnesses, and submit it to your lordship.

The indictment my lord, runs, that he, *vi et armis*, viz. 'verbis et figuris sequentibus,' forged this note. Now, my lord, it is not pretended that he forged the name of Mr. Gibson; and therefore, though I do not controvert that he that writes over my name is guilty of forging the whole note, yet not 'verbis et figuris 'sequentibus;' that is, forging the whole note. Therefore being charged herewith, and they admitting that he did write the name Thomas Gibson——

Just. *Page.* Is the name in the indictment?

Serj. *Baynes.* Yes, my lord.

Just. *Page.* Now Thomas Gibson is agreed to be the hand of Mr. Gibson, but not to that note.

Serj. *Baynes.* No, my lord, I admitted that, in stating the objection. I said, that he that writes over my name is guilty of forging such a note, but not 'in verbis et figuris sequenti-'bus;' he is not guilty of forging the name of Thomas Gibson. They have taken upon them to fix that this note was 'verbis et figuris se-'quentibus;' then after the body of the note followeth Thomas Gibson. Now, my lord, we apprehend this is not forged. Though the substance of the note is not Mr. Gibson's hand-writing; yet they own, on the other hand, that the name is the hand-writing of Mr. Gibson. If so, it appears very plainly, that we have not forged this note 'verbis et figuris sequentibus.'

Just. *Page.* Brother, do you rely upon this objection? If you do, I will give you my opinion of it when the whole is finished.

Mr. *Grainger* called and sworn.

Serj. *Darnell.* Sir, are you acquainted with Mr. William Hales?

Grainger. I am not personally acquainted with him, though I have known him by sight many years. I know nothing at all of his dealings.

Serj. *Darnell.* Do you know Mr. Samuel Palmer? Do you know his dealings?

Grain. Yes, Sir, as to Mr. Palmer, I knew him from a child. I married his mother. He was brought up at the East India house, was sent by the East India company into Persia, and lived there many years. Not having the encouragement that he expected, he returned thence, but stayed in Turkey.

Just. *Page.* Were you there with him? After he came home, what did you know of him?

Grainger. As he came home through Turkey——

Just. *Page.* You cannot say that upon oath, since you were not there with him. Did you know him here at London after his return? What did he deal in?

Grainger. I know not of any dealings he had in England.

Just. *Page.* Do you know of any transaction between him and Mr. Hales?

Grainger. He told me——

Just. *Page.* That is nothing. What substance was he of?

Grainger. He had no substance at all, for he was an insolvent man.

Just. *Page.* How long since he was in London?

Grainger. Within a twelvemonth.

Thomas Ayles, esq. called and sworn.

Serj. *Baynes.* You are desired, Sir, to give an account, whether you know the defendant Mr. Hales, how many years you have known him, and what is your opinion of him?

Ayles. I have known him twenty-three years and upwards, when partner with sir Stephen Evance, with whom I kept a considerable cash all that time: I received a great many civilities from Mr. Hales upon several occasions, for which I have always had a good opinion of him.

Serj. *Baynes.* What opinion had you of his character?

Ayles. I took him to be of as good a character as any.

Serj. *Baynes.* Do you know of any considerable sums passing through his hands, during these years that you have known him?

Ayles. Not any since his failure.

Mr. *Lacy.* I beg a word of the same side with the other gentlemen. As to the exception they have made, it will not be contended (I believe) but that they might have laid it otherwise. They might have made it a forgery of the note, though they had set it forth otherwise. Our objection is, Whether "verbis et figuris sequentibus" doth not tie it down to the second part of the note as well as the rest? Another thing is this; they have given an account of the publication at London in Mr. Hoare's shop; whether should not the forgery be fixed in London too?

Just. *Page.* If a forged note be published in two counties, may not the prosecutors lay it in which they will? And the indictment too is in London, if that were any objection.

Mr. *Lacy.* Should not the forgery be local as well as the publication?

Just. *Page.* Yes, if that very act of forgery had been in Middlesex, it ought to have been tried there: But where there is no positive and direct proof of the forgery, but the whole arises from circumstances, some in London, and some in Middlesex, it may be laid in either; or it would be impossible that any artful person should be convicted of forgery; it is but being alone when he commits the fact, and he is safe. And the objection will be as strong in one county as in another; and then, if your doctrine be true, he can be tried no where, which sure is not so. You know a felony may be tried in any county where the goods are

found on the prisoner. As to your other objection, that the indictment is for forging the whole note, whereas Tho. Gibson is Mr. Gibson's own hand-writing; that is extraordinary. Did Mr. Gibson put his name to that bill? No. Suppose, in a less degree, Mr. Gibson had given his note for a less sum, and Mr. Hales had only made it for a greater, would not that have been a forgery of the whole bill? You know it is so of a bond, bank, or other bill, in every day's common experience.

Att. Gen. My lord, this was the same case with Mr. Ward's. There it was adjudged, that Mr. Ward forged a note of the duke of Buckingham's in that form. There was no pretence but that it was (as originally) the duke of Buckingham's note. This objection was then made, but it was over-ruled, That the altering a material part was making it entirely another bill.

Serj. *Darnell.* My lord, we have done with our Defence.

Sol. Gen. My lord, as their defence hath given us no further occasion, we shall not take up your lordship's time with any reply.

Just. *Page.* Gentlemen of the Jury, the prisoner at the bar is indicted for forging a note of Mr. Gibson's of 6,400*l.* and also for publishing this note, knowing it to be forged; upon which two things are proper for your consideration: First, gentlemen, by whom this note was forged, (for it is agreed to be a forged note) whether by the prisoner, or if he was privy to, or concerned in it? And secondly, Whether he is guilty of the publication of it knowing it to be forged? There have been a great number of witnesses examined; and I should have gone over the whole evidence as it was given, but the counsel for the prisoner have eased me of that trouble. Forgery is what concerns every Englishman: As paper-credit is come to that height it is now in, the utmost care ought to be taken to preserve that credit: but still the innocent must not suffer. As to this note's being forged, which hath taken up the most part of the very long time this cause hath been trying, the counsel for the prisoner all agree that it is a forged note; and then it will be to no purpose to sum up that part of the evidence to you. I shall therefore take notice only of such parts as go to prove Mr. Hales himself guilty of this forgery, or of his publication of it knowing it to be forged.

The two first witnesses were Philip and Robert Booth, which may be proper to be taken notice of by and bye.

The third witness was Rumsey, who hath gone through this whole matter, and whose credit hath been supported by others of unquestionable reputation in every material circumstance. He tells you, he was no dealer in this kind of business, but a perfect stranger to it, bred up to the sea: that he hath been acquainted with the prisoner for about a year, and from June, till the time this fact was committed, was very much with him. This note, which was read and shewn to you, bears date the 7th of September last; and the whole management was carried on till the 9th. He saith, that on the 7th of September, which was Saturday, he was at Mr. Hales's, not then knowing that he was to dip his finger for him in so vile a thing. He says, Mr. Hales only then told him, that he must go into the city with him on some business; and that his dress, which was a red waistcoat and breeches, were not proper to appear in, in the affair he had to employ him in; and that he had provided him another (the same which Rumsey has now on). That he was not thought disguised enough, but was in this new dress carried to Holborn, and there had a black peruke bought for him, and a letter-case with papers put in, as a man of business; from whence, after he was equipped in this disguise, he and the prisoner went together to John's coffee-house in Shire-lane.

You will observe, gentlemen, Mr. Hales, as Rumsey swears, did not then discover to him what he was to do; but it was to come out as by accident, which was thus: soon after they came to the coffee-house, a porter with a letter directed to Rumsey, came there, which Mr. Hales immediately took from the porter and opened; which then appeared to be a cover with this note in it, and nothing writ on the cover but, Lady Harriot Elliot 4,300*l.* Sir John Hynde Cotton 2,100*l.* This, Rumsey says, he did not understand; nor did the prisoner give him leave to open the letter, knowing (as Rumsey says) he was unacquainted with the contents of it. But when Mr. Hales had opened the letter, he explained to him what the two names and figures meant, and then told him, he would have him go to Mess. Snow and Poltock's with this note, and get of them two bills, one for lady Harriot Elliott for 4,300*l.* the other for sir John Hynde Cotton for 2,100*l.* and told him, that Mr. Snow's shop was a little without Temple-bar, and did not so much as trust Rumsey out of his sight, but went with him over-against the door. Rumsey goes in, where was Mr. Poltock. The first thing Mr. Rumsey does is to produce a Bank-note of 40*l.* and 10*l.* in money, and to take his note for 50*l.* and then produces the note for 6,400*l.* But Mr. Poltock being a very careful man, and being now called, says, he made much the same observations that I believe you have all made on view of it. He says, it was an odd sort of a bill; that he never had any of Mr. Gibson's bills but of his own hand-writing; and that this was writ on so scanty a piece of paper, that he would not meddle with it.

When Rumsey came out of the shop, he says he found Mr. Hales over-against the door, where he left him, and tells him what ill success he had had, and gives him back the note: whereupon the prisoner and Rumsey go back to the coffee-house, and there the prisoner said, he must try elsewhere, and named Mr. Hoare's. And to give Rumsey credit there,

he was first to pay in at Hoare's 70*l.* that is, Mr. Poltock's note for 50*l.* and 20*l.* in money, and to take Hoare's bill for 70*l.* which was done: that it was then scarce light; and every one knowing Mr. Gibson's very great credit, Mr. Turner, who was then in the shop, without observing much this note, takes it, and gives Rumsey two others. But Mr. Hales had then directed Rumsey not to take the 4,300*l.* note to lady Harriott Elliott, but to sir Richard Grosvenor or bearer, and the 2,100*l.* note to sir John Hynde Cotton or bearer; and that Turner confirms. And Rumsey swears, that the prisoner also shewed him Mr. Hoare's shop, and went with him almost to the door.

When Rumsey had succeeded at Mr. Hoare's, he says, he found the prisoner waiting at a fruit-stall, a small distance from the shop; and there he gave the prisoner the 70*l.* note, and the notes he had received in exchange for Mr. Gibson's. Rumsey swears, he was to get nothing, and that the prisoner had the whole profit. But this would not do the prisoner's business, nor did he rest here. The next thing therefore is to make the best of these notes, and to manage matters so as not to be traced or found out; in which, gentlemen, it was certainly right that the notes should be shifted and changed, divided and subdivided, as much as possible, that no track of them might be seen: and for this, Rumsey says, that he accordingly did go with these notes by the prisoner's direction, from one goldsmith to another; first with the 4,300*l.* note to Mr. Woodward's, who would not meddle with it; thence to Mr. Brassey's, where he changed it for four bills, which he gave to Mr. Hales, who waited for him at a coffee-house.

The notes Rumsey received at Mr. Brassey's the goldsmith's, in exchange for Mr. Hoare's note of 4,300*l.* were four, viz. one for 1,200*l.* one for 1,100*l.* and two for 1,000*l.* each, all made payable to one Samuel Palmer, in whose name Rumsey was instructed by Hales to take these notes, and was himself directed by the prisoner to go by the name of Fowler, which he did; and the prisoner was so watchful, that he waited about Mr. Brassey's shop during all the time Rumsey was there.

Rumsey says, that he went and lay at Mr. Hales's that and the next night; and Mr. Hales bid him be ready on Monday morning in that dress he had then put on: and accordingly on Monday morning he went with him to Janeway's coffee-house, where it was fixed how he should dispose of these notes, and was directed by the prisoner to go to Mr. Alderman Hankey's to make other alterations, and then to the broker's for the bonds he had bespoke, who told him he had only got 1,000*l.* worth, which Rumsey says he had, and afterwards, on his going again, had more.

Gentlemen, I have laid [this] before you, not for your consideration whether Mr. Gibson's note was forged, for that is admitted; but how far Mr. Hales has been concerned an actor in this affair; and to put you in mind (if Rumsey swears true) that he was only the cat's claw, and a mere tool for Hales, and that Hales contrived and ordered every thing.

When all this was so successfully carried through, the prisoner sends Rumsey to the Bank for money, where the matter comes to be discovered in this manner.

Mr. Humphreys swears, that he being Mr. Hoare's out-going clerk to carry bills abroad and receive money, on Monday morning he went to Mr. Gibson's with this note for 6,400*l.* Mr. Gibson, he says, was gone to Bath; and it is remarkable that the note is dated on a day when he transacted no business, and it was not published till he was gone to Bath. Mr. Humphreys says, that he not meeting with Mr. Gibson's cashier, desired the money should be paid into the Bank, and left the note for that purpose. When Mr. Gibson's cashier, Mr. Phillips, came home, he says he had the bill, and looking upon it, saw great reason to suspect it, and thought it not probable Mr. Gibson should draw a bill as that was. He saith, that in all his time he never knew Mr. Gibson sign such a note, nor any note for money, but of his own hand-writing. The size of the paper also, he says, confirmed his suspicion. And sure, gentlemen, paper must be very dear, that a note for such a sum should be wrote on so scanty a piece as you have produced. But the cashier further says, that looking on the note, he found there was a manifest alteration in the writing; Thomas Gibson was Mr. Gibson's hand, but a rasure appeared above it, and the letter *o* in the word 'For' to be intruded in it, and wrote with another ink. You have all seen the note, and to me it seems very plain, that the letter *o* was not originally written in that place. And to give you at least a very probable account, that this word was at first 'Free' and not 'for' and done by Mr. Hales himself, the first witness (Mr. Philip Booth) you will remember swears, that the prisoner some time ago prevailed on him to get of Mr. Gibson two franks on two letters of Mr. Hales, directed to Robert Booth, esq. of Bristol, ; and says, that the foldings of those letters were large enough to tear off the piece produced. And Robert Booth, esq. of Bristol, says, there is no other of that name there, and that he never received any letter franked by Mr. Gibson. And as things of this kind are generally made out by circumstances, it seems no very hard thing to erase the two *e's*, and put the *o* between the *F* and *r*, in such a manner as this has been shewn to you. Gentlemen, Mr. Humphreys goes further, and says, that going to the Bank about noon that day, he found that Mr. Gibson's people had not paid in this sum; at which he says he was pretty much surprized, knowing Mr. Gibson's credit and the carefulness of his people; and went again to Mr. Gibson's to know what the reason was; where he was informed of the discovery, which came out thus. Mr. Hoare's two notes having been

shifted and changed about, as you have heard, some part of the money was at last in Bank-bills, and there Rumsey that Monday morning receives 650*l.* on account of those bills, before the fraud was discovered. But from what appeared at Mr. Gibson's, and the Bank-numbers of the bills delivered being entered, care was taken to examine the receipt book, to see who came for any more money on those bills. And Mr. Maddox tells you, that he having notice given him, ordered the clerk that paid, when any body came with those bills, to seem ready to pay the money, but to delay it till a constable could be fetched: that soon after Rumsey came again, when a constable was fetched, and charged with Rumsey. He at first declined to give any account of his name, or where he had the note; at length he told Mr. Maddox, that if they would let him write a letter, he would send it to the person he had the note from; and accordingly writes a letter to Mr. ——— (with a blank) at Robin's coffee-house, with which the constable, with some of the clerks of the Bank, went immediately to see who was there, and found three persons besides Mr. Hales. The three were neighbours whom the coffee-man knew: Mr. Hales was a stranger to him, but known to the officers of the Bank. When he was seized, Mr. Rumsey was examined again, and owned that that was the very person who sent him with the bill. Upon this Hales was carried up stairs, examined and searched; and not only one of those bills that had been received found upon him, but also an account under Mr. Hales's own hand, that exactly tallied with the account Rumsey gave. And Mr. Maddox says, the prisoner owned the account to be his; and the notes, bonds, broker's account of the bonds bought, and effects found upon him, to be the very produce of the 6,400*l.* So that, gentlemen, you will now take it into your consideration, that the evidence against the prisoner doth not depend singly on the credit of Rumsey, but that he is supported by the number of witnesses you have had, and, in particular by Mr. Maddox, and (which cannot err) the account and produce of the money taken upon him.

Thus, gentlemen, the forgery being admitted, I have laid before you that part of the evidence that principally affects Mr. Hales, and that goes to prove him either guilty of the forgery, or of the publishing of this note, knowing it to be forged. As to the forgery, gentlemen, of this note, by Mr. Hales, I must leave it to you upon the strength of this evidence, which has been very long, and (I doubt not) fully observed by you; and that you will give it its just weight. But as to his publishing it knowing it to be forged, he hath not given you the least colour of evidence to the contrary; and I must tell you, wherever a forged note, or other thing of that nature, is found in any one's hands, it is in law a strong evidence that he is the forger, unless he can give some account of it. But here you are only told, that he had it from Palmer; but not one word of proof. Mr. Hales's counsel have indeed offered to you in his defence, first, that he is a gentleman, and shall not be presumed to be guilty of such an offence; nor, gentlemen, shall any other on a bare presumption. But here, gentlemen, is great strength of evidence that affects him; I do not know that I have met with a stronger proof of the very fact; it is not to be expected. They have also told you, that he was a bankrupt, and could not get a certificate; that the commission of bankruptcy against him was about twenty years ago. They say, that upon that account he was forced to make use of other names in his dealings, and sometimes fictitious ones: that he hath traded for upwards of 300,000*l.* in that time: that Palmer was much employed by him, and entrusted in the carrying on that trade, and being thereby indebted to Mr. Hales in above 7,000*l.* gave him this note in part of payment; which, as to his trading in that manner, I think, is so far from justifying his character, that it is of itself a crime not much less than that with which he stands charged. A man that is a bankrupt, if he afterwards becomes able, ought in honour and conscience to pay his just debts. It is not the first time I have known that done: general Wood was a draper, failed, and paid very little; he went into the army for bread, and proved so gallant a man, that he raised himself to be a general. He, like a good Christian, and a man that did as he would be done by, paid his debts to the full; which if the prisoner had done, it would have given him a much better character. Gentlemen, his counsel have told you he carried on a vast trade for twenty years; but do they tell you that his creditors were the better for it, or were ever paid one penny? No, gentlemen, they did not; and therefore I must leave it to you, whether this was not one continued act of fraud to cheat his creditors; if so, it will affect the prisoner quite another way than his counsel intended it. And though two or three witnesses were called to give evidence of the dealings between Mr. Hales and Mr. Palmer, there was not one thing proved: so that, gentlemen, there seems very little for you to consider. You have a number of concurrent witnesses, that have given you a full and clear account of this whole transaction; that this was contrived, managed, and carried on by the prisoner in a very extraordinary manner, and which there was not, nor could be any reason for, but to avoid being detected of the vile crime he is now charged with; nor can there be any doubt but the whole produce of this note was for his benefit, the account, bonds, and bills, having been found in his pocket.

I must leave it to you, gentlemen: but never was stronger evidence than here is, that Mr. Hales is the author of this. So that I think, gentlemen, if you believe the evidence, the charge, one way or other, is fully brought to the prisoner's door. If you believe him guilty of the forgery, you will then find him guilty generally of the whole indictment: but if you are not satisfied of that, you will only find him

guilty of the other part of the indictment; or, if you can upon this evidence, you may acquit him.

The Jury being withdrawn, after a few minutes stay, brought the prisoner in Guilty of forging the note, and of publishing the same, knowing it to be forged.

The prisoner was a second time indicted upon the statute of 33 H. 8, c. 1, for obtaining money by false tokens. To which indictment the defendant pleaded Not Guilty; and the same evidence, in substance, being offered as upon the former indictment, the jury brought him in Guilty.

It is stated in the former edition, that this full report, taken in short-hand by order of Mr. Gibson, was not obtained in time for insertion near to the other Cases respecting Hales, in which part of the work was therefore substituted a short account of the trial taken from the Session Paper. This full report being now given in its proper place, the abridgement from the Session Paper is omitted. In that abridgement the trial is stated to have been on December 9th, 1728.

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472. The Trial of Mr. WILLIAM HALES, at the Sessions-House in the Old-Bailey, before the Lord Chief-Baron Pengelly, Mr. Justice Reynolds (afterwards Lord Chief-Baron), Sir William Thompson (afterwards Baron), Serjeant Raby, and several of his Majesty's Justices, for Misdemeanors, in forging several Notes and Indorsements in the Name of Samuel Edwards, esq. and publishing the same, knowing them to be forged:* 3 GEORGE II. A. D. 1729.

January 20, 1729.

Cl. of Arr. OYEZ. All manner of persons that have any thing to do at the sessions of Oyer and Terminer, held for the city of London and county of Middlesex, draw near, and give your attendance.

Oyez. You good men of the city of London, summoned to appear here this day, upon the Trial between our sovereign lord the king and William Hales, answer to your names, as called upon, &c.—James Filmer, Samuel Cranmer, Richard Knollys, William Howard, Henry Rogers, Abraham Fowler, Robert Knaplock, Robert Kendal, John Hearne, Thomas Swaine, Thomas Court, Ralph Knox, Thomas Ford, Cornelius Mason, John Pote, Richard Chauncy, James Coulter, Henry Spragg, Joseph Jackson, Henry Ashhurst, John Selidge, William Selwyn, Samuel Craighead, Frederick Staunton, —— Hoskyns, John Jenkyns, Nicholas Beresfield, Edward Tay, Peter Crouch.

Clerk. You shall well and truly try this issue between our sovereign lord the king and William Hales. So help you God.

JURY.

Samuel Cranmer,	Thomas Ford,
Richard Knollys,	Ralph Knox.
William Howard,	Cornelius Mason.
Abraham Fowler,	John Pote,
Robert Knaplock,	Richard Chauncy,
Thomas Swaine,	Joseph Jackson.

* See the preceding and following cases.

Clerk. Oyez. If any man can inform our sovereign lord the king, the king's justices, the king's attorney, the king's serjeants, in this cause between our sovereign lord the king and William Hales, let him now come forth.

Attorney General. (Sir Philip Yorke, afterwards earl of Hardwicke). My lord, we desire that those that were summoned on the jury, who happened not to be sworn, should stay, lest when Mr. Kinnersley is arraigned there should be a defect of jurymen.

It was ordered accordingly by the Court.

Clerk of Arraigns. Gentlemen of the jury, William Hales stands indicted, by the name of William Hales, late of London, goldsmith, for that he being a person of evil fame and conversation, and endeavouring Samuel Edwards, esq. and divers others willingly to defraud, on the 1st of June, in the parish of , had in his custody a certain note, bearing date May 17, 1728, by which note it was supposed, that Mr. Robert Hales† did promise to pay unto

† This Robert Hales, esq. Jan. 27, 1728-9, was tried at the King's-bench bar, Westminster, by a special jury of the county of Middlesex, of which sir George Walters, knt. was foreman, on an indictment for a misdemeanor, for that the said Robert Hales, esq. would have defrauded Samuel Edwards, esq. of 800*l.* by means of a note, drawn by the said Robert Hales, esq. for 800*l.* payable to Samuel Edwards, esq. or order. The paper, on which the said Note was drawn, having the name of the said Samuel Edwards on the back thereof,

Samuel Edwards, esq. the full sum of 800*l.*; and that, on the same note, with an intent to defraud, in the parish aforesaid, he did fraudulently and deceitfully, on the 13th of June, forge and counterfeit a certain indorsement, to the great damage of the said Samuel Edwards, esq. to the breach of his majesty's peace, and the ill example of his majesty's subjects in like case offending.

Mr. *Strange.* May it please your lordship, and you gentlemen of the jury, the prisoner at the bar, William Hales, standeth indicted for forging, counterfeiting, and publishing an indorsement of Samuel Edwards, esq. on a promissory note. The indictment sets forth, that the prisoner did endeavour to deceive and defraud Samuel Edwards, esq. and others his majesty's subjects, having in his possession a certain promissory note, under the hand of Robert Hales, bearing date May 17, 1728, by which note, this Robert Hales is supposed to promise to pay to Samuel Edwards, esq. or order, a certain sum of 800*l.* having this note in his custody, did forge and counterfeit, and caused to be forged and counterfeited, a certain indorsement on the same note, viz.

"Pray pay to for Samuel Edwards."

and having in his custody the said note for 800*l.* payable to Samuel Edwards, esq. on which there was so forged an indorsement in the name of the said Samuel Edwards, esq. did publish it to be a true indorsement, knowing the same to be so forged and counterfeited. This is laid to be to the great damage of the said Samuel Edwards, esq. the breach of his majesty's peace, and the ill example of his majesty's subjects in like case offending. To this the said defendant hath pleaded, Not Guilty.

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only as a frank of a letter to be sent by the post; he, the said Robert Hales, having no dealings with the said Samuel Edwards. The trial lasted seven hours, when the jury brought him in Guilty. But in June following, he pleaded his majesty's most gracious pardon in the Court of King's-bench, for the said offence.

Mich. Term [the year of the King is omitted], Geo. 2.

DOMINUS REX *vers.* ROBERTUM HALES.

"Mr. Attorney moved for a trial at bar on an information filed by him for forgery. But it not being carried on at the expence of the crown, but of a private prosecutor, the Court held, that he must make out the usual requisites to bring it to the bar: so the motion was denied. And, at another day, Mr. Attorney moved, on an authority from the king to prosecute, and it was granted as of right to the king in his own cause. And in Hil. sequen'. it was tried, and the defendant convicted. And in Trin. sequen'. being called to judgment, he produced a pardon, which was allowed; and being only for a misdemeanor, he was not put to go to the bar, or plead it upon his knees." Strange, vol. 2, p. 816. *Former Edition.*

Attorney General. My lord, and gentlemen of the jury, I am counsel on the same side, for my lord the king. The charge against the defendant, William Hales, is for forging an indorsement on a promissory note, to Samuel Edwards, esq. for the sum of 800*l.* The note was made in the name of Robert Hales, for 800*l.*, payable to Samuel Edwards, esq. or order. And, gentlemen, it will appear, that the prisoner hath been guilty both of forging this indorsement, and of publishing it knowing it to be so forged. Gentlemen, this Samuel Edwards, esq. hath a considerable employment in the Exchequer, and is besides a member of the House of Commons, and by that hath the privilege of sending his post-letters free. It was his misfortune to live in the neighbourhood of Mr. Hales, in Duke-street, in Westminster. The opportunity for committing of this fraud seems to have been in this manner: Mr. Hales used frequently to apply to Mr. Edwards, sometimes by himself, sometimes by a servant, for frank covers of letters to send news into the country. The gentleman's good-nature induced him to accommodate him according to his desire with them, supposing that they were only designed to send news to his friends in the country. He having possessed himself of several papers thus subscribed, it will appear, that most probably he made use of one of these franks to commit this forgery. The forgery is an indorsement on a note of Robert Hales. The note is this:

"*May* 17, 1728.

"I promise to pay to Samuel Edwards, esq. or order, eight hundred pounds, three months after date, value received.

"ROBERT HALES."

The Indorsement is thus:

"Pray pay the value of this to , for value received. SAMUEL EDWARDS."

This indorsement being thus wrote over the name Samuel Edwards, gentlemen, it appears by the face of this indorsement, that it is cut off from another writing. There is the tail of a letter, which manifestly appears. The word 'the' is wrote with an abbreviation *y^e*. That will appear to be a word altered from something else. It is difficult to tell whether to read it for *y^e*, or which looks like the truth of the case, for 'ye.' It will appear to be very probable, that the manner of forging was this: having possessed himself of these franks, he cut off a piece of one of these franks proper for a promissory note to be wrote on it, which would have on the back of it the name of Samuel Edwards. When he had done this, he did not think proper to write the note himself, but got another gentleman to write a promissory note on the back of this paper, payable to Samuel Edwards, esq. or order. When this was done, the name Samuel Edwards served for an indorsement on the note. And the alteration seems to have been made in the following manner: there being the word 'free' wrote over the name, there is the letter e

crowded in between the *f* and the *r*. As to the *e*'s after the *r*, the use made of them is this: out of the one of them is drawn the stroke for the letter *y*, the latter *e* stands on one side, or rather above the *y*, and makes *ye*. Having done this, it appears, that here is a promissory note, in the name of Robert Hales, to Samuel Edwards, esq. and here is an indorsement of Mr. Samuel Edwards, by which, by virtue of an act of parliament, which makes these notes current, and the indorser liable, Mr. Edwards is made liable to the payment of this note. The use made of this note is this, to raise money upon it, and stake the credit of Mr. Edwards as a security for this money. Gentlemen, having done this, he applies to Mr. Harle, to borrow of him a certain sum of 450*l*. He knew very well, that his credit would not serve for that purpose, he being a known bankrupt; but desired that Mr. Harle would lend him 450*l*. upon the credit of this note. Mr. Harle knew that Mr. Edwards was a gentleman of great credit: it was a promissory note of 800*l*. payable to Samuel Edwards, esq. and indorsed by Samuel Edwards: Mr. Harle made therefore no doubt of advancing the money desired upon it. The manner of advancing this money was by Mr. Harle's making a draught upon his goldsmiths, Mess. Caswal and Mount, where Mr. Hales received this money. Gentlemen, there will be evidence to charge this upon Mr. Hales. Gentlemen, the occasion of discovering this forgery was this, Mr. Hales having been taken up in September last, on another discovery of forging a note of Mr. Gibson's, for which he was convicted last sessions, that caused a pretty deal of noise. And, gentlemen, such as had notes of Mr. Hales for their security, were alarmed; Mr. Harle heard of this among others, and the thing thus coming to be inquired into, it appeared plain Mr. Edwards had no dealing with them, but it was a forgery and an imposition both upon Mr. Edwards and Mr. Harle. We will call the witnesses, and then we apprehend, that the thing will speak for itself, and will appear a plain forgery.

Serj. *Whitaker*. My lord, there are a pretty many indictments, and Mr. Attorney hath opened the cause: therefore we shall immediately call the witnesses.

Thomas Maddocks sworn.

Serj. *Whitaker*. Whom do you live with?

Maddocks. Mr. Edwards, Sir.

Serj. *Whitaker*. Where doth he live?

Maddocks. In Duke-street, Westminster.

Serj. *Whitaker*. Where doth Mr. William Hales live?

Maddocks. Within a few doors over-against my master's.

Serj. *Whitaker*. Will you give us an account, whether Mr. Hales hath ever sent for any franks to your master?

Maddocks. Yes, Sir, several times.

Serj. *Whitaker*. What manner of franks were they?

Maddocks. There was always some superscription.

Serj. *Whitaker*. Who had them of you?

Maddocks. His man had them of me. They were sent by him to Mr. Hales.

Serj. *Whitaker*. Will you recollect whether there was ever any request to you, that there might be some only free without any superscription?

Maddocks. Yes, Sir; there was in the beginning of July last.

Serj. *Whitaker*. How many were there of them?

Maddocks. There were half a dozen.

Serj. *Whitaker*. What came of them?

Maddocks. I have five of them here. The other, I believe, is torn.

Serj. *Whitaker*. Did you give them to Mr. Edwards?—*Maddocks*. Yes, Sir.

Serj. *Whitaker*. What answer did he give?

Maddocks. He said, when I delivered him that message, that he never did such a thing; and that he would not do them without a superscription.

Serj. *Whitaker*. Were there any afterwards sent without a superscription?

Maddocks. About a week after he came again, and I told him, that my master would not do it without a superscription.

Serj. *Whitaker*. Were they afterwards left?

Maddocks. They were left with a young woman that is now in Court.

Serj. *Whitaker*. Are those they that were delivered to you by her?

Maddocks. Yes, Sir: one is, I believe torn. Those are the other five.

Mr. *Hungerford*. Have you been long acquainted with your master's business?

Maddocks. Yes, Sir.

Mr. *Hungerford*. Have you ever known it to be his practice to give promissory notes?

Maddocks. No, Sir.

Lord Chief Baron *Pengelly*. It is proper you should give an account where Mr. Edwards lives?

Maddocks. In Duke-street, Westminster.

Lord Chief Baron. And where doth Mr. Hales live?

Maddocks. Within a few doors, almost over-against Mr. Edwards.

Lord Chief Baron. How long since was it?

Maddocks. I believe that it might be three or four years ago.

Att. Gen. There were (I apprehend you say) several that were franked?

Maddocks. Yes, Sir, there were frequently.

Att. Gen. How long might this continue?

Maddocks. I believe several years. It was since the time of his living in our neighbourhood, which I believe, may be about three or four years.

Att. Gen. Do you know of any other business transacted between them?

Maddocks. No, Sir.

Mr. *Strange*. You say that these covers were brought and left with the maid. Do you?

Spicer. Yes, Sir.

Att. Gen. What sort of *f* doth he make?

Spicer. A sort of double *f* just such as is here.

Att. Gen. Do you take the letter *o* to be his hand-writing?

Spicer. It is an altered letter. It was something else turned into an *o*.

Att. Gen. The *r*, what is that, doth it not seem to have been another letter?

Spicer. Yes, it seems altered from another letter; but bunglingly done.

Serj. *Whitaker.* We will, my lord, call one of Mr. Caswal's apprentices to prove that this draught hath been complied with.

Mr. *George Branthwait* sworn.

Serj. *Whitaker.* Do you look upon that draught. Do you remember whether it was ever brought to you, and by whom?

Branthwait. I believe it was brought by Mr. Hales.

Serj. *Whitaker.* To you?

Branthwait. Yes, Sir, and it was marked by me.

Serj. *Whitaker.* What had he for it?

Branthwait. He had of me two notes. One was for 250*l.* the other for 220*l.* which was 470*l.* and he brought besides this draught two notes of Wanley's for 20*l.* which made the balance.

Serj. *Whitaker.* Whom were they payable to?

Branthwait. One to one Calthrope, and the other to himself.

L. C. B. You say there were two notes you gave him. Whom was the 250*l.* note payable to?

Branthwait. To Mr. William Hales.

L. C. B. And who was the 220*l.* note made payable to?

Branthwait. To one Charlton Thrup. He gave me this draught of Mr. Harle's for 250*l.* and notes of twenty pounds.

L. C. B. Whom did you say the 220*l.* note was made payable to?

Branthwait. To one Charlton Thrup.

Att. Gen. My lord, we have done with our evidence.

L. C. B. Well, what do you say to this?

Serj. *Darnell.* I have nothing material in mine instructions; therefore, I shall not trouble your lordship.

Mr. *Lacy.* I take leave to observe, that it doth appear that no prejudice is done by this note. The 450*l.* borrowed on it hath been repaid.

Att. Gen. Mr. Hales owed Mr. Harle money upon other accounts, and he had it upon account: And besides, it is attached in the goldsmith's hands, and it was on the very same day that he was taken.

L. C. Baron. Gentlemen of the Jury, this is an indictment against William Hales, goldsmith, for a very great misdemeanour. It is for forging an indorsement on a promissory note for 800*l.* for the charging of the person indorsing with the payment of this sum; and the publishing of this indorsement as a true one, knowing it to be so forged. It is a very great offence, a misdemeanour of the highest nature; not only as it affects particular persons, and charges the person whose name is made use of with the payment, but as it is destructive to all commerce: You are therefore to consider what account the defendant can give of it. The indictment sets forth that the defendant had in his custody a certain note or a writing, purporting to be a promissory note, with the name of Robert Hales; by which note it was supposed, that Robert Hales promised to pay to Samuel Edwards, esq. or his order, the sum of 800*l.* within three months after date. And upon this, the charge by the indictment is, that the defendant, with an intention to charge Mr. Edwards with the payment of the money contained in this indorsed note, and to defraud and deceive him and others, on the 13th day of June did falsely and deceitfully forge and counterfeit a certain indorsement on this note in these English words following: "Pray pay to the order of for the value received," over the name of Samuel Edwards, as if subscribed to that indorsement; and, that knowing the same to be a forged and counterfeit indorsement, he published the same in order to deceive several persons, the king's subjects, as a real indorsement, as well as to defraud the said Samuel Edwards, esq. Now in order to prove this, the counsel gave some account of the circumstances of the defendant, the character of Mr. Edwards, the acquaintance between them as neighbours. And to shew you the circumstances of the fact, they have called several witnesses: First, they called a servant of Mr. Edwards's, who mentioned that he had lived some considerable time in Mr. Edwards's service; during which time the defendant, Mr. Hales, hath frequently, for several years, sent to Mr. Edwards to have franks delivered him in the name of Mr. Edwards, who hath for some years been a member of parliament, in order to send them free of the postage. It appears that this hath been done for several years; and the usual way, was, when Mr. Edwards had received the direction of the name of the person, he himself wrote the whole superscription, and then subscribed to frank it 'Free Samuel Edwards.' He tells you, that in the beginning of July last, several covers were brought to him for franks, made up as you may perceive pretty large. The covers were brought over to Mr. Edwards's house by a servant of Mr. Hales's. The message was, that Mr. Hales desired some franks upon these covers, particularly desiring them to be franked without any superscription. He saith, that these were left in this manner, and were all delivered to a servant of Mr. Edwards with this desire, that he would only write thereupon "Samuel Edwards free:" that the rest might be left to be filled up by Mr. Hales as he thought fit. He tells you, that when his master came home, his master having as he

observes, always wrote himself the whole superscription, his master refused to do this; and therefore these covers remained without franking: Mr. Edwards would not accommodate the defendant, Mr. Hales, in that manner with his hand, and leave the rest blank for another person to fill up as he thought fit. This was very prudently done; Mr. Edwards, who is a gentleman in business, might well apprehend that an opportunity might be hereby given to serve purposes that it might not be in his power to controul. This, gentlemen, is made use of as proof of an attempt by the defendant, to get such sort of franks into his power to make use of to such a purpose as this. The next witness that they called is Anne Clarke, who saith that she is likewise a servant to Mr. Edwards, and she produceth a note written by Mr. Hales, and saith, that this was brought to the house of Mr. Edwards, with a desire to have some franks directed to each of those persons, two to each of these three several persons: She saith, that it was some time last summer, she thinks about July. She saith, that when her master, Mr. Edwards, came home, she shewed it to him: and Mr. Edwards declined giving or accommodating Mr. Hales with franks to these persons. The reason that he gave was this: Mr. Hales (said he) hath both a brother and a nephew that are members of the House of Commons; and therefore he need not send to me for franks, when he may have them from his own relations; he therefore declined it at that time. These were the directions: Two to Mr. Levett of Huntingdon, two to John Pratt, esq. at Bristol, two to Stephen Mitford, esq. at Bristol. Gentlemen, to corroborate this evidence that this note came from the defendant Mr. Hales, Mr. Booth is called. He is asked, whether he is well acquainted with the hand-writing of the defendant Mr. Hales? He saith that he is, and that he verily believes that this note is his hand-writing. It hath been observed by Mr. Attorney, that there seems to have been some design, the form wherein it is wrote being very proper to give an opportunity for an alteration; that each of these directions is very short, and would take up at most but one line on the superscription or outside of the cover; that there would have been a considerable space left, so that when Free, Samuel Edwards, was wrote, there would have been a sufficient space of paper to write a note or any thing over it. This is the observation that hath been made upon this note of directions. After this they produce Mr. Robert Harle, who is secretary to the million bank, to witness to the particular fact. He saith, that this note was on the 13th of June last brought and delivered to him by the defendant Mr. William Hales. He saith, that he was then at Baker's coffee-house in Exchange-alley; that the defendant, Mr. Hales, came to him, and produced this very note of 800*l.* payable to Samuel Edwards, esq. within three months, subscribed Robert Hales, and indorsed in the name of Samuel Edwards, and desired him to advance him 450*l.* upon the credit of that note; that seeing a promissory note made payable to Samuel Edwards, esq. and indorsed by the said Samuel Edwards, esq. this appeared to him sufficient security to lend 450*l.* upon; that he did thereupon comply with the request of the defendant, Mr. William Hales, to advance him that sum; that he drew a draught for it on Caswal and Mount, who were his goldsmiths for this sum, which draught he took up afterwards, and allowed in his settling of his accounts with his goldsmiths; that at that time when the defendant brought this note to him, this very note was delivered to him, with this very indorsement that is now upon it,

"Pray pay to the Order of for ye value received SAMUEL EDWARDS."

He saith, that he is sure that it was thus indorsed when it was left with him, he being desired to lend the money on a note so indorsed; that it hath been in his custody ever since, so that he is sure there hath been no alteration made thereon since that it was delivered unto him. You may remember that he was particularly asked, are you sure that it was indorsed when it was delivered you? He saith that he is sure; and indeed the thing bespeaks itself. 'When a note is made payable to a particular person, if any other person brings it, every one expects that there should be an indorsement to intitle any person that is not the very person to whom it was made payable. I am therefore sure (saith he) that it was so indorsed: and as Mr. Edwards was a person of very great dealings and considerable substance, and so likely to have such a note made payable to him, I therefore gave credit to this note as a sufficient security to reimburse me the 450*l.* which I advanced thereupon.' This fact he tells you was thus transacted at that time; and he is sure that he received it from the defendant thus indorsed, and that the defendant hath had the benefit of the draught which he gave him on the credit thereof. Mr. Harle hath allowed this in settling his accounts with his goldsmith. Upon this the note hath been read to shew you the purport thereof, and the indorsement thereon. The note is this,

"*May* 13, 1728.

"I promise to pay to Samuel Edwards, esq. or order, the sum of eight hundred pounds, within three months after date, for value received. "ROBERT HALES."

Then upon the back of the note there is this indorsement:

"Pray pay to the order of for ye value received, SAMUEL EDWARDS."

Mr. Harle goeth on in the account which he gives you, and saith that this note was left in his hands in June; and that on Sept. 9, after, he was in Exchange-alley all the morning till about two; that there was a message left for him at Baker's coffee-house, but he received it

not there; that he went home, and heard that there was a message left for him by the defendant, Mr. Hales, at Baker's coffee-house; that he went out in the afternoon, and had not a particular account of the message till he came home. The message was from Mr. Hales, that he had that morning paid to his goldsmiths Caswal and Mount 450*l.* on his account: Mr. Harle tells you that there was more money due to him on security. So much money was then paid in discharge of so much, part of money advanced by him to Mr. Hales, and it was the exact sum which had been advanced on the 13th of June on the credit of this note. He tells you, that in the evening Mr. Caswal came to him, and told him there was a melancholy account, that a sad accident had happened: for Mr. William Hales, the person that had paid them this money on his account, was taken up for forgery, and this money was attached in their hands for to prevent his issuing it out. Mr. Harle tells you, that this was the first discovery that he had of the particular fact, that gave him occasion to make the more particular enquiry: he had indeed two or three days before spoke to a gentleman of the Exchequer, one Mr. Wright, had shewed him the indorsement; and having some suspicion, asked him whether he was acquainted with Mr. Edwards's hand, and whether he thought that that was his hand-writing? Mr. Wright thought it was a little odd, was something diffident, but believed that it was Mr. Edwards's hand, as Mr. Harle himself also thought that it was. He saith, that after that the defendant was apprehended, he went to Mr. Wright to desire him to go with him, that they might have from Mr. Edwards more particular satisfaction. They went and met with Mr. Edwards, in Westminster-hall, shewed him the note, asked him whether he knew of it, and whether it was his indorsement? Mr. Edwards was very much startled, and said, that he never gave any such note, and knew nothing of it. Mr. Harle asked him whether the name was his hand-writing? He said that if it was, an ill use was made of it. Mr. Edwards took a copy of it, and kept it by him. The note hath been read to you, and appears to be a promissory note in the name of Mr. Robert Hales, for 800*l.* payable in three months, to Samuel Edwards, esq. The indorsement is

"Pray pay to the order of for *y^e* value received, SAMUEL EDWARDS."

Gentlemen, upon the producing and reading of this note, Mr. Attorney hath made several observations on the manner of writing it. You have had the inspection of it, and something very particular appears to every one's view. It is by the counsel for the prosecutor supposed, that this note must be formed from part of a frank cover signed 'ffree Samuel Edwards,' *ffree* being turned into *for y^e* value received; that there is the remainder of another letter. And you may observe whether there is a selvedge or any thing of that nature, that sheweth it to have been the outside of a sheet of paper. All the edges indeed seem to be smooth and clean as a paper that is cut. The indorsement begins, 'Pray pay to the order of for' then comes *y^e*, and then a large distance between that and 'value received.' So that it seems pretty extraordinary if any one was honestly writing, and had a paper not written on before, that they should write in this manner, that the word *y^e* should be tacked to the word 'for,' and put at such a distance from 'value received.' 'Received' follows 'value' immediately in a more plain writing: besides, it is unusual to make use of the word *y^e* before 'value received;' but they say it is more generally 'value received.' You have an instance in the note itself; the conclusion of the note is 'value received:' and I believe the observation is just; that it is not so usual to say 'For *ye* value received.' But the observation of the counsel was this, that there was a necessity of this in order to accommodate the letters to the forgery; as the words now stand they exactly suited. And, gentlemen, the *f* is of a paler ink than the *or*, and these letters thicker, and seem of a deeper ink. If there were two *ee*'s before, the alteration and making the other letters must occasion the thickness of these letters, and their seeming of a blacker ink. Other letters being to be superinduced, they must of necessity be thicker and deeper than the first letters. Here is a very strange sort of an *r*, and the *o* seems very odd. At the end of the *r* is something made use of to assist to make the upper part of the *y* which doth not stand cleverly. And you will find that part which is the head of the *y* much thicker than the other part that makes up the *y*. And then on the side or one shoulder of the *y* there is a sort of *e* put. You may see how improperly it stands. It is not an *e* directly over the *y*, which is the way sometimes of writing 'the' short; but it comes to the bottom of the head of the *y*. So that, gentlemen, these are the observations that have been made by the counsel. You have seen this note, and may observe upon it, whether you think these observations plain, proper and just? Upon this occasion, another servant of Mr. Edwards is called, one Mr. Spicer. He saith, that he hath been a clerk in the Exchequer above ten years, but in the whole in Mr. Edwards's service upwards of 20 years; that he is well acquainted with his public dealings and private transactions in money-matters: and that he never knew or heard that he had any money-dealings with the defendant, which he believes he should, if there had been any, being his clerk, and acquainted with his money-dealings. And he saith, that as to the name Samuel Edwards, he believes it to be Mr. Edwards's proper hand-writing, being very well acquainted with his hand. And he saith, that as to the indorsement, he believes that the *f* is his, but not the other letters; that he is satisfied that 'value received' is not Mr. Edwards's writing.

And he saith, that the *o* and *r* he doth not take to be Mr. Edwards's hand-writing, but an alteration from something that Mr. Edwards had wrote before; that the usual way of Mr. Edwards franking is 'free' with a *ff* as here *ffree;* and that the *o* appears to be made out of an altered letter. So that this is a proper observation, that there is an alteration, as they believe upon their oaths. He saith, that it is bunglingly done; that he apprehends it done as hath been mentioned. Well, another witness is called, Mr. George Branthwaite, a servant to Mess. Caswal and Mount. He saith, that this draught was brought to their office by the defendant himself, because he hath put his mark upon it, as is proper for persons of such dealings; that that mark of his at the bottom reminds him that the defendant brought it. Upon the bringing of this draught, he had two notes from this witness on account of his master; one was for 250*l.* the other for 220*l.*: that came to 470*l.*: therefore the deficiency of this draught was to be supplied with another to make up that sum complete. Therefore, he saith, that he brought notes of Wanley's for 20*l.* which made up the balance. The note for 250*l.* he saith, was made payable to the defendant himself; and that for 220*l.* to one Charlton Thrup; and that at this time the draught and Wanley's notes were delivered to him for these notes on account of Mess. Caswal and Mount. This is the account given by them. The defendant himself and his counsel are here. Nothing material is said by them in defence, only Mr. Lacy mentioned that there is no damage done by this note, the 450*l.* borrowed on it being repaid. To this it was replied by Mr. Attorney, that the money was paid upon account, there being other monies due to Mr. Harle on security; and besides it is attached in Mr. Harle's goldsmith's hands, to prevent its being issued out. Gentlemen, you will observe, that if this was a real indorsement, it would be an assurance of paying the whole debt. Whosoever indorseth a note, whereof no part is paid, is liable to the whole. Therefore the question is not, whether or not this money was paid? But whether here is not an engagement to pay the note, which the re-payment of the money borrowed thereon is no fence against? Therefore if the money had been repaid, that had been no acquitting of the crime. That will no more discharge a person, than if a felon should say that he is acquitted because the goods are restored. The behaviour afterwards is not a sufficient acquittal of a crime. And consider when that was. It was not before, but upon the Monday, the very day that he was apprehended. Then the message was left, and the money paid. You are to consider, therefore, whether this did not arise from an apprehension and fear of a discovery, in order to clear things as well as he could? Gentlemen, as there is sufficient evidence to fix this upon the defendant, so hath he not proved how he came by this note. He hath not called one witness to shew that he had any money-dealings with Mr. Edwards, or that he received it of any other person; but it is left on the evidence given by the prosecutor. Therefore, there can be no doubt in the matter. If a person is silent to the charge, and cannot give you any satisfaction as to it, it stands as fully fixed upon him as if any had seen him write the indorsement. Therefore, gentlemen, you are to consider, whether any thing appears to afford the least presumption that this was a true indorsement made by Mr. Edwards, for value received by him? It is, gentlemen, an offence of a very heinous nature, and, if not suppressed, must tend to hinder all commerce by bills and paper-credit. If this be suffered to increase, none can take such a note, unless he goeth to the person himself. It will render it insecure to carry on commerce by notes or bills. As to an indorsement of this nature, though it was not mentioned, it is proper for me to take notice, that though the name be not named, it may be made to any person. The person, in whose possession it is, can go and receive the money. So that the indorsement is complete authority to impower the person in whose possession the note is, to receive the money, and likewise to charge the person that so indorsed it with the re-imbursement of the money. Therefore, gentlemen, the crime and offence seems complete. Upon this evidence, it doth not seem to me that there can be any doubt with you, whether he be guilty of this fact or not.

473. The Trial of WILLIAM HALES,* for a Misdemeanor, in obtaining the Sum of Four Hundred and Fifty Pounds, from Mr. William Harle, by false Tokens :† 3 GEORGE II. A. D. 1729.

Jury sworn over again.

Clerk. OYEZ, Oyez, if any one can inform, &c.

Gentlemen of the Jury, William Hales stands indicted by the name of William Hales, &c. for falsly and deceitfully obtaining the sum of 450*l.* of Mr. William Harle by a false token, to wit, a promissory note in the name of Mr. Robert Hales, whereby the said Robert Hales is supposed to engage to pay within three months after date, the sum of 800*l.* to Samuel Edwards, esq. with a counterfeit indorsement on this note to the great damage, &c. To this indictment he hath pleaded Not Guilty.

Mr. *Strange.* This likewise is an indictment against the defendant Mr. William Hales, and is for falsely and deceitfully obtaining a sum of money of Mr. William Harle by a false token. And it sets forth, that the defendant having in his possession a promissory note of Mr. Robert Hales's for 800*l.* payable in three months after date to Samuel Edwards, esq. with a forged indorsement thereon in the name of the said Samuel Edwards, esq. did falsly and deceitfully obtain of one Mr. William Harle, the sum of 450*l.* on the said note. This is laid to be to the great damage, &c.

Mr. *Hungerford.* May it please your lordship, the fact charged is the very same as in the former cause already heard, only upon a different law, 33 Hen. 8. There was, it seems, so long agone an abominable practice of obtaining money by false tokens. The act of parliament hath prohibited that practice, and made it penal. There is but one witness we shall trouble your lordship with.

Mr. *Harle* sworn.

Mr. *Hungerford.* Mr. Harle, pray give an account to my lord, and the jury, when you first saw that note, and what money you paid upon it.

Harle. On the 13th of June, Mr. Hales applied to me, to lend him 450*l.* upon this note. I accordingly made a draught on my goldsmiths, which I suppose was paid the same day, having taken up the draught on settling mine accounts.

L. C. B. *Pengelly.* Mr. Lacy, do you expect that they should go on further in their evidence?—Mr. *Lacy.* No, my lord.

L. C. B. *Pengelly.* This indictment is against William Hales, goldsmith. It is for obtaining upon this note a draught equivalent to money, and which afterwards produced money, by this false token. If the note was forged, it was a false note. He brought this note as a good note, to induce Mr. Harle to accommodate him with 450*l.* thereupon. That is the description of the act of parliament, that if any one by a false token doth obtain or get any thing or any goods of another's, corporal punishment shall be inflicted. If this appear to be a forged indorsement; this being a false token, he must be guilty.* So that the evidence is the same as to both these indictments.

The Officer sworn to keep the Jury.

Clerk. Gentlemen, answer to your names.

Jury called over.

Clerk. Are you all agreed in your verdict?

Jury. Agreed.

Clerk. Who shall say for you?

Jury. Our Foreman.

Clerk. How say you, Is William Hales Guilty of the misdemeanour wherewith he is charged, in forging and publishing an indorsement on a promissory note, or not Guilty?

Foreman. Guilty.

Clerk. How say you, Is William Hales Guilty of the misdemeanour wherewith he stands charged in obtaining money by a false token, or not Guilty?—*Foreman.* Guilty.

* See the preceding and following Cases.

† These Trials were taken in short-hand by order of Mr. Edwards. *Former Edition.*

* As to this, see East's Pleas of the Crown, chap. 18, sect. 6.

474. The Trial of WILLIAM HALES and THOMAS KINNERSLEY, Clerk, for forging and counterfeiting a Note of Hand, bearing date August 16, 1727,* for Twelve Hundred and Sixty Pounds, payable to Samuel Edwards, esq. or Order, signed Thomas Kinnersley, and indorsed Samuel Edwards: 3 GEORGE II. A. D. 1729.

Jury called over again, and sworn.

Crier. OYEZ, Oyes. If any one can inform my lord the king's justice, the king's serjeants, attorney, &c. in this cause between our sovereign lord the king and William Hales and Thomas Kinnersley, let them come forth, &c.

Here the Indictment was read.

Mr. Strange. Gentlemen of the jury. This is an indictment against the two prisoners at the bar, William Hales of London, late goldsmith, and Thomas Kinnersley, clerk. The indictment sets forth that these two defendants, being persons of ill fame and reputation, and devising and intending to defraud Samuel Edwards, esq. and divers other his majesty's subjects, in March last had in their custody a certain note or a writing purporting to be a promissory note signed by Thomas Kinnersley, and dated Aug. 16, 1727. In this note Thomas Kinnersley is supposed to promise to pay 1,260*l.* to Samuel Edwards, esq. within three months after date, for value received; that on this note which they had in their custody, they forged an indorsement in these words, "Pray pay to the order of for value received, Samuel Edwards;" that thus having in their custody this note with this forged indorsement thereupon, and knowing this to be a forged indorsement, they did afterwards publish it to be a true one. These offences are laid to be to the great damage of the said Samuel Edwards, esq. the breach of his majesty's peace, and the ill example of other his majesty's subjects in like case offending. To this indictment they have pleaded Not Guilty.

Attorney General. My lord, and gentlemen of the jury, I am of counsel on the same side for my lord the king. Gentlemen, the charge against the defendant is for forging an indorsement on a promissory note for 1,260*l.* Likewise they are charged with publishing the said counterfeit indorsement for a true one, knowing the same to be forged and counterfeit. Gentlemen, this is not the first of several facts of this nature that have come to be considered with regard to the defendant Mr. Hales: but the first that hath come to be examined in this place charged upon the other defendant, Mr. Kinnersley, a clergyman: and it is a very melancholy thing that when a scene of forgery of this nature is going on, which as you have been told is of a very pernicious nature to trade and commerce, we should see one charged therewith that hath a right to appear in that habit, and thinks fit to appear here in it. But it will appear that there is just ground to charge not only the defendant Hales, but the defendant Kinnersley. Gentlemen, as to the fact, it will seem that it took rise in the same manner as the former fact; that by that correspondence that Mr. William Hales thought fit to let himself into with Mr. Edwards, by applying for frank covers to send news into the country, he took occasion to make use of such a paper; and that there being an intimacy between him and Mr. Kinnersley, Mr. Hales having by this means possessed himself of a frank cover with the name of "Samuel Edwards, ffree" thereon, that upon a piece of that paper cut off from the rest, a promissory note is written. I take it that the note will appear to be the handwriting of Mr. Kinnersley, dated in a different hand, Aug. 16, 1727. The words are these:

"I promise to pay to Samuel Edwards, esq. or his order, three months after date, the sum of twelve hundred and sixty pounds, for the value received. THOMAS KINNERSLEY."

On the back of the paper these circumstances will appear: first, the edge of the paper on that side of it where the indorsement is wrote appears cut off; and as in the former case, so here there are the tails of two or three letters still remaining plainly to be seen. And it will appear that here is an irregularity and unevenness in the cutting; the edge in one place smoother being turned in, and an hook or dent made in the paper. Under this, pretty near the top of the paper, is written, "Pray pay to the order of," then there is a wide blank as in the former instance; then follow the words, "For the value received, Samuel Edwards." It appears that the words "for the" are written in a stronger and blacker ink than the former; the *f* of the former sort, probably Mr. Edwards's. The word "the" is not written in a contraction as before, but at length. Here, instead of changing letters, erasing or turning, are letters written over in a blacker ink: the other letters, as the two *ee* appear in a paler ink; so that it will appear to a demonstration that this was a frank turned to this use. Other observations will likewise appear as to the

* See the preceding and following Cases.

manner of penning it: this note being written, and the indorsement upon it, it will appear what use was made of it; and it will appear by strong circumstances, if not by the confession of the defendant Kinnersley, that the name of Samuel Edwards was there when he wrote the note: if so it will appear clear against Kinnersley. It will thus appear a circumstance to charge the defendant; as first, it appears that there never was any dealing between Kinnersley and Mr. Samuel Edwards: I know not that it will appear that they were so much as known to each other; and yet here is a note wrote by Mr. Kinnersley, whereby he engageth to pay 1,260*l.* within three months after date, to him or his order. It is very extraordinary that any gentleman should write a promissory note, especially should write such a note to pay such a sum to another, to one with whom he had no dealings. It is incumbent therefore on Kinnersley to shew any such dealings, and upon what fair occasion it can be made appear to be given. Gentlemen, as this will appear to you to be the nature of the note and the manner of indorsing it, and that there were no dealings between them, and consequently no reason for putting it in Mr. Edwards's name, but that his name was there, and to make him the indorser; so the use made of it was to carry it to Mr. Bird, an officer to the Hudson's Bay company. Mr. Hales delivered it to him as a true note and indorsement; and desired that Mr. Bird would accommodate him with 750*l.* upon it. I think that Mr. Hales gave his own note for that sum: but as the principal security this note of Mr. Edwards's was left with Mr. Bird. It was on the 20th of March, 1737, that this note was left and thus deposited with Mr. Bird. And, gentlemen, in April following there was the sum of 450*l.* as part of the 750*l.* paid by Mr Hales. Gentlemen, the residue not being paid in such a time as it was expected, Mr. Bird directed one Mr. Tomkins to write to Kinnersley to demand the money, and to threaten to sue for it. After this Mr. Kinnersley came to him at Fenchurch-street, the Hudson's Bay house. Mr. Bird told him that there was such a note which was left with him for a security for money borrowed; that there was so much thereof that remained due, and desired the money. It will appear that at that place and time when the note was shewed to Mr. Kinnersley, he owned that he had wrote this note, and said that he was an undone man, and that Mr. Bird must not expect the money from him, but apply to Mr. Edwards who indorsed the note. Gentlemen, after this declaration had been made by Mr. Kinnersley, in September there was a discovery made of Mr. Gibson's note, upon which Mr. Hales was committed, September 9th last: that gave occasion to every one that had received of Mr. Hales notes for their security to look about them; which produced a particular enquiry about this note. Mr. Edwards was informed that such a note was in the hands of Mr. Bird; upon his applying to Mr. Bird, it appeared in the manner that I have opened unto you: when that appeared, and that the note was wrote by Mr. Kinnersley on a paper signed by Mr. Edwards, Mr. Kinnersley was taken up. I think that there was some difficulty at first for the constable to apprehend him; but at length he was apprehended and carried before sir Richard Hopkins. It will appear that he was then in great confusion, and appeared to have some sort of inclination to make the only reparation that guilt of such a crime could admit of, viz. making a full discovery. He said, that he would confess every thing, and owned that both the body of the note and the subscription to it was his hand-writing. He confessed likewise, if my brief be right, that he knew that Mr. Edwards's name was on the back of it; that Mr. Edwards was a stranger to him, and that he had no dealings with him. It happened at that time that there was one Mitford present, something of an attorney or solicitor, and a relation of Mr. Kinnersley's. He found that Mr Kinnersley was on a dangerous point when he declared, that he knew that Mr. Edwards's name was there when he wrote the note. He stopped him short, bade him confess nothing, asked him what he meant? He took his advice, and, I think, denied his own hand-writing. Upon that occasion a discovery was prevented: he was then committed, and that is the occasion of the present prosecution. We shall call the witnesses. As to Mr. Hales, the evidence that we shall lay before you is his usual practice of applying to Mr. Edwards for franks, the manner of making this note and indorsement, the use he made of it, his publishing and depositing of it as a true indorsement, when it appears on the face of it to be a forged one. It will appear plainly against him that he was concerned in the forgery, and in the publication of it. As to the other of the defendants, Mr. Kinnersley, the circumstances that I have mentioned will make it appear to be his, and be as strong evidence against him as against the other.

Serj. *Whitaker*. I will not take up any of your lordship's time, there being more indictments; but shall immediately call our witnesses.

Thomas Maddox and *Anne Clark* sworn.

[N. B. Their examination was in substance the same as in the former Trial, therefore need not be inserted over again.]

Mr. *John Spicer* sworn.

Serj. *Whitaker*. Look upon that note. Are you acquainted with Mr. Edwards's hand-writing?—*Spicer*. Yes, Sir.

Serj. *Whitaker*. How long have you been acquainted with it?

Spicer. Twenty-four years, Sir.

Serj. *Whitaker*. How long have you been a clerk to him?

Spicer. Between ten and eleven years, Sir.

Serj. *Whitaker*. How much is his hand?

Spicer. Samuel Edwards and the *f*.

Serj. *Whitaker.* Very well. As to the other letters, what are they?

Spicer. Some of them seem to be written over other letters, which I suppose were part of the word 'free.' The *r* seems visible between the *o* and *r*.

Mr. *Strange.* What was his method of writing the word 'free?'

Spicer. With a double *f*, just as it is here, 'free.'

Mr. *Strange.* Did you ever know him use the word Frank?—*Spicer.* Never, Sir.

Serj. *Whitaker.* You say that you have been concerned as clerk between 10 and 11 years. Were you concerned before for him?

Spicer. Yes, Sir.

Serj. *Whitaker.* In what business?

Spicer. As to his private affairs in town, cash in town, and many of his rents.

Serj. *Whitaker.* During the time that you were acquainted with his private transactions, did you ever understand that there were any transactions in money affairs between him and Mr. Hales?

Spicer. No, never any whatever. I never so much as heard his name in the family.

Serj. *Whitaker.* Did you ever know that Mr. Edwards used to make a practice of indorsing any other person's notes, or of giving promissory notes?—*Spicer.* No, Sir.

Serj. *Whitaker.* I believe you will all be convinced that it is his hand-writing.

Kinnersley. I admit, Sir, the whole body of the note to be mine own hand-writing.

Mr. *Strange.* Look upon it before you do that. We desire nothing but what is fair.

Kinnersley. Yes, Sir, I admit both the figures on the top, and the whole note to be mine.

Serj. *Whitaker.* Gentlemen, you will observe that there were but 3 months mentioned in the note. The note is drawn August 16, and was not brought till March 20 after, so that the whole time was long expired before the note was left with Mr. Bird for the money which he lent upon it.

Mr. *Strange.* I verily believe, my lord, the indorsement and note to be both the same hand.

Mr. *William Wright* sworn.

Serj. *Whitaker.* Sir, were you at any time with Mr. Kinnersley and Mr. Edwards, and was there any discourse passed between them about this note?

Wright. When Mr. Kinnersley was examined before sir Richard Hopkins, he there owned it to be his own hand-writing, both the note and indorsement.

Serj. *Whitaker.* But give us an account whether he was going to make a confession, and what was said upon it?

Wright. As soon as he said that the note was all his hand-writing——

L. C. B. *Pengelly.* And what did he say besides?

Wright. What he said, my lord, as to the indorsement was afterwards. As soon as he said that the note was all his hand-writing, Mr. Edwards asked him, Why he drew the note payable to him, when there never had been any dealings or negociations between them?

Serj. *Whitaker.* What said Mr. Kinnersley to that?

Wright. He said that there never had been any dealings between them, either before or since the making of the note payable to him; that he did not know Mr. Edwards, nor, except that time before sir Richard Hopkins, had not seen him.

Serj. *Whitaker.* Pray, Sir, give us an account how he was prevented going on.

Wright. He opened himself in this manner: that he was indebted to Mr. Hales in that sum, and more, and that Mr. Hales desired him to give a note of his hand; that he asked Mr. Hales to whom it should be made payable? I replied, It is very unusual to ask that. It is sure natural for a man to make it payable to a person that he oweth the money to. I said, Sir, you seemed before to declare yourself an unhappy person, an undone man. I asked him the reason; and upon that Mr. Mitford, who was with him, said, You shall not go on to declare any thing farther, you may do yourself an injury.

Mr. *Strange.* Did he say at that time, that he saw any thing on the back of that note?

Wright. As soon as he had declared the note to be his hand-writing to Mr. Edwards, and Mr. Bird had shewed the note to Mr. Kinnersley, he was asked, Whether he knew of that indorsement of Mr. Edwards's hand before he saw the note? He said, he did know of the indorsement thereof, but knew not how it came there.

Mr. *Strange.* How did Mr. Edwards ask the question?

Wright. He asked Mr. Bird, Did Mr. Kinnersley own the indorsement before you shewed him the note?

Mr. *Strange.* Sir, you do not apprehend the question asked you. What was the question that Mr. Edwards asked Mr. Kinnersley?

Wright. Whether he knew of the indorsement before that Mr. Bird showed him the note?

Mr. *Strange.* What did he say?

Wright. He answered that he did.

L. C. B. Was that all that he said?

Wright. He said that he had had several dealings with Mr. Hales, which was the cause of his drawing that note in that manner.

L. C. B. But what did he say concerning the indorsement?

Wright. Mr. Bird said, that before he shewed Mr. Kinnersley the note, Mr. Kinnersley said that there was such a note of his hand, with such an indorsement.

L. C. B. But what was the answer that Mr. Kinnersley gave Mr. Edwards?

Wright. That he knew of the indorsement, but knew not how it came there.

Mr. *Strange.* Did he, Mr. Kinnersley, mention the indorsement himself? Did he say,

whether he saw the name before his writing the note?—*Wright.* Not at that time, Sir.

Mr. *Strange.* Did he at any other in your hearing?—*Wright.* No, Sir.

Mr. *Strange.* When Mr. Mitford stopt him, was there any discourse afterwards whose hand-writing the note might be; was there any dispute?

Wright. Sir, the company broke up then, when Mr. Mitford had given him that caution.

Sir *Richard Hopkins* sworn.

Serj. *Whitaker.* Sir Richard——

Mr. *Lacy.* I would beg first to ask sir Richard, whether this examination was reduced into writing?

Sir *R. Hopkins.* I always take a memorandum in my book of what is said upon an examination. There was none other examination in writing, but my memorandum of what I thought sufficient to occasion the commitment that I made.

Serj. *Whitaker.* When was it?

Sir *R. Hopkins.* It was some time about September. I remember that he was charged before me about two notes. One was a note of 1,260*l.*, the other was a note of 1,650*l.*; which of these you desire me to speak to, I know not.

Serj. *Whitaker.* That of 1,260*l.*

Sir *R. Hopkins.* There was such a note drawn by Thomas Kinnersley, payable within three months after date to Samuel Edwards, esq. and indorsed by Samuel Edwards. I looked upon it; and, turning over the indorsement, it seemed to me to be an altered and forged thing. Upon this I examined Mr. Bird, whom they offered as an evidence. Mr. Bird told me, that he had lent money upon that note of 1,260*l.* and that he had received some money in part of payment of what he had lent: That hearing that Mr. Hales was taken up, he made application to Mr. Kinnersley for what money remained due to him; that when he made such application to Mr. Kinnersley for this money, Mr. Kinnersley, before he saw the note, told him, that he had a note of his for his 1,260*l.* payable in three months after date to Samuel Edwards, esq. or order, and indorsed by Samuel Edwards. This I laid my finger upon before him, thinking it sufficient to commit him, and repeated the words to Mr. Bird, are these the words that you say? If they are, repeat them; which he did. I asked Mr. Kinnersley, whether he had any dealings with Mr. Edwards? He said, that he had not. I asked then, how he came to make a note for 1,260*l.* payable to him, a person with whom he had no dealings. He said, that he did it at the request of Mr. Hales, to whom he was indebted in that sum of money. He said, that as to the indorsement he knew not how it came there. He seemed ready to make an ample confession; but there was a person there, who was (I think) one way or other related to the law, who stopt him directly, and had oft interrupted. I said to him, Sir, this is not becoming here: I expect to examine any person without your interrupting. I will afterwards ask any question that——

Serj. *Whitaker.* Sir, when Mr. Kinnersley had owned the note, was there afterwards a denial?

Sir *R. Hopkins.* Afterwards, Sir, there was a denial. It might be as to the other note; and not that which you are now asking me about.

Mr. *Richard Davis*, the constable, sworn.

Serj. *Whitaker.* Richard Davis, I think that you were the constable sent to apprehend Mr. Kinnersley. Will you give us an account how often you went to apprehend him, whether he was to be met withal, and what passed when he was apprehended?

Davis. My lord, on September 12, there was a warrant issued out to take up the rev. Mr. Kinnersley, and was given to me to execute. Accordingly I went in the afternoon, and took a porter with me. We went to the Magpye tavern without Aldgate. I sent the porter thence to Mr. Kinnersley's house in Mansel-street to tell him, that there was a gentleman there to speak with him; because, the living in Mansel-street in Middlesex, I could not there execute my warrant. When the porter came back, he told me, that the daughter came to the door, and said, that the reverend Mr. Kinnersley was not in town. After I had paid for what I had called for, I went from thence to the clerk of the parish, and asked him, whether the reverend Mr. Kinnersley was in town? He answered, No; and said, that he went out of town on Tuesday, I think it was, and that he did not know when he would be in town. He asked me what I wanted with him? I told him that a couple wanted to be married, and wanted a licence. Won't (said he) the curate do? No (said I), the young gentlewoman will not be married by any but the doctor, and at his church: So the person having no apprehension, sent me to London-house in Aldersgate-street, to enquire for Mr. May, who would tell me when the doctor would be in town. He told me, that he would be in town next Thursday night. Accordingly I went the next Friday morning, took a porter with me, went directly to the Doctor's house. When I came there I rung hard at the gate. Out came the daughter. I asked to speak with the doctor; she said that he was not at home, and enquired what I would have with him. I told her the same about my wanting a licence that I had told the clerk before. I will (said she) go and call my mamma. Accordingly madam Kinnersley came out: I told her that I wanted a licence, was informed that the doctor generally kept licences by him, or at least could help me to one. She desired me to walk into the parlour, said that the doctor had been out of town, was very much fatigued, which was the reason that he was denied. Out came the doctor; Sir, (said he) where is the gentlewoman? Sir, (said I) she is hard by, at the Magpye tavern by Aldgate.

Who (said he) is she, and who are her friends? I told him that her name was Bird. Where (said he) lives she? I said in Fleet-street. I do not (said he) remember that name. You do, sir, (said I) know her father very well. What age (said he) is she? I told him her age. Have her friends given consent (said he), without that I would not do it for 100*l.*: the penalty is 50*l.*; I told him that it had been done to my knowledge. Aye (said he) it may be at the Fleet. I desired him to go to the tavern, where her brother was with her, and he would be satisfied. My intent was to decoy him into the liberties of the city. He said, No, he would not go with me: so I had no opportunity then. But having seen him once, and so knowing him, I afterwards watched for him, and saw him come out, and go through the Minories: I watched him till he came to Aldgate; I then paid my respects to him. I think (said he) that you are the person that came to me about a marriage. Yes, Sir, (said I) but I have now another affair to speak to you of. I have a warrant against you for forgery of a note of 1,260*l.* He said, God forbid. He asked to see my warrant. He said, had the gentleman sent to him, he would readily have come. I asked him why he denied himself? He said, that he apprehended an arrest. I desired him to go with me to the White Hart tavern in Bishopsgate-street. He there owned the note.

Serj. *Whitaker.* Was it within or without the bars?—*Davis.* It was within.

Serj. *Whitaker.* Did you go with him to sir Richard Hopkins?—*Davis.* Yes, Sir.

Serj. *Whitaker.* My lord, there is another thing that we shall prove, for all is circumstance. We shall shew that Mr. Kinnersley and Mr. Hales have been often together for four or five months in a private manner. As soon as the one hath come in, the other hath gone with him into a private room, and they have stayed some time together; and this was about the time that these transactions have been. When these matters are laid together, you will judge that Mr. Kinnersley hath not been so kind to Mr. Edwards as to give him 1,260*l.*; but that there was a plain formed design to raise this money upon his credit. Join this together with his owning, that he knew that Mr. Edwards's hand was on the back of the note before he drew the note, and that he knew of the indorsement, though he said he knew not how it came there. Considering these things, none will doubt but that there was a contrivance between them. We shall call several witnesses.

Mr. *Lacy.* We submit it to my lord, whether it be proper. It is foreign to this indictment; and we should have nothing offered but what we may be supposed to come prepared to defend. We cannot be supposed to come prepared to defend this, by shewing how he came there, and upon what account.

L. C. B. It is an indictment against both the defendants. The note was indeed subscribed by the defendant Kinnersley: But then it was delivered out by the other defendant Hales. Now, they say, that they will shew by several witnesses that they were very conversant together about that time, and they are acquainted with the private manner of their conversing together. You hear what is the use they make of it. I see not that we can refuse their giving this account. What use is to be made of it must be left to the jury.

Mr. *Mather.* Are these things to be proved by circumstances?

Serj. *Whitaker.* Can forgery be proved any otherwise?

Mr. *Bab* sworn.

Mr. *Strange.* Pray, where do you live?

Bab. At Peel's coffee-house, in Fleet-street.

Mr. *Strange.* Do you keep that house?

Bab. Yes, Sir.

Mr. *Strange.* Have you ever observed that Mr. Hales and Mr. Kinnersley ever frequented that house, and in what manner?

Bab. Last summer, the greatest part of the summer, sometimes twice or thrice in a week, till near the time that the gentleman was taken up, Mr. Hales would sometimes come thither, and sometimes be there an hour or two. Sometimes he would ask whether a minister had been there to ask for him? We hardly knew the name of either of them, but knew whom he meant. Mr. Hales would often be in our room, and see sometimes Mr. Kinnersley coming, out of the window. Mr. Hales would hardly take any notice of him; but as soon as he came in Mr. Hales would go into a private room, and the other afterwards go to him. And sometimes as soon as one came in at one door, the other went out at the other, and he followed him.

Serj. *Whitaker.* How often was this?

Bab. Twice or thrice in a week.

Mr. *Strange.* Do you remember on what occasion, and how they left off coming to your house?

Bab. Mr. Kinnersley was not at the house for two or three weeks or a month before Mr. Hales was taken up. Mr. Hales was there a few days before.

Mr. *Strange.* Do you remember that Mr. Kinnersley passed by?

Bab. Once he did. He went down Fleet-street: Mr. Hales rose up, went out, and went after him.

Mr. *Strange.* How long was this before Mr. Hales was apprehended?

Bab. It was three weeks or a month, I believe, before he was apprehended.

Mr. *Strange.* I ask, Whether at any time they sat down in the public room?

Bab. Very seldom: they generally went into the private part.

Mr. *Strange.* Was that distinct from the rest of the house?

Bab. Yes, Sir, quite separate.

Mr. *John Brooks* sworn.

Mr. *Strange.* Where do you live?

Brooks. I keep a coffee-house in Downing-street, in Westminster.

Mr. *Strange.* What name doth your coffee-house go by?—*Brooks.* My own name.

Mr. *Strange.* Do you know that you have ever observed that Mr. Hales and Mr. Kinnersley ever frequented your house, and in what manner?

Brooks. Mr. Kinnersley hath sometimes come to the coffee-house; sent for a porter; gave him a note to Mr. Hales, who hath come, and they have gone to a private part of the room.

Mr. *Strange.* Was there any other with them?—*Brooks.* No, Sir, never.

Mr. *Strange.* Was it often that they met thus?

Brooks. About four or five times in a month.

Mr. *Strange.* How long have they stayed?

Brooks. Several hours. When I have asked the servant why a candle was not carried them, he hath said, that they refused it.

Mr. *Strange.* How long was it before Mr. Hales was taken up?

Brooks. About a month.

Mr. *Strange.* Was there any observation made upon his being taken up?

Brooks. I observed it the more, having often seen them together.

Thomas Janeway sworn.

Kinnersley. I admit, my lord, that we have been together at several coffee-houses.

L. C. B. Well, now the man is sworn, we will go on with him.

Mr. *Strange.* Do you know Mr. Kinnersley and Mr. Hales?—*Janeway.* Yes, Sir.

Mr. *Strange.* Do you keep a coffee-house?

Janeway. Yes, Sir.

Mr. *Strange.* Where?

Janeway. In Cornhill, Sir.

Mr. *Strange.* Do you remember that they have frequented your house together, and in what manner?

Janeway. I believe they may have been there together several times.

Mr. *Strange.* What company had they with them?

Janeway. I take no notice what company is there. I observed them not.

Mr. *Strange.* How often have you observed them retire up stairs together?

Janeway. I take no notice of such things. They might for an hundred times, for aught I know.

Serj. *Whitaker.* My lord, we shall rest the evidence here. We submit it to your lordship and the jury, when such a note is drawn by such a man upon such a paper, by which he promiseth to pay such a sum to a person with whom he had no dealings, to what end can it be. Can it be with any other intention than to charge an innocent man with it? I think it is a plain case. It is certain that Mr. Hales carried this note, and borrowed a sum of money upon it; and Mr. Kinnersley made preparation for it by making a note for so much money payable to Mr. Edwards. Doth a man so easily give 1,260*l.* to a stranger with whom he hath had no dealings? To what purpose could it then be thus drawn? Why, to be indorsed. And this Mr. Kinnersley did, and he owned that the name was there, and he knew that Mr. Edwards was a rich man. Well, if Mr. Edwards was a rich man, and the other not worth a groat, as he owned himself to be an undone man, to what purpose then can it be? Well, I think it clearly appears that this was a contrivance between them two. If you think not this plain, I think that it is impossible to convict any man on a stronger evidence.

Serj. *Darnell.* My lord, I am counsel for the prisoner at the bar, Mr. Hales. And I think it doth appear that there was a transaction between Mr. Hales and Mr. Kinnersley; and that this money was due from Mr. Kinnersley to him. And we apprehend, notwithstanding what hath been offered, that the confession of Mr. Kinnersley is a proper justification of Mr. Hales. It is not, my lord, Mr. Kinnersley's being a defendant that shall depsive Mr. Hales of the benefit of this confession. It appearing that he was indebted to Mr. Hales, this note was given in satisfaction: we apprehend that it was given upon this account to Mr. Hales. In confirmation of what Mr. Hales saith, we can produce a person to shew that there was an account between them, and Mr. Kinnersley acknowledged such a balance, in satisfaction of which this note was given. And we think that it could not be drawn as a note of Mr. Kinnersley's payable to Mr. Hales, not only because the account would be as good against Mr. Kinnersley as such a note of his hand, but also because of Mr. Hales's own circumstances. Mr. Hales applied to a gentleman that recommended him to Mr. Bird to borrow money upon this note. And, gentlemen, it was this note thus drawn that recommended him. Mr. Hales had the misfortune to be concerned with sir Stephen Evance; he could not therefore appear himself; and, therefore, by the assistance of this note, borrowed the money. When difficulties came upon it, he went and paid part of the money, and I believe would have taken care to have paid the whole: it doth not appear that this hath affected Mr. Edwards. His name indeed hath been exposed as a man would not be willing that it should; money hath been raised upon the credit of his name; but he hath not been affected thereby. This therefore lieth on the unhappy circumstances of Mr. Hales. We will call one witness, and then this confession of Mr. Kinnersley we hope will avail.

Mr. *Lacy.* My lord, I apprehend that there is a circumstance that lessens the weight of, if it not wholly sets aside what they go upon. What they have gone on was, that Mr. Edwards's franks were used to this ill purpose. Maddox, a servant of Mr. Edwards, is produced, who tells us of a parcel of franks that were delivered in July last. Mr. Bird gave an account that this note was brought to him in March: so that it was brought him before those franks

were delivered. And though it may be apprehended that there were other franks, we think that there ought to be a proof of some franks that were delivered before.

Mr. Strange. There have been, Mr. Lacy, (as hath been deposed) for several years. Those that were brought in July last, are those that never were franked, but were only covers left for that purpose.

Mr. Robert Burkit sworn.

Serj. *Darnell.* Do you know, Sir, of any account stated between Mr. Hales and Mr. Kinnersley?

Burkit. No, Sir, none at all.

Serj. *Darnell.* No! What doth the man mean?

Mr. *Strange.* What, none in Newgate, nor no where else? Do you know of none?

Burkit. No, Sir.

Mr. *Strange.* Do you know of any money that was at any time due from Mr. Hales to Mr. Kinnersley?

Burkit. No, Sir, none at all.

L. C. B. Have you any other witness?

Serj. *Darnell.* My lords, there are two witnesses to this account stated.

Serj. *Eyre.* My lord, and gentlemen of the jury, I am counsel for Mr. Kinnersley. I apprehend that he is innocent. I readily agree with Mr. Attorney, that the affair of notes, established by act of parliament, is of great moment, and their security necessary to commerce; and that the forgery of such notes and indorsements thereupon is very pernicious to the public: I therefore apprehend that there ought to be strong evidence for the convicting of such a crime. I humbly submit it, that before a man be convicted of so infamous an affair, there ought to be strong evidence; and the rather because he is a clergyman of the Church of England, and his capacity of service depends upon his credit: And it doth appear that he hath behaved himself with all possible caution. You see that the contrivance that the officer sent to apprehend him made use of, was a pretence of a marriage. You see, gentlemen, and I am glad to see it, and wish that all others used the same caution, that upon his enquiry what age the young woman was of, understanding that she was not of age, and her parents not being there, notwithstanding that he was told that her brother was there with her, yet he absolutely refused, and said, that he would not be concerned for an hundred pounds without the parent's consent: That is such a point in his favour, that I think that it is a stronger circumstance for him, than the other circumstances are against him. As to the offence that is charged upon him, it is, I suppose, that he should give out a note made in his name payable to Mr. Edwards, and indorse such a note in Mr. Edwards's name, in order to charge Mr. Edwards with the payment of the money. They lay a great stress upon this, and say, that Mr. Kinnersley was wholly unacquainted with Mr. Edwards. One of the witnesses saith, that Mr. Kinnersley himself owned that he had never seen Mr. Edwards before in his life. How therefore (say they) is it likely, that there should be any fair reason for a man to make such a note payable to one that he had no dealing nor acquaintance with, nor had so much as ever seen before in his life? I submit it to you, whether in the course of business it is a material thing whom a note is made payable to. If a man owe a sum of money, and give a note for it, it is natural to enquire to whom it should be made payable, It was the more natural in this case, as Mr. Hales, having the misfortune to have a commission of bankruptcy standing out against him, could not negociate notes in his own name, but must act in some friend or neighbour's name. And it is no great wonder that Mr. Kinnersley, whose character directed his studies another way, and who was not acquainted much with these affairs, should be imposed upon to give such a note; and the less so, for this plain reason: Sir Stephen Evance and Mr. Hales formerly lived in Mr. Kinnersley's parish; received him with a great deal of civility: It can be no wonder therefore that he afterwards continued an acquaintance with him. Notwithstanding his misfortunes, it is plain that Mr. Hales was still acquainted with several very worthy gentlemen: Mr. Gibson and Mr. Edwards both furnished him with franks; sir Biby Lake recommended him to Mr. Bird, to borrow of him a considerable sum of money. If such gentlemen as these thus corresponded with him after his misfortunes, no wonder that Mr. Kinnersley, who had been the minister of the parish where Mr. Hales had lived, should keep up an acquaintance with him; and so no wonder that he should be so imposed on. In fact, we shall shew you that he was indebted for such a sum to Mr. Hales. It is impossible to give a particular account of the whole affair; Mr. Hales being also a defendant, and therefore no evidence: But that he was indebted in some such sums is plain. Gentlemen, it is very innocent if a man give a note where there is no consideration. It is no injury to the public. The person that gives the note may injure himself, but not the public. There is no act of parliament against the giving of such notes. Well, if the giving of the note be not culpable, consider how the fact of the indorsement comes about. And if you consider how that comes about, no doubt but that he must be cleared of the fact. How must this be done to affect Mr. Kinnersley? It must be on the back of the note when he wrote the note, and he must know it to be there. Now, with great submission, have they given any proof, or colour of proof, that it was then there, or, that if it was, he knew it to be there? They have given you the proof of Mr. Bird and the constable, who was present when he was examined. According to the first of these, it is plain that he knew not. He said that he knew that the name was there, but knew not how it came there. This, I think, instead of a confession,

is an avoiding of it, by saying, that he knew nothing at all how it came there: But consider the nature of the thing, how it is supposed to be done from a frank of Mr. Edwards's. Mr. Edwards had never franked a letter for him, but many for Mr. Hales. Is it not most natural to suppose then that Hales was concerned? How doth it follow, that this being done from a frank, the name must be there before the note was wrote? A man that is capable of drawing such a note for such an end, might he not give it to be franked? Is it not easy to conceive, that if I give such a note on a quarter of a sheet of paper doubled up to a person to be franked, that he shall do this so as to make the name stand for an indorsement? I would make this further observation, it hath been counted doubtful, whether the making use of a man's name to a different purpose from what he designed it for, shall be counted a forgery. I think that the doubt ariseth upon a distinction of my lord Cowper, on the statute of 8 Eliz. between forging and making a false deed. I do not pretend to say but that the opinion of the King's-bench was right. It was in the affair of Ward and Bridge.

L. C. B. No, Bridge and Dutton: there was an alteration. The question was, whether it could be accounted a forgery within the act of parliament? The words of the description in the act of parliament are, "If any one forge or erase, &c." whether he could be charged with forging of that note? I was one of the counsel. It appeared their opinion, that he forged it as much as if he had wrote the whole note.

Serj. *Eyre.* My lord, I agree it to be as your lordship puts it. I only mention it as a doubt not settled by the printed books. My lord, a man may alter a deed, *e. g.* a person oweth me money on bond; if I alter the bond to mine own damage, that is no forgery; but when he doth it to the injury of the person to whom the money is owing, then it is forgery: the forgery therefore lieth in the design of defrauding another. Now, whose good is it that this note was drawn for? It appears that my client had no benefit at all by it. The money was all received by Mr. Hales, and the whole transaction about paying the money was by Mr. Hales: he was therefore to receive the benefit, most likely therefore that the forgery was his. And as to this promissory note, what was the effect of it? No one will pretend to say, but that if Mr. Edwards was to bring an action he might recover his money of Mr. Kinnersley: he hath, therefore, only wrote a note, which, without controversy, hath subjected him to the payment of such a sum of money. Mr. Hales hath received the money, and gained by this note. We submit it therefore to your lordship.

Mr. *Mather.* My lord, with relation to the transactions between Mr. Kinnersley and Mr. Hales, we shall call evidence to shew the reasons of those private meetings that were between them.

Mr. *Peter Marsh* sworn.

Mr. *Mather.* Sir, do you know the defendants, Mr. Hales and Mr. Kinnersley?

Marsh. I have, Sir, known Mr. Hales many years.

Mr. *Mather.* But have you known Mr. Kinnersley?—*Marsh.* Not so many years.

L. C. B. What is your business or employment?

Marsh. I am an attorney, my lord.

Mr. *Mather.* Do you know of any transactions between Mr. Hales and Mr Kinnersley?

Marsh. About ten or eleven years ago, Mr. Hales brought me a bond of 50*l.* payable by Mr. Kinnersley to me. Mr. Kinnersley owed him the money, and had given him a bond payable to me. He desired me to get it.

Serj. *Whitaker.* This is not evidence. What signifieth it what the defendant told him?

Mr. *Mather.* What was done upon that? What came of the bond?

Marsh. I delivered it to Mr. Hales again.

Mr. *Mather.* Did Mr. Hales owe you any money?—*Marsh.* No, Sir, none at all.

Mr. *Cropley* sworn.

Mr. *Lacy.* Mr. Cropley, What do you know of any money-matters between Mr. Hales and Mr. Kinnersley?

Cropley. I received about 60*l.* at Janeway's coffee-house, a debt which was due to me from Mr. Kinnersley: they were there together; Mr. Kinnersley was the debtor, Mr. Hales had given me a note for it. Mr. Kinnersley had prevailed on me to lend him an hundred and odd pounds upon but a slight acquaintance: he brought another gentleman to be security with him for the paying it me; so I forbore him for six months. I then enquired of him after it: when he had led me a dance from coffee-house to coffee-house for some months, I was forced at last to sue for it. He desired me to sue the other party, and forbear him: I recovered half from the one, then I came upon him for the other. When I came to serve him with a notice of a writ of enquiry, he met me with Mr. Hales at some tavern in Holborn, about June or July last was a twelvemonth. Then Mr. Hales said to me, I am to receive about 6 or 700*l.* within about three months time; and then I shall be ready to pay that money: upon that I stopt my procedure upon the Writ of Enquiry; and, as Mr. Hales requested me, I took Mr. Hales's and Mr. Kinnersley's note for the payment of it within three months: when that time was expired, or within about four months, I got it. What was his part to pay I received at Janeway's coffee-house: they were together; which paid me I cannot say. The money was in half and quarter broad pieces: I refused to take it in those pieces, being to transact it in the Alley. Upon that he took me to a banker's about Temple-bar, and there changed it.

L. C. B. When was this?

Cropley. It was in February. Mr. Kin-

sensley gave me a little note at the same time for the damages that I had sustained in seeking it; about 50*s.* or thereabouts.

Mr. *Strange.* Hath there been any application made, Sir, to you to appear as a witness?

Cropley. Yes, Sir, Mrs. Kinnersley sent to desire me; and Mr. Kinnersley also sent me a letter, and besides that sent me a Subpœna.

Mr. *Strange.* Can you produce that letter?

Cropley. I have it not here, Sir.

Mr. *Strange.* You cannot say which paid you the money, Sir?

Cropley. No, Sir, but they were both together.

Kinnersley. Sir, one word I beg. Did not Mr. Hales give you a note for it?

Cropley. Yes, Sir, you and Mr. Hales joined in it.

Mr. Peter Beart was called, but did not appear.

Mr. *John Wells* sworn.

Mr. *Lacy.* What do you know, Sir, of any money due from Mr. Kinnersley to Mr. Hales?

Wells. No, Sir, I know not of any.

Mr. *Lacy.* Or of any money lent, particularly an hundred pound? Was Mr. Kinnersley indebted to you?

Wells. Yes, Sir, an hundred pound.

Mr. *Lacy.* Who lent him the money to pay you?

Wells. Mr. Hales, as Mr. Kinnersley told me.

Mr. *Lacy.* Who paid you the money?

Wells. Mr. Kinnersley.

Mr. *Lacy.* Was Mr. Hales present?

Wells. I do not know, Sir. It was paid to my attorney.

Mr. *John Simpson*, banker, sworn.

Mr. *Lacy.* Sir what do you know of money due from Mr. Kinnersley to Mr. Hales?

Simpson. I know not Mr. Hales, Sir. I never saw him out of Court.

Mr. *Lacy.* Was Mr. Kinnersley indebted to you?

Simpson. Some months ago he borrowed of me 30*l.* on some lottery tickets.

Mr. *Lacy.* Who paid it you off?

Simpson. I was not at the shop when the money was paid.

Mr. *Lacy.* But do you not know how it was discharged, whether by money or notes, and by whom?

Simpson. No, Sir, I cannot say. It doth not appear by our books.

Mr. *Lacy.* Do you know or not that Mr. Hales paid it, or gave a note for it?

Simpson. I do not know, Sir.

Mr. *Lacy.* Doth any note by your books appear given for it, or by whom paid?

Simpson. No, Sir; if it had been paid by any other hand than Mr. Kinnersley's, I believe that it would have appeared by our books.

Mr. *Fowler*, banker, sworn.

Kinnersley. Sir, I beg you to say whether you remember that I gave you a note from some friend of Mr. Hales's?

Fowler. You never mentioned his name. I lent you money upon lottery tickets; but know nothing of that you mention.

Kinnersley. Did not Mr. Hales come to your shop, take up the note, and pay it?

Fowler. No, Sir, not that I know of. I never saw him there.

Mr. *John Hall* sworn.

Mr. *Lacy.* Did you ever, Sir, give a note upon Mr. Hales's account and for his money?

Hall. Not that I know of.

Mr. *Lacy.* Did you at his desire pay any money?—*Hall.* No, Sir.

Mr. *Lacy.* Do you know any person that did?—*Hall.* No, Sir.

Serj. *Whitaker.* Do you know Mr. William Hales? Will you give us an account of his paying you a bill in broad pieces, and whether he asked you to write his name Wells. He can tell very well I know what this means. Did you give any note, or set your name?

Hall. I set my name.

Serj. *Whitaker.* Do you know your name again?—*Hall.* Yes, Sir.

Serj. *Whitaker.* Is that your name?

Hall. Yes, Sir, it is.

Serj. *Whitaker.* When did they get it of you?—*Hall.* On August 17 last.

Serj. *Darnell.* I see not how my brother makes this evidence against Mr. Hales. He is not brought for him but for Mr. Kinnersley; and they would cross-examine him as to Mr. Hales.

Serj. *Whitaker.* I agree with you that we could not have called him: but my brother Eyre called him to shew that there was a promissory note, he denies it. Well, I submit it.

Serj. *Eyre.* My lord, we have gone through the evidence opened: but I would mention this as to the examination before sir Richard Hopkins. It is suggested that Mr. Kinnersley would have confessed, but that he was interrupted by Mr. Mitford. It is plain that he had spoke to all that was material both as to the note and the indorsement: I think that it is therefore wrong for them to say that he would have confessed more, but that he was interrupted. But we will call a gentleman to shew in what a candid manner he behaved, and that he was not interrupted in the manner that hath been suggested.

Rev. Mr. *John Hayes* sworn.

Serj. *Eyre.* Were you present, Sir, at sir Richard Hopkins's, when Mr. Kinnersley was examined?—*Hayes.* Yes, Sir.

Serj. *Eyre.* What did you observe about his being stopped, or did he fully speak his mind?

Hayes. I remember, Sir, that Mr. Mitford desired him to be cautious, and not too free in making his reply.

Serj. *Eyre.* I only ask you, whether he had not then spoke both as to the note and the indorsement?

Hayes. He said that the note was his. He said that as to the indorsement, he had heard

that it was indorsed by Mr. Edwards, but knew not how it came.

Serj. *Eyre.* Do you apprehend that his being cautioned was to be careful in his answer, or that referred to the answers that he had already made?

Hayes. I apprehended that the caution was to be careful in his answers.

Mr. *Grants* sworn.

Serj. *Eyre.* Were you present at the examination of Mr. Kinnersley before sir Richard Hopkins?

Grants. Yes, Sir, Mr. Kinnersley sent for me when he was first taken up. I suppose it was because I married a relation of his; for I knew nothing of any transactions between him and Mr. Hales.

Serj. *Eyre.* I ask you, whether he fully spoke his mind about the note and the indorsement, or whether he was interrupted therein?

Grants. Sir Richard asked him, whether he knew the note and the indorsement? There then passed a sort of a squabble between him and Mr. Mitford.

Serj. *Eyre.* Did you observe that any gentleman interrupted Mr. Kinnersley, or cautioned him as to his answers?

Grants. There was an interruption: but what it was I could not particularly hear.

L. C. B. Have you done?

Serj. *Eyre.* Yes, my lord.

Serj. *Whitaker.* My lord, I observe that the defence that they have made is for one to throw it upon another. Mr. Kinnersley thinks that Mr. Hales is as deep as he can be, and therefore may bear the load: But then my lord, Mr. Hales wants to retort it upon Mr. Kinnersley; but the drift of both is, that Mr. Kinnersley may get out as he can. You will observe the defence: There is a pretence of mutual dealings, and that this note was given in discharge of the balance of the account. I submit whether there hath been any evidence of any dealings to any such sum: If not, to what purpose was it given? If it was to raise money, was it for a fraudulent purpose, or not? If it was, they are both equally guilty. But the pretence now is this, Mr. Hales was a bankrupt: and it was therefore proper for them to have a third person, in whose name to transact. Now how could that be proper, if it was a person over whom they had no power? Would any one be willing to take notes in the name of a stranger? Is a stranger to be trusted with such a sum? No. If not, how then? Here is one man to write such a note for another in Mr. Edwards's name, to what purpose? Why, in order to charge Mr. Edwards with the money: Else, what signifieth the indorsement? The question then is, was Mr. Edwards's hand there? And did Mr. Kinnersley know it? They that would have it that Mr. Kinnersley was very innocent, say, that he knew nothing at all that Mr. Edwards's hand was there. Well, when he comes to be called upon and importuned for the money by Mr. Bird; what doth he say? Why, Mr. Edwards is a rich man: I am an undone man: You must therefore resort unto him. This was said not only upon the sight of the note, but before it was shewed to him. He then told Mr. Bird that he knew that he had such a note of his so indorsed. Gentlemen, things of this nature are only to be detected by circumstances. They will not call persons to be witnesses to these transactions. If this was a fair dealing, it was proper to have called some one honest man to give an account that he was present thereat, and privy to this transaction: But instead of that, which is the wickedest I cannot tell; but it is plain that here is a contrivance to charge an innocent person; and such little things as evidences of transactions of a note of fifty or thirty pounds, or the like, are not to go against it. Circumstances will not make a plainer proof than here is of forgery. A note drawn on such a little paper in so slovenly a manner, detects itself. Here is a plain forgery. The question is, who is guilty of it; and whether there is not sufficient proof that the defendants are the persons guilty of it?

Mr. *Strange.* My lord. I beg it may be considered, whether it is not criminal to give such a note. At several times he declared before he saw the note, that the name of Mr. Edwards was on the back of it. If the jury are of my mind, as to one fact, it is a demonstration that the name was upon it when the note was given. If the jury will look upon the note, it will appear that something was written upon the note, and nothing more probable than 'free.' Can any imagine, that Mr. Edwards, whose name is there, would ever write a frank upon a note? If therefore the jury is of my opinion in this observation, that there was at first 'Free Samuel Edwards,' it is impossible to imagine but that it was wrote there before the note was drawn. My lord, that the jury will take on their view. My lord, there have been several things said as to whose benefit this should be for, that it is plain that Mr. Kinnersley received no benefit by it, that therefore it could not probably be his forgery. My lord it is plain by the account that we have given you of their correspondence, that there was something carrying on between them, which must be of a very private nature. Doth it not appear for whose benefit it was? I am (said he) an undone man; you cannot expect it of me, but must apply to Mr. Edwards who indorsed it: And therefore, though he made himself liable, that signified not, as he was at the same time liable to many more actions. It appears that they were obliged to give the note in the name of another person who was responsible, having no credit of their own. As to that objection, for whose benefit, we apprehend it of no consequence; they might probably share it between them. There was another thing endeavoured to be proved, viz. such a debt due from Mr. Kinnersley to Mr. Hales. Since they thought it necessary to attempt a proof of that kind, if they have failed in that proof, it

apprehend that their opinion was that they were in need of a proof of that kind, which hath failed them. What have they gained? Notwithstanding a note given of 1,260*l.* (a very great sum to be due from a clergyman in his circumstances), they have pretended to prove nothing but one bond of 50*l.* which hath not been proved, but only Mr. Hales came to Mr. Marsh and told him this, which I apprehend to be no evidence: Had they brought the bond, it would have appeared whether true or not: This is no proof that Mr. Kinnersley was indebted to Mr. Hales. What Mr. Cropley saith, amounteth to no more than about 59 or 60*l.* I must submit it, whether they have given a reasonable account of this affair. My lord, it is an happiness that there are such general circumstances as tend to detect them.

Kinnersley. My lord, I desire to speak.

L. C. B. You were called on before. You should advise with your counsel whether it be proper: I would only acquaint you that it is not regular. If you would be heard, or call any witness, if you have any thing material for your defence, it shall be heard: But if you produce any thing new, the counsel for the king must have liberty to answer; or if you bring any witness, they must have liberty to cross-examine, or to bring any other evidence on their side.

Kinnersley. My lord, I shall call no other evidence. I shall leave it to your justice; and this gentleman I believe will acquiesce. Mr. Hales lent me 50*l.*; he took it in that gentleman's name that was called for a witness: Next, Mr. Took had one hundred and fifty pound note: Another gentleman (Mr. Burton) hath note of 100*l.* which Mr. Hales gave him to discharge a debt.

L. C. B. Mr. Kinnersley, you intimated that you should bring nothing new.

Kinnersley. My lord, at a public coffee-house he desired me to lay down 25*l.* and the policies are now in court which were actually insured for so much money. And as to this note, I call God to witness, that this note I gave him upon no other account but on settling the account in exchange for other notes which amounted to that sum. He directed me how to do it; took the paper out of his book, and held it double, whence I now apprehend that Mr. Edwards's name was then on the back. I never was privy to his altering any letters: I gave him that note for want of money, for a debt which is still due, and call upon him to declare what is true.

Att. Gen. My lord, whatever Mr. Kinnersley hath averred is without witness.

L. C. B. When persons are prosecuted capitally, the law alloweth him not counsel as to fact: therefore, what a person alleges himself must be taken notice of. Upon a charge of misdemeanor you make your defence by counsel, and they state the case. It doth not avail in proof what a person saith himself, and what they say avails not, except supported by proof. What you say will have no weight as proved, except proved.

Kinnersley. My lord, are policies no proof? Here is a certificate from the proper officer. Sir, I insist upon it that you do me justice in this matter. I will be content to suffer death if this be not so.

L. C. B. You are not to be now regarded.

L. C. B. Gentlemen of the Jury, this is an indictment against Thomas Kinnersley, clerk, and William Hales, late of London, goldsmith, for forging and publishing an indorsement on a promissory note, for the payment of 1,250*l.* to Samuel Edwards, esq. And the indictment sets forth, That the defendants, having in their custody a promissory note subscribed by Thomas Kinnersley, and bearing date August 16, 1727, whereby Kinnersley promised to pay 1,260*l.* to Samuel Edwards, esq. within three months; that the defendants, having this note in their custody with an intention to deceive and defraud the same Samuel Edwards, esq. and being persons of evil fame and reputation, did falsely and fraudulently forge and counterfeit on this note for 1,260*l.* payable within three months after date to Samuel Edwards, esq. or his order, an indorsement to this effect:

"Pray pay to the Order of
for the value received, SAMUEL EDWARDS."

thereby intending to charge Mr. Edwards as the indorser of that note with the payment of the 1,260*l.* contained in the body of the said note; that after they had forged and counterfeited this indorsement upon this note, and knowing it to be a counterfeit, they did publish the said note so indorsed. Gentlemen, the counsel on the behalf of the prosecution have acquainted you that they look upon this as a contrivance of both defendants to carry on this forgery upon what they suppose at first merely a frank; that the name of Mr. Edwards upon the cover of a letter with the word 'free;' that the word 'free' hath been at the time of the indorsement altered and made 'for the,' and the words 'value received' added to that, and made the indorsement to this note. For the corroborating of this they have called several witnesses. First, Thomas Maddox was called, a servant to Mr. Edwards. He tells you that Mr. Edwards lives in Duke-street, Westminster, and that the defendant Hales lived near over-against him; that the defendant Hales frequently sent covers over, upon which he had several franks directed to several persons; that this hath been the custom for several years; that Mr. Edwards used to send them over indorsed with his name 'Samuel Edwards, free.' He saith, that his usual way was to indorse the whole superscription; but that last summer, some time about July, there were six covers sent over by the defendant to Mr. Edwards's house by the defendant Hales, desiring that they might be franked with only 'Samuel Edwards free,' without writing the whole superscription; that Mr. Edwards declined that, saying that he never did it: he therefore refused him, and those covers were

not indorsed, but were produced here. He hath been asked, Whether he knew of any correspondence besides this of franking letters between Mr. Edwards and Mr. Hales; and whether he knew of any between Mr. Edwards and Mr. Kinnersley? He answered, that he doth not know of any whatsoever. Another servant, one Anne Clarke, comes and produceth a paper of names that was brought over from the defendant Hales to Mr. Samuel Edwards's house, in order for him to frank letters to those persons, and write the whole superscription as at other times. She produced the paper in court, which she said that she received from Mr. Hales's servant. And Mr. Booth being examined thereto declares it to be the proper hand of the defendant Hales, with whose writing he hath been well acquainted, especially since his bankruptcy, he being a clerk in that commission. In this paper is wrote,

Two to John Pratt, esq. Bristol.
Two to Mr. Levett, Huntington.
Two to Stephen Mitford, esq. Exeter.

They make use of this evidence to shew that there was a sort of an attempt to get covers with these names franked, hoping or supposing that there might be a space left sufficient to write a note of this nature. Mr. Booth, who was called to prove the hand-writing of Mr. Hales, was cross-examined by the counsel for the defendant, whether he knew of any traffic of Mr. Hales since his bankruptcy. He saith, that he doth not know of any, but that he was well acquainted with his hand-writing, being employed in the affair of the commission of bankruptcy. Mr. Thomas Bird was next called and examined as to the circumstances of the publication of this note. He tells you that this note, dated August 16, 1727, for the forged indorsement whereof both the defendants are prosecuted, was brought to him, in order to take up money upon this note, and further security, which Mr. Hales gave in March last; that it was brought in the manner that it now is, and no alteration made either in the body of the note or in the indorsement, but it stands and remains in the same manner as when he first received it; that when Mr. Hales came to him, he proposed to borrow of him 750*l.* upon the credit of this note for his security, and likewise upon his own note for the payment of this money; that he had been requested by a friend of his in the morning before to accommodate Mr. Hales with this money upon the credit of a note which the person had in his hand, and which was the same note; and that on the afternoon of the same day [March 20], while he was at the Hudson's-Bay house, in Fenchurch-street, Mr. Hales came to him with the note, and he then lent him the money for 14 days; that he then desired Mr. Hales to write some paper to testify the receipt of the money, and be a further security to him; and that the said Mr. Hales thereupon wrote a promissory note dated the same day, wherein he promised the re-payment of this 750*l.* in 14 days, which note was subscribed by the defendant Hales himself; that the sum of money was made up in several bank notes; that he delivered these to the said defendant Hales, and took this note and Mr. Hales's own note, as a security for the said money; that April 3 following, Mr. Hales brought 400*l.* which he indorsed upon his own note; and that the rest of the money remains due. He tells you, that when he heard that the defendant Hales was apprehended in September last, he sent to one Tomkins, an attorney, delivered this note to him to go to Mr. Kinnersley, to get this money for him. The account that he received was, that Mr. Kinnersley was out of town, so that he could not meet with him. At length Mr. Tomkins intimated that Mr. Kinnersley cared not to see him, but would come the next day to Mr. Bird himself upon this affair. Accordingly on or about the 16th of September, the defendant, Kinnersley, came to Mr. Bird at his compting-house: Mr. Bird, not knowing who he was, seeing a clergyman come in his gown, and looking a little at him, he said his name was Kinnersley. He hereupon said that he had a note of his hand left with him for a security; to which he replied, I know, Sir, that you have, and it is for 1,260*l.* payable in three months to Mr. Edwards or his order; that he said that the note was of his own hand-writing; but immediately added, How it came to be indorsed by Mr. Edwards I know not. This, gentlemen, you must take particular notice of, because this was the first mention of Mr. Edwards's indorsement: at that time Mr. Bird had not mentioned that, nor shewed him the note; when Mr. Kinnersley having owned the note to be his hand-writing, immediately added, but how it came to be indorsed by Mr. Edwards I know not; naming thus the particular person who was the indorser of this note. He saith, that Mr. Kinnersley was in a great consternation at that time, and said that he was an undone man, among other expressions. And he said likewise, that Mr. Edwards was a gentleman of substance; and this he declared, though Mr. Bird had not shewn him the note at that time: I am (said he) an undone man; Mr. Edwards is a man of substance. This he said before that the note was shewn to him, or any declaration was made by Mr. Bird relating to Mr. Edwards's being the indorser of this note. He said further that he was not in a capacity to pay this money; and that they must apply to Mr. Edwards, who was a substantial man, for it. Gentlemen, this was made use of as a sort of defence at this time to avoid this thing, to put it off from himself by this argument, why Bird should not come upon Kinnersley himself, who was uncapable of paying him, but take his remedy against Mr. Edwards, who was a substantial man. He was cross-examined: the counsel for the defendant asked who was the person that recommended Mr. Hales to him as the borrower of this money? It was answered, That it was sir Biby Lake. He was asked on whose credit he lent the money, Mr. Hales's or Mr. Edwards's? It was

swered both, as it must be in such a case. Gentlemen, upon this the note was read; for it being received directly from the hands of the defendant Hales, that was sufficient cause to read the note, and lay it before you. Accordingly it appears to bear date August 16, 1727, and is a promissory note, running thus:

"I promise to pay to Samuel Edwards, esq. or his order, within three months after date, the sum of twelve hundred and sixty pounds, for value received,

"THOMAS KINNERSLEY."

"£. 1,260.

Then comes the indorsement: and there, there is wrote on the top, "Pray pay to the order of," then there is a large blank, then comes, "for value received," and then there is the subscription "Samuel Edwards." Gentlemen, upon this it is proper to take notice of the observations made by the counsel for the prosecution on the manner of the writing of this indorsement. They observe that this must be a subscription by Mr. Edwards of his name for a frank for the passing of a letter free: it appears very probable from the manner of his writing a frank. 'Free' and not 'frank' is the word that he makes use of: and upon what appears by what remains in this note, they say, that by the top it appears that it must be cut off from some other note, and that there is an indenture where they suppose that some other letters were; that there is the appearance of something, not a blot, but the appearance of the remainder of a letter or figure on this place, and some appearance of a little dash from it. But they say that 'for the' is substituted for the word 'free;' that it appears by the thickness of the letters, by the ink, and by the manner wherein the letters are put there; and by the form of the *ff* which Mr. Edwards makes in the word 'ffree;' and that there is still the appearance of the remainder of one or both the e's. Upon this, gentlemen, you will consider whether the *o* and the *r* have not the appearance of some other letters under them, and between the *f* and the *r*. It is plain upon sight whether the other letters seem wrote of the same strength and thickness with the *f* and *r*. The *ff* seems paler and thinner, and of a different ink from the other letters. And then, gentlemen, the word 'the' is here written at length. You will consider whether this seems not to have been from a necessity to put some other word to fill the whole compass of the word 'free.' Now 'the' seems not wrote at the same time, and with the same ink with 'value received.' If this had been wrote all at the same time, it is pretty extraordinary that it should not have been wrote even. The *f* is wrote in a strait line even with 'value received,' but the *o* sinks a little, and the *r* comes under. You will consider, gentlemen, whether there was sufficient room, and whether this was the cause of putting it so. These considerations are made use of to make it probable that it was wrote at different times: if so, it is most probable that it was at first 'free,' and that the other words were substituted afterwards. So that these are the observations as to the manner of writing it, which you are to consider whether they are true, and there be a foundation for them or not. Mr. Spicer then was called, who hath been a clerk to Mr. Edwards in the Exchequer between ten and eleven years, but hath been in his service about twenty-four years. The note was shewn to him, and he tells you, that as to the name, he takes it to be the proper hand-writing of Mr. Samuel Edwards, his master: the *f* he also counts to be his. Upon his observation and oath, which is evidence to be left to you, the word 'for' is wrote over other letters, and he believes, upon his oath, that the first word was 'ffree.' He saith, that Mr. Edwards, when he maketh a frank, makes use of a *ff* as in the manner that it here stands. If it was made for 'value received' at first, it is pretty extraordinary that a *ff* should be written, and not a single *f* as usual. Why (saith he) it is my master's usual way of writing 'ffree.' And then he saith that he always wrote 'ffree' and not 'frank;' which is material, as the word 'frank' might not so well correspond with this alteration. He saith that the *r* seems visible, and to stand between the *o* and *r*. You will see whether there be the remainder of any such letter or no; since he saith that he doth think that the *r* is visible. He tells you, that as he is clerk to Mr. Edwards, so he is acquainted with his private affairs, relating to his estate and the like, and that he doth not know of any money transactions between his master and either of the defendants; that he is so well acquainted with his affairs, and the nature of his employment under Mr. Edwards such, that he believes that if any such dealings had been, it would have come to his cognizance. He tells you, likewise, that Mr. Edwards is not a person that useth to deal this way: it was very proper to ask him this, because it is common for many persons to indorse notes in this manner. He saith that it is not his usual custom: it cometh not into his public business; and, as to his private transactions, he never knew him to do it. They were then going to call a witness to prove the body of the note to be Mr. Kinnersley's hand-writing. Upon this, Mr. Kinnersley took upon him to admit that it was all his own hand-writing. So then it is to be taken for confessed, that the body of the note was his writing. It is written in this manner,

"*August* 16, 1727.

"I promise to pay to Samuel Edwards, esq. or his order, three months after date, the sum of twelve hundred and sixty pounds, for value received, THOMAS KINNERSLEY."

"£. 1,260.

Well, gentlemen, after this, the counsel for the prosecution say, that Mr. Kinnersley hath in

effect confessed as much as amounts to what they stand in need of to convict him of thiefergery. First, they call Mr. Wright, who was present at the examination of Mr. Kinnersley before sir Richard Hopkins. Mr. Wright tells you, that at that time the defendant Kinnersley owned that the note was all his own handwriting; that Mr. Edwards thereupon asked him why he drew the note payable to him, when there never had been any dealings between them. Mr. Wright saith, that the defendant Kinnersley owned at that time that there never had been any dealings between them, and likewise that he did not know Mr. Edwards, nor had, to the best of his knowledge, ever seen him till then before sir Richard. But he said, that the reason of his doing it was this: that he was indebted to the other defendant Hales in a sum of such an amount and more; and that Hales desired him, the defendant Kinnersley, to write him a promissory note for that sum; that he asked Mr. Hales whom he should make the note payable to, and Mr. Hales said to Samuel Edwards, esq. and that accordingly he wrote the note in that manner that it now appears in to you upon the request of Mr. Hales. Mr. Wright tells you, that at that time he had heard what had past relating to the discourse with Bird; and he told him, Why you have expressed yourself as if you was a ruined and undone man; why did you say that, if Mr. Hales requested your writing him a note for such a sum as 1,260*l.*? Upon this, one Mitford said to Mr. Kinnersley, You shall not go on to declare yourself any further, you may do yourself an injury. This is made use of as a circumstance by the king's counsel, that Mr. Kinnersley was going to explain himself further if he had not been prevented by his friend or solicitor, who knew the consequence of a confession of this nature. Mr. Wright tells you, that at this time when Mr. Bird was examined, and said that he had not at that time shewed the note to Kinnersley, when he said, that how it came to be indorsed by Mr. Edwards he could not tell. Mr. Edwards hereupon asked him whether he knew of this indorsement before Mr. Bird shewed him the note? That he answered that he did, but that how it came there he could not not tell. So that that is the substance of his confession in that respect, that he did know of it, though he said he knew not how it came there. Sir Richard Hopkins likewise was called to give an account of what passed before him: he saith that he took minutes of what passed; that it was in the latter end of September that he was brought before him charged with forgery of two notes, this of 1,260*l.* and another of 1,600*l.*; that as to this note, it seemed to him an altered note, which was the occasion of his more strict examination of the matter. He saith, that he examined Mr. Bird, who advanced this money, who said that before he had shewn this note to Mr. Kinnersley, when he had only told him that he had a note of his hand left with him for a security, he answered, I know that you have: it is for 1,260*l.* payable in three months to Samuel Edwards, esq. or his order, and is indorsed by Samuel Edwards. Sir Richard hereupon asked Mr. Edwards if he had had any dealings with Mr. Kinnersley? Who said that he had not. Kinnersley also said the same, but said that he drew this note payable to Mr. Edwards at the request of the other defendant Hales, to whom he was indebted in that sum, and more; but that he did not know Mr. Edwards, nor to the best of his knowledge had ever seen him before that time. He saith, that upon his observing that it was very strange that he should make such a note payable to a person with whom he owned that he had no dealings, and who was an utter stranger to him, Kinnersley was going farther to open his mind, but one Mitford stopt and prevented him from going on. Richard Davis, who is the constable that apprehended him, was next called to give an account of what passed when the warrant was issued out, and given him to be executed. He tells you, that because Mr. Kinnersley lived out of the city, he went to a public house within the jurisdiction of the city, and sent a porter to desire to speak with him; but received answer that he was not in town. He enquired when he would be in town, and went himself, and made a pretence of a couple wanting to be married. At first came out the daughter, and then the mother, whom he acquainted with his business: at first they seemed to say that he was not at home, or did not readily say where he was; but after that he had given an account of his business, he was carried into the parlour, and then Mr. Kinnersley came to him. He told him the business of the marriage: the defendant thereupon asked him several questions; and, among the rest, how old the lady to be married was? This is necessary to be mentioned, because they have insisted upon it as a proof of his honesty, that he asked whether she was of age or not? And being told that she was not, then asked whether there was consent of relations or not? If (said he) there be not, I will not be concerned in a thing of this nature for 100*l.* He was told that the brother was with her at the Magpye tavern, and asked to go thither for satisfaction, but would not go. Upon this the constable saith, that he went away, and made it his business to watch and see when Mr. Kinnersley came out. In an hour or two he came out, he dogged him up the Minories, then when he was come within Aldgate, he told him that he had a warrant against him for forgery of a note of 1,260*l.* He then desired him to go into a house with him, where he asked to see the warrant: Upon seeing it, he said, that if the gentleman had sent for him, he should readily have come to him. Being asked why he denied himself? He answered, that he was afraid of being arrested for debt, and that was the reason of his denying himself when the constable came to enquire for him. He then owned that the note

was his own hand-writing; but said that he knew not how the indorsement came there. This agrees with what was said by the counsel, and proved by the witnesses, concerning what was said by him upon his examination before sir Richard Hopkins, and to Mr. Bird at his compting-house when he came to him. This is the evidence, as to the fact. The counsel for the prosecution go on and say, that there hath been a private correspondence carried on between these two defendants, which they insist on as a circumstance to make it likely that they joined herein. They called to this, first, Mr. Thomas Bab, who saith, that both the defendants used to meet frequently at his house; that Mr. Hales frequently came there early in the morning, would sometimes walk about a considerable time, would ask sometimes if the minister had been there without naming him, but they knew whom he meant, having frequently seen them together; that some time before Kinnersley came in, Hales sitting by the window, saw him go by and went to him; sometimes Kinnersley came in and went through the coffee-room into a back room, and Hales would follow after him, and they would stay there together; Kinnersley sometimes would go out at one door, and Hales immediately go out at the other; that this continued for about a month or three weeks before Mr. Hales's apprehension; that one time particularly, Mr. Kinnersley passed by and went down Fleet-street, and Mr. Hales seeing him, rose up and went out after him; this, he saith, was about a month before the defendant Hales was taken up. He saith, that they seldom sat down in the public room, but went into a private room. John Brooks was next called, who saith, that he keeps a coffee-house in Downing-street, in Westminster. He said, that Mr. Kinnersley used to come sometimes to his coffee-house, send for a porter, and give him a note for Mr. Hales, who hath come to him, and they have gone into a private part of the room, and there they have staid for three or four hours together; that it being in the evening he hath thought them in the dark, and asked the servant why a candle was not carried them? Who hath answered, that he had carried them one, but they refused it, not caring to be interrupted; that they met thus about three or four times in a month, a little while before Mr. Hales was apprehended. Mr. Janeway also was called, who saith, that he hath seen the two defendants several times retire up stairs together at his coffee-house. This, gentlemen, is relied upon, and given in evidence, to shew that there was a correspondence between them about some affairs not so proper to be managed in public. This is the substance of the evidence on the side of the prosecution: and the counsel for the king tell you, that as to things of this nature, they must be done in a very private way in order to prevent a discovery; it cannot be expected that they would call persons to see such a thing done; that the only evidence, therefore, that can be given is

circumstance. Well, gentlemen, the dants come upon their defence: they by different counsel, and make a separ fence. The counsel on the behalf of fendant Hales insist that there was a d from Kinnersley to Hales, for which t was given; that this doth appear from veral declarations made by Mr. Kin from time to time. They rely upon evidence of such a debt for money adva him, and that this note was given by fendant Kinnersley for such a debt. T you that Mr. Hales being a bankrupt, an fore it not being proper to have such a his own name, because it would be liab claimed by the assignees in the commi bankruptcy against him, that therefor proper to make use of the name of anoth son; that Mr. Edwards was never affe injured hereby; that part of the mon been paid, and if they had had a little pe as 400*l.* was paid, so the rest would ha paid. And though they admit that the ing of such a note in the name of ano advance credit without his leave was cr yet it did not, they say, really affect or him. And then to shew that there wa son or foundation for the giving of thi they said that they would call witne there was an account stated, upon whi money appeared to be due. They call bert Burkit to it: but he saith that he k of no such account, it is all imagination his name was made use of without his ledge; that he knew nothing of any ever due between them: so that it is that that witness is lost in the examina to any benefit to them. They said that th another witness who happened not to be this is the substance of the defence of t fendant Hales. Kinnersley then comes defence. His counsel insist that he is n denced to be concerned and knowing forgery; that as this is a crime of a ver ous nature, and deserves the greatest p ment, so it is necessary that the cleares should be given you before you convic They say that his character likewise r stronger evidence than others; that his is more concerned than others, becau very exercise of his function depends up credit, without which he will be of no the parish where he doth or may minister they say, that it appears by the evide the side of the prosecution, that he i careful in the discharge of his function, they insist on from his refusal to be con in a marriage without a licence and cons friends, it being contrary to acts of parli and to the canons of the church, and tha suppose him as cautious in other things. say, that the thing itself is usual, an it is an innocent and harmless thing; t person is hurt by another's engaging him a sum of money by such a note; th person, indeed, who gives such a note is to an action for the money, but that ther

injury done to the person to whom it is made payable; that therefore as to Mr. Kinnersley's subscribing a note for so much money payable to Samuel Edwards, esq. especially when it was done upon the request of the defendant Hales, upon account of a debt which was due from him to Hales, and for the convenience of Hales, it was an innocent thing; that Kinnersley was to pay Hales so much money, and Hales himself desired a note for it in this name. They say that Kinnersley might be induced to do this from the credit and character of Hales, and from their former acquaintance; that he was the minister in his parish when the partnership was between him and sir Stephen Evance; that notwithstanding his misfortunes since that first acquaintance, it is plain that he hath been corresponded with by persons of credit, therefore there can be no reflection on that head on Mr. Kinnersley. And they say, that as there was nothing culpable in giving of the note, so nothing amiss hath happened thereupon; that if Mr. Hales hath done any thing amiss, it does not affect Mr. Kinnersley. Though they raise Mr. Hales's credit at first, yet afterward they sink it, and seem to throw the blame upon him. They plead also, that there is no evidence that the indorsement was upon the note when it was subscribed by Mr. Kinnersley. If it was afterwards (say they) indorsed with or without authority from Mr. Edwards, it will not affect Kinnersley, except there be express proof that he did it. They say also, that there is no proof of any franks delivered to Kinnersley but only to Hales; that he had not therefore the opportunity that Hales might have; that therefore he is not involved in that circumstance or the inducement hereto; that the proof or evidence given is nothing against him. And then (say they) to what purpose should the note be contrived to be indorsed with the privity of Kinnersley, when he hath no manner of benefit thereby, Hales having received the money? They ask the question *cui bono*, and thence infer that Kinnersley could not do this. And they insist upon it in point of law, that the writing of this note can be no fraud in him, he having done what renders him liable to an action. And to shew that the money was due from Kinnersley to Hales, they have called several witnesses to shew that there was a foundation for this note. Mr. Peter Marsh was called: He saith, that about ten or eleven years ago he brought a bond of 50*l.* to him made by Mr. Kinnersley payable to him. Mr. Hales told him, that Mr. Kinnersley owed him this money, and had given him this note made payable to him, which he desired him therefore to get for him. He knew nothing of the matter, was surprised that his name was made use of, and so returned the bond again. This is insisted upon, gentlemen, to shew that there were transactions between Kinnersley and Hales. Now whether this proves a debt due from the one to the other, or proves an extraordinary method of taking bonds in the names of persons without their consent, you are to consider; especially when you must know that if this bond had been put in suit by Peter Marsh, he would have been liable to recover the money. Well, then William Cropley is next called. He saith, that he received at Janeway's coffee-house about 60*l.* a debt that was due from Kinnersley to him. He received it of the defendant Hales, and Kinnersley was there with him at that time. He saith, that Kinnersley was the original debtor for the money, and that Hales gave him his note for it. He saith, that Kinnersley had borrowed of him an hundred and odd pounds; that he brought another gentleman to be security with him for it; that at the end of six months he could not get his money; that he enquired of Kinnersley for it, who led him a dance from place to place after him for a considerable time; that at last he was forced to sue for the money; and recovered half from the other gentleman; that he then prosecuted Kinnersley for the rest; that then Kinnersley met him with Mr. Hales at some tavern, and then Hales told him that he was to receive about 6 or 700*l.* within about three months time, and then he would pay him. He saith, that upon that offer of Hales he took a note of Hales, and a new one of Kinnersley for the money; and that in February last he got the money as before-mentioned, and received it at Janeway's coffee-house. And he saith, that some little matter (about fifty shillings or thereabouts) was due for the charges, for which he gave him his note. Hales gave his note for the payment of a debt of Kinnersley's, a debt of 50*l.*, and he gave this reason for it, that he was to receive within six months about 6 or 700*l.* for him, and therefore he could venture being security for Kinnersley. This is a transaction of quite another nature. It is so far from proving a debt from Kinnersley to Hales, that it rather proves Hales indebted and becoming security for the other. Well, then John Wells is called. He saith, that he knoweth not of any money due from Kinnersley to Hales, but that Kinnersley owed him 100*l.*; that afterwards this money was paid to his attorney, by whom or how he could not tell. Mr. Simpson, who is a partner with Mr. Fowler, is then asked concerning 30*l.* borrowed upon some lottery tickets of Mr. Fowler, and is asked concerning this money, how, where, and by whom it was discharged? He saith, that he was not at the shop, and knoweth not by whom and how it was discharged. Mr. Kinnersley, upon this, applies himself to one of the gentlemen of the jury, and interrogates him how this money was paid. Mr. Fowler was hereupon sworn to give evidence. Upon his oath, he saith, that he never knew of any transaction in the name of Hales; that he never saw him at his shop. That as to Kinnersley there was a transaction of money borrowed on lottery tickets, but he knoweth nothing of Hales's being concerned. Another person is examined whether he ever gave a note on Mr. Hales's account, or at his request paid any money? He saith, that he never did,

nor knoweth that any other did. They tell you also, that the witnesses for the prosecution have in a great measure proved the denial of Mr. Kinnersley of his knowing of the indorsement: but they call themselves for further proof, evidence of it. They call Mr. John Hayes, who saith that he was present at the examination of Mr. Kinnersley before sir Richard Hopkins; that at that time the defendant Kinnersley owned his writing the body of the note, but at the same time said, that how the indorsement came there he could not tell. He tells you that the caution that was given to the defendant Kinnersley, was after this declaration made by him; that then there was an admonition that he should be cautious in the answers that he gave. One Andrew Grants likewise was present at that examination. He saith, that that was all that passed at that time, and that he was not stopped by Mr. Mitford, but only a reasonable caution given him that he should not be too much in an hurry, or the like. This is the substance of the defence made by the counsel for both the defendants. It is the right of the counsel for the king to reply. They say, that there hath been no evidence of transactions between Kinnersley and Hales to the amount of any such sum as the note is for; that if the note was given with a design to defraud, both must be equally guilty; and that it is a very extraordinary thing that this note should be written by Mr. Kinnersley as a promissory note for such a sum payable to Samuel Edwards, esq. when it doth not appear, on the defendant's part, that there was any correspondence between Edwards and Kinnersley, and on their side it hath been proved that there was no such correspondence; that it was very extraordinary if this note was given for a debt due, that it should be taken in the name of one with whom they had no money-dealings whatsoever, and over whom they could not be supposed to have any power; that this therefore seems to be only to give a credit to the note; that it could not be of any use whatsoever without having the name of some person of circumstance and condition to it who would be obliged to pay the note; that this note must have been thrown upon Mr. Edwards, appears (they say) from the declaration of Kinnersley, that he was an undone man. If then it was of any use to borrow money upon or in any other way, it must be from the substance of Mr. Edwards, and not from the poverty and deficiency of Kinnersley. They insist upon that circumstance, and the declaration of Kinnersley, that he knew of that indorsement, though how it came there, he said that he knew not. And further they say, that as the name was Mr. Edwards's own hand-writing, if that the word 'ffree' was wrote upon the paper, it must be before the writing of the body of the note. It cannot be imagined that the words were not there before. It cannot be supposed that Mr. Edwards would set his name to the word 'ffree,' or to any other word on the back of a note promising the payment of 1,260*l.*, within six months, to him or his order. They insist, therefore, that this name and the word 'ffree' were upon the paper before the note was wrote, and that this is a strong and reasonable evidence that Kinnersley must be privy to the name of Edwards, and the indorsement at that time. After that, Mr. Kinnersley desired to be heard, and he was indulged: but as to that you have been informed, that in indictments for misdemeanours, whatever the defendant saith for himself, it will have no further validity than as the counsel insist, and evidence is brought for him. The circumstance, therefore, is very different from what is allowed when persons are prosecuted in capital cases. However, you have heard how he hath declared in the most solemn manner his innocence. You are to consider whether that is of any validity, unless there was evidence of such a debt due from the defendant Kinnersley to Hales the other defendant, whether you will take it upon his word. This being the evidence on both sides, the first question is, whether the indorsement is forged, because till you determine that it is a forged indorsement, there can be no prosecution for the publication of it. If it be a true indorsement, no person can be guilty of the publication, much less can Mr. Kinnersley, who did not deliver the note: that therefore lieth upon the defence of Mr. Hales, which is not made but by the defence of Kinnersley. You are to consider then the opportunity that the defendant might take hold of from the receiving of franks for several years from Mr. Edwards; and you will consider whether there is any clear proof, or so much as the colour of it, that Mr. Edwards was privy to an indorsement of this nature, or there was any occasion for such an indorsement. If no such money was indeed due, to what purpose should the note be indorsed? Upon the best observations that I can make, I see not any evidence to raise a reasonable presumption from, that this was a fair and justifiable indorsement. If it was not an imposition on Mr. Edwards, because it makes him liable as an indorser for the sum mentioned in the note, if you should find that, yet you are to consider whether it is fair to make use of another's name in a note; for Mr. Kinnersley, who by his own confession is a poor, undone man, and whose living is under a sequestration, to make a note indorsed, by another person who can never be reimbursed by this person who subscribed the note, it is a very extraordinary way; though they say that it is an innocent way of raising money, for a person in custody, or liable to it, to make use of the name of a substantial person in such a note, whose credit must be at stake for the money. And then as to the nature of the note: if it was only a promissory note for so much money payable to Samuel Edwards, esq. it was not of such consequence, for then he was not liable: but he is liable to the payment only upon the indorsement of such a note. Why then, gentlemen, you are to consider, whether this note, when Mr. Kinnersley had wrote it, could be of any use in the world unless it was indorsed as-

terwards. Why then this note is either a preparation to obtain Mr. Edwards's voluntary indorsement for a security, or an imposition upon him. Hath any evidence been produced to shew a probability that Mr. Edwards would give him that liberty to transfer his own insufficiency and poverty upon him, and make him liable to Mr. Edwards, which can have no effect but by an indorsement; doth not Mr. Kinnersley put it into the power of Hales to negociate this note? Therefore I must inform you, if two persons contrive together to draw such a note, and make use of it, both persons concerned in the transaction, in my opinion, will be guilty. Forgery is an entire fact. Though one person doth one part, and another the other, both are equally guilty.* Gentlemen, it is material, as hath been observed, to consider when this indorsement was made; and if it was a forged indorsement, you will consider when it will appear to have been indorsed. You have been truly told that this can be only known by circumstances: therefore you are to consider, whether the name of Samuel Edwards can be supposed to be set there after the note was wrote. Well then, what is the proper and natural way of understanding this transaction? If there be the name of a person on any paper, where there is room for making an alteration, what is natural? Why, to transact on the other side what is necessary to supply and make that complete, without which the name would be to no purpose. Therefore, that is a material consideration; if it is impossible that the name could be wrote after the making of the note, whether that be not a reasonable presumption that he saw this indorsement when he wrote this note. Suppose the words only 'ffree Samuel Edwards,' it was not proper to write this note on the back of it. If this indorsement was made without his privity, how came he to know of it when he came to Mr. Bird? And upon Mr. Bird's telling him that he had a note of his left with him, immediately answered, "I know that you have; it is for so much, payable in three months to Mr. Edwards, but how it came indorsed by him I know not;" when Mr. Bird swears that he had not then acquainted him with the indorsement, nor showed him the note at that time. No evidence hath been produced to shew how he came to know that it was indorsed. He declared, indeed, that he knew not how it came to be indorsed: but you are to consider, whether that part wherein he declares his knowledge is to be regarded, or what he declares he knows not of. A declaration of this nature will be taken most strongly against him. Consider, therefore, whether this latter part of his declaration be sufficient to discharge him. If he knew that it was indorsed, you should have some evidence upon what account it was. As to the rest, as to the character, his coat, or the like, you are to try him upon the same law with Hales. I know not why the habit he wears should exempt him from the common rules of proof. As to the particular circumstance of his usefulness depending on his credit, that is left to you. But the same law is made for one that is for another: You are therefore to consider of it. If this be a fair indorsement you must acquit both. If you are satisfied that it is not, but the indorsement is a forged indorsement, whether either, and which of the defendants seems to be guilty. You are to consider the nature and circumstances of the transaction, and whether there appears any thing to distinguish the one from the other, and accordingly give your verdict against the one or the other. If you desire it, the note will be given to you.

Jury. My lord, if your lordship please, we will take the note up with us.

Kinnersley. I desire to be heard ——

L. C. B. Not in case of a misdemeanor. I know not any instance in which it hath been allowed.

Kinnersley. I beg leave, my lord. I take the Lord to witness ——

L. C. B. All I can say is, if you have a mind to aver or affirm any thing, the Court would rather be irregular than abridge you of any thing.

Serj. *Whitaker.* My lord, it never was allowed; after your lordship has summed up the evidence, and the jury going out: it is strange Mr. Kinnersley will behave so.

Att. Gen. Is it, my lord, to be allowed?

L. C. B. The gentlemen have insisted upon it. You cannot be heard.

Kinnersley. By the living God, I know nothing of it!

Cl. of Arr. [Calling over the Jury.] Are you all agreed in your verdict?

Jurymen. All.

Clerk. Who shall speak for you?

Jurymen. Our foreman.

Clerk. How say you, is William Hales Guilty of the misdemeanor wherewith he stands charged, in forging an indorsement on a promissory note for 1,260*l.* in the name of Samuel Edwards, esq. and publishing the same knowing it to be forged, or Not Guilty?

Foreman. Guilty.

Clerk. How say you, is Thomas Kinnersley Guilty of the said misdemeanour wherewith he stands charged, or Not Guilty.

Foreman. Guilty.

* See East's Pleas of the Crown, ch. 19, s. 52.

475. The Trial of WILLIAM HALES,* for a Misdemeanor, in obtaining from Thomas Bird the Sum of Seven Hundred and Fifty Pounds by false Tokens, &c.: 3 GEORGE II. A. D. 1729.

The Jury called over again.

Clerk. OYEZ, Oyez, If any one can inform, &c. &c.

INDICTMENT.

William Hales stands indicted by the name of William Hales, &c. for falsly and deceitfully obtaining the sum of 750*l.* of Thomas Bird by a false token, viz. a promissory note, in these words following:

"*August* 16, 1727.

"I promise to pay to Samuel Edwards, esq. or his order, within three months after date, the sum of twelve hundred and sixty pounds, for value received, THOMAS KINNERSLEY."

On which note there is the following indorsement;

"Pray pay to the order of for value received, SAMUEL EDWARDS."

to the great damage of Samuel Edwards, esq. &c. To this indictment he hath pleaded not guilty.

Mr. *Strange.* May it please your lordship, this is an indictment against the prisoner William Hales only. It sets forth that he, having in his possession a certain writing purporting to be a promissory note made in the name of Thomas Kinnersley, wherein the said Thomas Kinnersley is supposed to promise to pay the sum of 1,260*l.* to Samuel Edwards, esq. within three months, with a forged indorsement of Mr. Edwards on that note, did, in March last, falsly and deceitfully obtain of Mr. Thomas Bird, the sum of 750*l.* by that false token. This is laid to be contrary to the statute in that case made, to the damage of Samuel Edwards, esq. &c. to the breach of his majesty's peace, and to the ill example of his majesty's subjects in like case offending.

Att. Gen. My lord, this is an indictment against Mr. William Hales, for obtaining a sum of money by the false token of this note. For this we will only call Mr. Bird.

Mr. *Bird* sworn.

Att. Gen. Mr. Bird, look upon the note, and give an account who brought it to you, and what money you paid upon it?

Bird. Mr. William Hales brought it to me on March 20th, last.

Att. Gen. What did he say?

Bird. He said, that at the request of a gentleman, I was to lend him 750*l.* upon that note.

Att. Gen. Did he produce the note?

Bird. Yes, Sir, I had it then of him.

Att. Gen. Was it then indorsed as it is now?

Bird. Yes, Sir, in the manner as now.

Att. Gen. How much money did you deliver him upon it?—*Bird.* 750*l.*

L. C. B. *Pengelly.* Did you deliver it, when he delivered you this note?

Bird. Yes, my lord.

Att. Gen. Should you have let him have this money if he had not produced this note?

Bird. No, Sir.

Att. Gen. What was it paid in?

Bird. In one or more Bank-notes.

Serj. *Eyre.* I submit this, my lord: they have laid this indictment but singly for obtaining money, whereas in the former they layed doubly for obtaining money, or other valuable things. It lieth therefore upon them to prove that this Mr. Hales did receive in money. Though I know that generally Bank-notes are received as so much money, yet I know not that according to law they are reckoned money. They should therefore have laid it for money or other valuable things, it being two Bank-notes, and not money: and in this manner, I suppose, in case of a tender of money, it is not, as I apprehend, thought that a tender of Bank-notes is a sufficient plea: the consequence then is, that the giving of 750*l.* and the giving of such notes is not tantamount. They ought to indict him as the fact really was.

Att. Gen. Do you know, Mr. Bird, of the receiving of this money? Did he complain of his not receiving of this money?

Bird. No, Sir.

Serj. *Whitaker.* Did he pay back any of the money?—*Bird.* Yes, Sir, 400*l.*

Serj. *Whitaker.* Was it upon the account of those Bank-notes?—*Bird.* Yes, Sir.

L. C. B. Then when he paid you back that money, did he complain that he had not received it?—*Bird.* No, my lord.

Serj. *Eyre.* Pray, Sir, did he say that he had received it?—*Bird.* Yes, Sir.

L. C. B. Mr. Serjeant Eyre, I suppose you do not insist upon it as necessary that he should receive so much money of Mr. Bird. If he received the produce of those notes it was sufficient.

Serj. *Eyre.* My lord, I apprehend that though he did receive the money from the Bank for those notes, he received not the money from the hands of Mr. Bird. He received, indeed, what I should have taken for money. Especially as the act of parliament hath added, 'or any valuable thing,' as jewels or the like. I think it should have been so laid. I observe the words used are, 'by colour or means of a false token.' I would ask, suppose Mr. Bird

* See the preceding and following Cases.

had ordered him to receive it of his cashier, or sent the note to his goldsmith, whose payment would it have been? Suppose he had sent him to the Bank to receive that money before he delivered up the note, certainly he had obtained the money by colour or means of that note.

——— My lord, I admit that if it had been paid by his servant or by his cashier upon a note drawn upon him for it, I take it that it might have been laid either way.

Serj. *Whitaker.* The Bank in that respect are but cashiers for the gentlemen that have their notes.

Serj. *Eyre.* The other indictment laid it doubly.

Judge *Reynolds.* Though they might do that by way of caution, yet it might have been laid the other way as this is.

L. C. B. Gentlemen of the jury, you are to consider whether the indorsement on this note was a forged indorsement: for if it was not forged, the defendant cannot be said to obtain the money by a false token. And further you are to consider, as he obtained this of Mr. Bird by this false token, whether it ever came to his hands or not. You are to consider upon the evidence that he never complained that he had not received the money for those bills, but, on the contrary, paid back 400*l.*, part of the money, whether he would have paid it if he had not received the money. Therefore, if you apprehend that indorsement of the note was not a forged indorsement, or that the money was not paid, you are to acquit him. But if you judge that the indorsement upon the note was forged, and the money paid, whether it was paid by Mr. Bird in money, or in bills upon which he afterwards received money, I think that that makes no difference.

Jury called over.

Clerk. Are you all agreed in your verdict?

Jury. Agreed.

Clerk. Who shall speak for you?

Jury. Our Foreman.

Clerk. How say you, Is William Hales Guilty of the misdemeanour whereof he stands indicted in obtaining a sum of money by this false token, or Not Guilty?

Foreman. Guilty.

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476. The Trial of WILLIAM HALES and THOMAS KINNERSLEY,* Clerk, for a Misdemeanor, for fraudulently forging a Promissory Note, &c. in the Name of Samuel Edwards, esq. for Sixteen Hundred and Fifty Pounds, and publishing the said Note, knowing the same to be forged: 3 GEORGE II. A. D. 1729.

Jury called and sworn over again.

Clerk. OYEZ! Oyes! If any man can inform, &c.

INDICTMENT.

Gentlemen of the jury, William Hales and Thomas Kinnersley stand indicted by the names, &c. for fraudulently forging a note or a writing, purporting to be a promissory note, on the 2nd of March, in the first year of his majesty's reign, in the words following:

"I promise to pay to Mr. Thomas Kinnersley, or his order, within six months after dale, the sum of sixteen hundred and fifty pounds, for the value received, SAMUEL EDWARDS."

and knowingly and wittingly publishing of this as a true writing, knowing it to be so forged and counterfeited.

Mr. *Strange.* May it please your lordship, and you gentlemen of the jury, this is an indictment against the two prisoners William Hales and Thomas Kinnersley. This indictment sets forth, that they being persons of ill fame, and intending to deceive Mr. Edwards, &c. on the 2d of March, in the first year of his majesty's reign, did forge a writing purporting to be a promissory note, &c. The indictment further sets forth, that the defendants did likewise produce and publish this promissory note of Mr. Edwards's for 1,650*l.*; that knowing this to be a forged note, they did publish the said note for a true one. It is laid in other words, that they forged a note of Samuel Edwards's, whereby he is supposed to promise to pay to Thomas Kinnersley, within six months, the sum of 1,650*l.*, &c. To all these facts they both have pleaded Not Guilty.

Att. Gen. My lord and gentlemen of the jury, I am counsel for the king. Gentlemen, this is an indictment against both the defendants, for forging a promissory note in the name of Samuel Edwards, esq. for 1,650*l.*, payable to Thomas Kinnersley, or order, within six months after date, and also for publishing the same. And, gentlemen, though it is laid several ways in the indictment, the note is one and the same. There are not several notes. Gentlemen, it will appear to you that this forgery of this note was by the same opportunity taken by Mr. Hales, in conjunction with Mr. Kinnersley, that the former was. It hath been observed already, that in cases of this kind

* See the preceding and following Cases.

facts are to be proved only by circumstances. Plain and positive proof is not to be expected: but such circumstances speak the truth often more plainly than the other way of proof doth. As to Mr. Hales, Mr. Edwards being too obliging to him, he made use of it to much the same purpose as in the former case. But it was not new to indorse, but to make a promissory note for 1,650*l.*, payable by Mr. Edwards to Mr. Kinnersley, within six months after date, and dated March 30, 1728. And, gentlemen, this note is signed on the back with the hand-writing of Thomas Kinnersley. The manner of this forgery will appear to have been like the other: but it will appear on the very face of it manifestly a forgery. Gentlemen, the note is wrote on a very small piece of paper, which appears plainly to have been cut off from another paper. And, gentlemen, the words, 'for the value received,' are not wrote upon the line with the other words, but a little below the line. The words 'for the' appear done in the same manner as in the former note that before came under your consideration. Here is a *ff* such as before, and as Mr. Edwards always useth, then an *r* which appears to be of the same hand, then an *o* crowded in between them which seems not of the original writing. One of the *ee*'s is made to serve for the first stroke of the *y*, and a long stroke between the two *ee*'s, then the other *e* makes up the word *ye*. Then 'value received' is wrote in another manner of hand. This seems to be the nature of the forgery; and none can doubt it a forgery that inspects it. This appears to be done from a frank cover obtained from Mr. Edwards. And this is something remarkable: it is something odd that 'for the value received' should be wrote on another line. It is plain that the words are set thus odd because of the word wrote before, and that the *ff* beginning another line may make the better appearance. This note is made payable to Mr. Kinnersley. He was an absolute stranger to Mr. Edwards, as it appeared in the former case. There was no dealing between Mr. Edwards and Mr. Kinnersley, nor no colour of any such dealing, by which a debt of such a sum as this should become due from Mr. Edwards to Kinnersley. But, gentlemen, this note thus made for 1,650*l.*, payable within six months from Mr. Edwards to Kinnersley, without any dealings between them to give a foundation for it, in the manner I have shewed you, which is sufficient to make it appear to any a forgery, is indorsed by Mr. Kinnersley. That will appear a clear evidence of the forgery being by Mr. Kinnersley. No man in his senses would do this. If a forged note for 1,650*l.* was made in the name of any person, and appeared in all these circumstances of a plain forgery, no man in his senses, and designing to act a fair part, would make an indorsement thereto. No other purpose, therefore, seems aimed at in the indorsing but to set the note a going. If such a note was offered to a fair and honest man to indorse would he not startle at it? Would he ever have indorsed it? Therefore, this indorsement is a strong evidence against him. The use made of this note, thus forged and indorsed, was this: it being in the hands of Mr. Hales, Mr. Hales wanting a sum of money applied to one Mr. Thrup, desiring him to lend him his note of 400*l.* Upon his doing this with difficulty, Mr. Hales deposited this note as a security for his money, and hereupon this note continued in the hands of Mr. Thrup. Gentlemen, upon the discovery that was made of another forgery, whereupon Mr. Hales was apprehended, there was a suspicion: hereupon Mr. Edwards, being informed that this note was in the hands of Mr. Thrup, enquired of him about it. The thing upon this appeared, and Mr. Kinnersley thereupon was apprehended and carried before sir Richard Hopkins. At first he seemed willing to make a discovery: afterward he went back, and denied (I think) what he seemed before to have owned: that will be proved to you. I think that this will appear plainly to have been a forgery, and to have been done by Mr. Hales and Mr. Kinnersley.

Serj. *Whitaker.* My lord, we will go on in the same method as before, by calling two or three witnesses.

Thomas Maddox and Anne Clarke were called, sworn, and deposed as before.—As also Mr. Booth. Vide the preceding Cases.

Mr. *Charlton Thrup* sworn.

Att. Gen. Look, Sir, on that note, and tell us when you first saw it before.

Thrup. On May the 22nd.

Att. Gen. Who brought it to you?

Thrup. Mr. Hales.

Att. Gen. What did he say to you?

Thrup. He brought it to me, and desired me that I would give him on it three notes of 500*l.* I refused him at first, alleging that it was not for my credit. At length I put into his hand a promissory note for 400*l.* payable within six months.

Att. Gen. Look on that note and see whether it now is in the same case that it then was. Was the indorsement then upon it?

Thrup. I cannot say: for I took no notice of the indorsement till I delivered it to Mr. Booth at the request of Mr. Edwards.

Att. Gen. In whose custody was it till you delivered it to Mr. Booth?

Thrup. In mine, Sir.

Att. Gen. Did you make any alteration in it?—*Thrup.* No, Sir.

Att. Gen. And when you gave it to Mr. Booth you minded the indorsement, did you not?—*Thrup.* Yes, Sir.

Att. Gen. How came you not to mind it before? What security was Mr. Edwards's note if it had not been indorsed?

Thrup. I had such an opinion of Mr. Hales that I suspected nothing, and therefore gave him the note; I did not think he would have been guilty of so vile an action.

Att. Gen. When was it that you delivered this note to Mr. Booth?

Thrup. It was in September last.

Att. Gen. How much had you lent upon it?

Thrup. Four hundred pounds, Sir.

Mr. *Lacy.* What is become of that note?

Thrup. I know not, Sir. I am not yet possessed of it: but I believe it to be in the hands of Mr. Maddox of the Bank.

Mr. *John Spicer* sworn.

Att. Gen. Do you know Mr. Edwards's hand-writing?—*Spicer.* Yes, Sir.

Att. Gen. Look on that note, and tell us what of it you take to be his hand-writing?

Spicer. The name is his and the *ff.* And I think the plainest *ffree* that I have seen is remaining.

Att. Gen. Is the *o* Mr. Edwards's?

Spicer. No, Sir; it hath been something else.

Att. Gen. Was it part of the original word?

Spicer. No, Sir, to the best of my judgment it is altered. It is so crowded between the letters, that it seems as if it was part of them.

Att. Gen. Look on the *r*. Whose is that?

Spicer. I believe it to be Mr. Edwards's.

Att. Gen. And you observe two *ee*'s, do you not?

Spicer. Yes, Sir. One of the *ee*'s is brought to make part of the *y*, which with the other *e* makes the *ye*.

Att. Gen. How doth Mr. Edwards write his franks?

Spicer. Free with a double *f*, as it is here 'ffree Samuel Edwards.'

Att. Gen. In what manner are you concerned for Mr. Edwards?

Spicer. I am a clerk in his office.

Att. Gen. How many years in his service?

Spicer. I have been his clerk between 10 and 11 years: but I have been in all in his service about 24 years.

Att. Gen. Do you know that he had any money transactions with either Mr. Hales or Mr. Kinnersley?

Spicer. No, Sir, none at all.

Att. Gen. Did you ever know him give such notes?

Spicer. No, Sir. I never knew him give any notes for time, nor ever give any note but when he wrote himself the whole note.

Mr. *John Williams* sworn.

Att. Gen. Mr. Williams, look upon the hand at the bottom of that paper. Whose do you take that to be?

Williams. It is very like Mr. Kinnersley's.

Att. Gen. Have you ever seen him write?

Williams. Yes, Sir, I have his writing here.

Att. Gen. What are you?

Williams. I am his church-warden.

Att. Gen. Have you seen him write? Look upon that paper, and tell us whether you believe it his hand-writing or not?

Williams. The letters have a certain cut very like his hand-writing.

Judge *Reynolds.* Upon your oath, Do you or do you not believe it to be his hand-writing?

Williams. I think that it is very like his hand, my lord.

Judge *Reynolds.* Is it so like that you believe it to be his hand?

Williams. Yes, my lord, I believe it to be his.

Judge *Reynolds.* You are not called to swear, whether you saw him write it, or can say positively whether it is his hand-writing; but whether from his manner of writing that you have seen, you believe, or do not, that it is his hand-writing?

Williams. Yes, to the best of my belief it is his.

Serj. *Eyre.* Pray, Sir, how often have you seen him write?

Williams. Three or four times.

Serj. *Eyre.* How long since?

Williams. Last year.

Serj. *Eyre.* Do you remember his hand for the compass of a year, so as to take it upon you, upon your oath, to say that you judge it his hand?

Williams. Doth it depend upon my judgment?

Judge *Reynolds.* Yes, it doth. Look on it.

Williams. It is more like his hand than any other's that I ever saw.

Judge *Reynolds.* But is it so like that you really believe it to be his hand?

Williams. Yes, my lord.

Mr. *John Lincoln* sworn.

Serj. *Whitaker.* Sir, please to look on that paper. Have you ever seen Mr. Kinnersley write his name?—*Lincoln.* Yes, Sir.

Serj. *Eyre.* Frequently, or only once?

Lincoln. Several times, Sir.

Serj. *Whitaker.* You say that you have seen him write several times. Upon your oath, according to the best of your judgment, do you take that to be his hand or not?

Lincoln. There is a great deal to be said on that subject.

Judge *Reynolds.* Yes. But little needs to be said about it. Is it so like that you believe it to be his hand?

Lincoln. Yes, my lord, it is.

Serj. *Whitaker.* Then, my lord, having proved that this is his hand-writing, we desire that it may be read against both the defendants.

Note read.

"I promise to pay to Mr. Thomas Kinnersley, or his order, within six months after date, the sum of sixteen hundred and fifty pounds, for *ye* value received,

"*March* 30, 1728. SAMUEL EDWARDS."

Indorsement. "THOMAS KINNERSLEY."

Serj. *Whitaker.* The gentlemen of the jury should see it now.

Att. Gen. My lord, we desire that the jury may see it now. And, gentlemen, you will observe, if you cast your eye upon the note, that there is this one observation that may be

added to the others that were made, that the note is all written with a secretary *e*, but the *e* in 'for *ye*,' which plainly seems to answer to Mr. Edwards's hand, and shew that that is an old *e*.

Mr. *Thomas Bird* sworn.

Att. Gen. Sir, whose hand is that?

Bird. Mr. Kinnersley, Sir, owned that to be his hand-writing?

Att. Gen. Was it shewed by you to Mr. Kinnersley at that time when he owned it?

Bird. Yes, Sir.

Kinnersley. And did I own it, Sir?

Att. Gen. Why, you owned it in court. This is the old note.

Kinnersley. I beg your pardon, Sir; I did not understand that.

Att. Gen. Give that note to the jury to compare it with the other note that is now before them.

Serj. *Whitaker.* Mr. Lincoln, those receipts which you produced, did Mr. Kinnersley actually write them?

Lincoln. I saw him write them all.

Serj. *Whitaker.* Shew them to the jury.

Judge *Reynolds.* Gentlemen of the jury, in that book you will find some receipts wrote by Mr. Kinnersley, which Mr. Lincoln swears are his hand; that he saw him write them all.

Att. Gen. The next witness that we will call is Thomas Bab.

Bab not appearing nor Thomas Brooks, who was next called,

Sir *Richard Hopkins* sworn.

Att. Gen. Sir Richard, we must trouble you to give an account upon what account Mr. Kinnersley was brought before you, and what he said?

Sir *R. Hopkins.* He was brought before me about two notes, one of 1,260*l.* and this note.

Att. Gen. When he was before you, was there any particular mention made of this note of 1,650*l.*?

Sir *R. Hopkins.* It was given to me to examine Mr. Kinnersley about it.

Att. Gen. Sir Richard, can you recollect whether that is the note?

Sir *R. Hopkins.* I made no mark upon it: but I verily believe that this was the note.

Att. Gen. Was it shewed to Mr. Kinnersley?

Sir *R. Hopkins.* This note was put into my hand to examine Mr. Kinnersley upon. I looked upon it, and it seemed to me to be a forgery. Before I could say any thing to Mr. Kinnersley about it, I saw one Mitford there. Before Mr. Kinnersley could answer what I had not fully asked him, 'Hold, Sir (said he), say nothing; this is not your hand.' I thought this very odd treatment of a justice of peace. I said then to Mr. Kinnersley, Is this your hand or not? He said, No; I had the other note in my hand, I desired him therefore to recollect himself; for I thought that they seemed clearly to be the same hand.

Mr. *Strange.* I think he owned the one to be his hand-writing, and the other not. I ask, Whether that which he did own, was owned before that Mr. Mitford interrupted him, or after?

Sir *R. Hopkins.* It was before. Upon that Mr. Mitford interrupted him.

Serj. *Whitaker.* Upon the question, when enquiry was made whether he had had any dealings with Mr. Edwards, what did he say?

Sir *R. Hopkins.* Both Mr. Edwards and I asked him, whether he ever had had any dealings with Mr. Edwards? To which he replied No, he never had had any, nor ever to the best of his knowledge had seen him before. I then asked him how he came to draw that note payable to Mr. Edwards, when there never had been any dealings between him and Mr. Edwards? He answered, That he did it at the request of Mr. Hales, to whom he was indebted in that sum, and more.

Judge *Reynolds.* The first question I suppose was general, whether there had been any dealings between them? Afterwards, when the notes were shewn him, he owned the one, and denied the other. Was it not so?

Sir *R. Hopkins.* Yes, my lord.

Att. Gen. The next witness that we shall call is Thomas Bab, to shew that there was a private correspondence and several meetings between Kinnersley and Hales.

Thomas Bab sworn, and deposed as before.

Kinnersley. Sir, did we ever call for pen, ink and paper?—*Bab.* No, Sir, never.

Mr. *Brooks* sworn, deposed as before.

Kinnersley. There could not be much done at night without a candle.

Brooks. No, Sir; but you had been there a considerable time before.

Mr. *Wright* sworn.

Serj. *Whitaker.* Were you present, Sir, at the examination of Mr. Kinnersley before sir Richard Hopkins?—*Wright.* Yes, Sir.

Serj. *Whitaker.* When Mr. Edwards asked him, whether there had been any dealings between them, what did he reply?

Wright. He replied, that there never had been any dealings between them, and that he never had seen him till that time.

Serj. *Whitaker.* Did you observe any interruption?

Wright. Mr. Kinnersley was saying, I will tell you all if you will give me leave. Mr. Mitford laid his hand upon him and said, Hold your tongue, be careful what you say.

Serj. *Whitaker.* I ask whether he had there related any thing as to the note now in question before the interruption?

Wright. He had declared that that note was not his.

Kinnersley. I beg leave to speak, my lord. Both sir Richard Hopkins and that gentleman have made a mistake. Mr. Edwards asked me, How oft have you visited Mr. Hales in

Newgate? Upon this it was that he said, Hold your peace.

Serj. *Whitaker.* What was the question that was asked Mr. Kinnersley, when you say that Mr. Mitford interposed?

Wright. I cannot say what was the question that was asked immediately before.

Serj. *Whitaker.* But you say, that it was after that he had denied this note?

Wright. Yes, Sir.

Kinnersley. I would only ask, Sir, whether sir Richard Hopkins desired me to hold my tongue as well as Mr. Mitford?

Judge *Reynolds.* Did he bid Mr. Kinnersley make no discovery?—*Wright.* No, my lord.

Kinnersley. No, my lord: But he bade me take the gentleman's advice. I appeal to sir Richard.

Sir *Richard Hopkins.* The gentleman hath appealed to me. I take it that the question is, Whether I advised him to take the gentleman's advice? It would be very strange that I should reprove Mr. Mitford for misbehaviour, and yet should at the same time advise you to take his advice.

Wright. Sir Richard asked Mr. Bird, whether Mr. Kinnersley owned that he knew of the note being indorsed that was in his hands? He said that he did. Then he was asked when and how he knew this? This was before Mr. Mitford interposed.

Judge *Reynolds.* You have appealed to sir Richard Hopkins, that he advised you to take the gentleman's advice. Sir Richard denies this.

Kinnersley. But he cannot deny that he said, Take your friend's advice.

Mr. *John March* sworn.

Serj. *Whitaker.* Were you present, Sir, at the examination of Mr. Kinnersley before sir Richard Hopkins?—*March.* Yes, Sir.

Serj. *Whitaker.* Pray, will you give us an account of all that past there at that time.

March. My lord, I was attending upon sir Richard Hopkins as his clerk, when Mr. Kinnersley was brought before him with relation to these notes. When the first note was produced, he was asked, whether that note was his hand-writing or not? To which he answered, That it was. When that was gone through, the second note was produced, being a promissory note made in the name of Mr. Edwards payable to Mr. Kinnersley. When that note in the name of Mr. Edwards was produced, we perceived on the back of it the name of Mr. Kinnersley wrote. Mr. Kinnersley having denied this note, sir Richard, upon comparing the name on the back of this note, with the other note which he had owned to be his own hand-writing, said to him, "I would have you, Sir, consider very well whether you did not write that too: for it is very like that which you have owned." Upon that Mr. Mitford interposed.

Serj. *Whitaker.* What was it that Mr. Mitford did say?

March. Mr. Mitford upon that said, "Mr. Kinnersley, I would not have you answer that question;" or to that purpose.

Att. Gen. Did sir Richard Hopkins advise him to take his friend's advice?

March. No, Sir.

Att. Gen. Did he reprove Mr. Mitford for interposing?

March. Yes, Sir. He desired him to be quiet; and told him that he would ask whatever questions were desired, but desired that he would not interrupt.

Att. Gen. Was his denying of the note before or after the interruption?

March. He had first interrupted during the examination on the first note, and he afterwards interposed during that on the second note.

Att. Gen. Well. But I ask you as to the second interruption, whether it was before or after his denying his hand?

March. It was after.

Serj. *Eyre.* You were saying, Sir, that sir Richard bade him recollect himself, and consider well whether this was not his hand too, for that it was very like that note which he had owned to be his own hand-writing. Had not Mr. Kinnersley before that said, that he did not sign that note?—*March.* Yes, Sir.

Att. Gen. We rest it here, my lord, and leave the consideration hereof to the jury.

Mr. *Mather.* I would ask, whether Mr. Mitford's advice was not that he should not speak too fast?

March. No, Sir; it was that he should not answer to that question.

Kinnersley. They contradict one another; and Mr. Bird will swear any thing.

Judge *Reynolds.* You may prove that to be his character if you can; but without that you ought not to aver it.

Bird. It is well known, my lord, what my character is. I have persons of good credit that have known me these 26 years: I have never falsified my word.

Mr. *Lacy.* My lord, I have nothing material in my instructions; and therefore I shall not trouble your lordship.

Serj. *Eyre.* My lord, I am counsel for Mr. Kinnersley. I admit that they have proved that there was an intimacy between them. It is detrimental to my client that there was such an acquaintance when the one was parishioner formerly to the other, and that this acquaintance was kept up to the last: but it doth not follow that they are to be considered as one: If Mr. Hales be never so guilty, it doth not appear that Mr. Kinnersley is guilty. As to this indictment, the charge is forging a note in the name of Mr. Edwards, and indorsing the same. It is admitted that Mr. Kinnersley had no acquaintance with Mr. Edwards: but on the other hand it is pretty plain, by the evidence that hath been given, that there was an acquaintance between Mr. Edwards and Mr. Hales. They were near neighbours: Mr. Edwards hath indulged him with franks for several years. Mr. Hales is a man under mis-

fortunes for many years, hath had a commission of bankruptcy awarded against him: It is very natural for such a person to deal rather in another person's name than in his own; if therefore there be an intimacy between Mr. Hales and Mr. Edwards, Mr. Hales should apply to Mr. Edwards, and he upon his request should give him such a note, I do not wonder that any gentleman of character should indorse such a note signed by a person of such figure. It doth not seem very unnatural, that after their long acquaintance a note payable to Mr. Kinnersley, in trust for Mr. Hales should be indorsed by Mr. Kinnersley: This may be supposed the case, if actually he did indorse the note. I do not see why he may not be supposed as easily imposed upon as the other gentleman, viz. Mr. Thrup. It is not so plain a fallacy as that Mr. Thrup, who is a gentleman in business, could discern it. Why must we suppose then that Mr. Kinnersley must discern it? If then Mr. Hales is guilty of the forgery, it doth not follow that Mr. Kinnersley must be so. As to the other point, it is no wonder that there should be the name of Mr. Kinnersley on the back of the note: Any that would forge a note will not scruple to forge an indorsement. It is as likely as possible, and the man that would forge a note in Mr. Edwards's name for such a sum, may be as easily supposed to forge an indorsement on this note. How have they proved that it was indorsed by Mr. Kinnersley? Two or three gentlemen have been produced as witnesses, that have seen his hand several times, and from the similitude of the letters they believe it to be his hand: But there is such evidence to be every day given of one man's writing like another, that a similitude of hands is not to be wondered at. It is not to be wondered at that he that would be guilty of forging the whole note would indorse it: Whether there is any difference in the hand between the writings that have been produced and this note and indorsement, must be left to the jury.

Judge *Reynolds.* Have you any witnesses?

Kinnersley. I beg a word, my lord.

Judge *Reynolds.* Not till we have heard the whole that the counsel say.

Mr. Mather. I take notice, my lord, that there hath been a variance among the witnesses as to what past at his examination before sir Richard Hopkins. The only caution that was given him was, that he should not be too rash in his answers, as your lordship hath (I believe) thought him very rash in his conduct here. We shall only call a witness as to this.

Rev. Mr. *John Hayes* sworn.

Mr. Mather. Mr. Hayes, please to give my lord and the jury an account what passed as to this note of 1,650*l.*

Hayes. When this note was produced before sir Richard Hopkins, and shewed to Mr. Kinnersley, upon shewing him the name on the back of the note, he absolutely denied it to be his hand.

Mr. Mather. Did you hear Mr. Mitford interrupt?

Hayes. I remember that there was a dispute between sir Richard Hopkins and Mr. Mitford. There were minutes taken of Mr. Bird's examination: upon the reading these minutes, Mr. Mitford apprehended them not to be rightly taken according to the evidence that was given. Upon this Mr. Bird was re-examined, and then there was another question proposed concerning Mr. Kinnersley's going to Newgate to visit Mr. Hales. Then Mr. Mitford again interposed.

Mr. Mather. Was that the reason of the interruption?

Hayes. Yes, Sir, I believe it was.

Mr. Mather. Was there some other part in which he had also interposed?

Hayes. Yes, Sir.

Mr. *Ward* sworn.

Mr. Mather. Sir, were you present at the examination of Mr. Kinnersley before sir Richard Hopkins?—*Ward.* Yes, Sir.

Mr. Mather. Give us an account of the interruption by Mr. Mitford.

Ward. Mr. Kinnersley was examined as to the note of 1,260*l.*: Mr. Kinnersley being examined as to that, there happened some words to pass between him and Mr. Bird: after some hesitation and dispute, he having acknowledged that note, it was put down in the minutes. After that he was examined as to this note of 1,650*l.*: Upon his denying that it was his hand, Mr. Kinnersley was asked some question by sir Richard Hopkins concerning somewhat that he had formerly said; where upon he desired to be examined in the court of aldermen. Mr. Mitford hereupon desired him not to desire this.

Mr. Mather. My lord, the reason that we bring this witness is to shew, that he had confessed all that he could at that time, and there was no reason therefore for Mr. Mitford to interpose for the preventing Mr. Kinnersley's making a discovery.

Kinnersley. My lord, when this note was shewed me before sir Richard Hopkins, it was the first time that I ever saw it: I therefore denied it to be my hand; but by looking upon it more closely, I own that it is like my hand. Though none can oblige me to say any thing, I would be content to be examined; and therefore have, though not regarded, solemnly averred that I was not privy to his getting of that note or money. As to the other note, I owed him at that time the 1,260*l.*; I gave him that note for it, and would not with that solemnity say that it is not mine. He hath got it some other way indorsed: But as to this note it is not my hand. Had Mr. Hales brought Mr. Edwards's note to me, and desired me to indorse it; though I own that I think that it hath the marks of forgery, yet if Mr. Thrup and others were imposed upon, why might not I? Why should I suspect him more than others? I own that I had a great confidence in

him. Supposing this, will you condemn me for an unjust thing? I take God to witness, that I never set my hand to that note, nor never took any money. I beg pardon, I will say one word more: the gentleman hath taken notice rightly that I have spoken rashly; it is an oppression, and the wise man saith, that "Oppression will make a wise man mad," which is worse than rash.

Att. Gen. My lord, he hath intimated that his is an unjust and oppressive prosecution: I submit it. Proper evidence hath been given, and he hath replied to it by his counsel. The counsel suppose, that if the whole note was Mr. Hales's hand-writing, it was very likely that he would not scruple the indorsement. Mr. Kinnersley himself seems to admit, that for aught he knows he might have indorsed such a note; but the turn that he gives it is this: If such a note was wrote in the name of Mr. Edwards payable to him, he might indorse it, being brought by a creditable and honest person. If a note was made payable to him by a gentleman of such figure and character, and so brought to him, he thinks that he might indorse it, and would so have done: But it is impossible that it could be fairly done; there must be something fraudulent in it. The evidence on the side of the king shews, that there must have been a conspiracy between these two persons to defraud several persons: As the other note was, without any colour for it, made payable to Mr. Edwards, his name being indorsed upon it, he being a person of ability to credit the note; So this second, on the other hand, without any foundation also, because no colour of dealings between them, is made in the name of Mr. Edwards, payable to Mr. Kinnersley, and Mr. Kinnersley's name indorsed. Why should Mr. Kinnersley's name be put to it, but only to give a currency to this note? When a note is made payable to any person, it cannot be negociated by any other without his hand being put to it: His hand therefore was not so much to give a credit to the note, he being a man of no substance, as to give a currency to the note, it being in his name. When that appears to you, it is (I think) sufficient to convince your judgments that Mr. Kinnersley is a partner in this forgery, otherwise he would not have indorsed this note in these circumstances.

Serj. *Whitaker.* My lords, it is very extraordinary for a person to pretend such a note belonging to him, that never had had any dealings with Mr. Edwards. What proof hath he given that he did not indorse it? What colour is there to say that this is a rash prosecution?

Kinnersley. My lord, I beg a word. I say not that it is rash, as to the whole prosecution: but I never was privy to any wickedness in this note, nor in any other: If I had, I would never have appeared here in my gown. My character ought not to exempt me if I am guilty; I ought to abstain from all appearance of evil: When I have forfeited that character, I desire to live no longer among mankind. I asked Mr. Hales on what account I was sent for, and whether there were any note of mine? He said, Yes; there was a note of 1,650*l.* payable by Mr. Edwards. Is it (said I) a true note? Is it wrote by Mr. Edwards? He shook his head and said, Just as true as the other. I asked him whether it was indorsed? To which he replied, Yes. Had I known, my lord, that the note was indorsed, I need not have asked Mr. Hales. He is ready to do me justice, though he must thereby take it upon himself. Your lordship knows that I have no such character in Suffolk.

Judge *Reynolds.* We shall not need, Mr. Kinnersley, to go to Suffolk for your character.*

Judge *Reynolds.* Gentlemen of the jury, William Hales, late of London, goldsmith, and Thomas Kinnersley, clerk, stand indicted for forging a note under the hand of Mr. Samuel Edwards, for 1,650*l.* payable within three months to Thomas Kinnersley, or order, after the date thereof, for value received: And another part of the indictment chargeth them with publishing the same. To this indictment they have pleaded Not Guilty: The question you are now to determine. Gentlemen, the foundation of this which hath been insisted on by the counsel on the side of the prosecution is, that these gentlemen, or rather the one of them, Mr. Hales, having an acquaintance with Mr. Edwards, and being indulged by him the liberty of applying to him for franks, they have made a wrong use of this, and by converting

* In Trinity term 5 Geo. there was an information against this Mr. Kinnersley and one Moore, as being evil-disposed persons, in order to extort money from my lord Sunderland, did conspire together to charge my lord with endeavouring to commit sodomy with the said Moore; and that in execution of this conspiracy, they did, in the presence and hearing of several persons, falsely and maliciously accuse my lord, that he "conatus fuit rem venereum habere" with the defendant Moore, and so to commit sodomy. Kinnersley only appeared, and pleads to issue, and is found guilty; and several exceptions were taken in arrest of judgment, see Strange's Reports, vol. 1, p. 193, but the Court over-ruled them all. Whereupon judgment was given for the king, and afterwards the Court proceeded to sentence, and told the defendant Kinnersley, nothing but his being a clergyman protected him from a corporal punishment; they fined him 500*l.*; a year's imprisonment, and to find sureties for his good behaviour for seven years. In Easter term, 5 Geo. Moore was convicted and sentenced to stand in the pillory, suffer a year's imprisonment, and to find sureties for seven years. And this term, Kinnersley, on affidavits of his being indisposed, moved the Court that he might be admitted to the benefit of the rules. Sed per Curiam, we never do it for one in execution, which differs from the case of a person committed for high treason, who have been bailed on account of illness. Ib. 196. *Former Ed.*

some of the letters of the word 'ffree' into "for the," and by adding some other words, they have now formed it into a negociable note for the sum of 1,650*l.* payable within six months to Mr. Kinnersley, or his order: And then Mr. Kinnersley, to give a circulation to the note, and make it negociable, hath, in combination with Mr. Hales, indorsed his name: Mr. Edwards is responsible to any body to whom this note is transferred over. Gentlemen, to make out this to be the case, they have first endeavoured to shew that Mr. Hales, for some time, on several pretences, procured a number of superscriptions to be written for franks by Mr. Edwards, who is a member of parliament, and particularly some superscriptions in such circumstances as were most accommodated to serve a design of this nature. And to this end they have produced Thomas Maddox, a servant of Mr. Edwards's. He saith, that Mr. Hales, living near Mr. Edwards in Duke-street, in Westminster, hath several times applied to him for frank covers to send news into the country: that Mr. Edwards hath given him several for that purpose, but generally wrote the whole superscription himself, pursuant to the directions that were given him: that in July last there came a parcel of franks, six of them, whereof five have been produced, to be franked, but without any direction to whom to superscribe them. Mr. Edwards was desired to frank them without any superscription: Mr. Edwards refused to frank them, unless directed to whom to superscribe them: Thus these covers, upon that, were not done at that time. But then to shew you what past afterwards upon occasion of these blanks sent to be franked, Anne Clarke, a servant also to Mr. Edwards was called. She saith, that some time after this, Mr. Hales's servant came again over to Mr. Edwards's house, and told her that Mr. Edwards having refused to frank his master's covers without superscriptions, he had brought from his master a paper of directions what superscriptions he desired Mr. Edwards to put to them. That paper of directions hath been produced, and hath been sworn by Mr. Booth to be Mr. Hales's own hand-writing. They were very short directions:

Two to Mr. Levett, of Huntington.
Two to John Pratt, esq. at Bristol.
Two to Stepen Mitford, esq. Exeter.

And they would infer, that as these superscriptions were very short, and so would not take up much room, a vacant space would have been left sufficient to write any thing of this nature. That is the reason of their producing an account of this transaction, which doth not immediately affect this cause, but only as they are inclinable to believe that some such frank may have been made use of to such an end as these seem to have been designed for. And then, to shew you the one which they made hereof, the note [is produced] upon which this indictment is immediately founded. The note is in these words,

"I promise to pay to Mr. Thomas Kinnersley, or his order, within six months after date, the sum of sixteen hundred and fifty pounds for the value received,

"*March* 30, 1728. SAMUEL EDWARDS."

and on the back it is indorsed with the name, Thomas Kinnersley. Gentlemen, they have insisted upon it that the note itself carries the evident marks of forgery upon it. They say that this is so plainly derived from the frank cover of a letter, that the word 'ffree' is not wholly covered, but that still some of it appears; that the stile is unusual 'for the value received.' 'The' in a large hand, and then afterwards 'value received,' the *ee* of a round hand, whereas all the other *ee* are of a quite different figure, in a secretary hand. Other observations they have also made, which you, that have viewed the note, can easily judge of. They then apply themselves to bring evidence as to Mr. Hales, the one of the defendants: and for that purpose they have produced Mr. Charlton Thrup. He saith, that on May 22d last this defendant, Mr. Hales, brought this note to him, desiring him to lend him three 500*l.* notes upon it; that he, not caring to have his credit engaged to such a degree, refused to do it; but upon his importunity, did at last consent to give him a promissory note of 400*l.* upon the security of this note, which Mr. Hales thereupon then deposited in his hands; that it was a note for 1,650*l.* signed by Mr. Edwards, payable to Kinnersley, and indorsed. He saith, indeed, that he did not then observe the indorsement. Seeing this note signed with Mr. Edwards's hand, and knowing him to be a man of great sufficiency, he was not so attentive to the other. He saith, that he kept this note in his hand till after that Mr. Hales was taken up, and then he delivered it by the direction of Mr. Edwards to Mr. Booth; that before it went out of his hands, he observed the indorsement. He swears also, that it received no alteration in the intermediate space between its coming into his hands and its going out: it must be therefore indorsed before. He saith, that as to his own note, he knoweth not what is come of it, but believes that it is in the hands of Mr. Maddox, at the Bank. To shew that this is a forged note they have called Mr. Spicer, who hath been above twenty years concerned for Mr. Edwards; about ten or twelve as his clerk. He saith that the name is Mr. Edwards's, and that the *ff* is also his; that it is his master's constant custom, when he franks a letter, to write the word 'ffree,' and not 'frank' over his name, in the manner wherein this originally stood, and that always with a *ff*. He saith, that he likewise thinks that the *r* is his master's hand-writing, but that the *o* is since crowded in between those letters. He thinks that there are plain footsteps, which shew that the first of the two *ee* which joined to form the word 'ffree,' hath been made use of to form the first part of the head of the *y*, and the other stroke being drawn between that and the other

e, it forms the word *ye*, but then it doth not stand as usual over the *y*. And then he observes, that he the rather believes this to be his master's *e*, for that he always writes such an hand, and all the rest here are in quite another hand. And he saith, that he believes, that being acquainted with his master's affairs, he should have known of it, if that there had been any such transaction of his master's, and that this note too is of a quite different form from any that his master ever delivered, and in a manner wherein his master doth not usually transact his affairs: for that, as he is a man of great credit, he never knew him give a note for time; and in the next place he is so very cautious that he never knew him give a note but that he wrote the whole body of it with his own hand, whereas the body of this note is not his own hand, and therefore contrary to the method that he usually observes. Thus far the evidence is produced, in order to charge Mr. Hales, one of the defendants: but then in order to prove Mr. Kinnersley a partner in this transaction, they have afterwards observed upon the indorsement that this note being made payable to Mr. Kinnersley, it could be of no use till indorsed by him to give it a currency. They have shewed the hand upon the back, and in order to prove his name wrote there to be his hand, as in cases of this nature nothing but an observation of the similitude of hands can be expected, they have called on those that have seen his hand, to give their opinion thereof. The first man expresseth himself with a great deal of caution, seeming to apprehend at first that he was called to swear positively that it was his hand: he saith, that he hath seen him write several times, particularly at least three or four times the last year; that this is so like that he verily believes this to be his hand, and cannot alter his judgment as to it. To the same purpose they have also produced another person, one Mr. John Lincoln: he saith, that he hath seen him write several times, and put his name to receipts in a book: and that he cannot believe but that this is his hand-writing. Some of you having desired to see and compare with this note the other note which was formerly proved, it hath been again proved; and as the person aforementioned produced several receipts which he saw him write, you have had them also to look upon: which how far it will help you in forming a judgment you are to judge. Further, they say, that Mr. Kinnersley was a stranger to, and had no transactions with Mr. Edwards. They have called several persons that were present at the examination of Mr. Kinnersley before sir Richard Hopkins, as well as sir Richard himself, who all say that Mr. Kinnersley himself owned this, and was going to say something further, had he not been interrupted by Mr. Mitford. Sir Richard Hopkins hath been produced. He saith, that in the latter end of September last, Mr. Kinnersley was brought before him, charged with two notes, viz. one of 1,260*l.* and this note of 1,650*l.*; that they entered into the examination of the first note, which he owned very frankly to be his note, written with his own hand; that they then entered upon the other note, which he verily believes to be the same that hath been here produced; that Mr. Kinnersley having denied this indorsement to be his hand, he desired him to recollect whether this indorsement was not his hand too, for that he observed a very great likeness of the hand between that and the note which he had owned to be his hand-writing, and delivered the note to the defendant Kinnersley to look upon; that upon this Mr. Mitford came up to him, and said, 'Answer nothing: this is not your hand-writing.' He saith, that upon this Mr. Kinnersley said the same thing, that this was not his hand-writing. He saith, that he asked him, whether he had had any dealings with Mr. Edwards? That he replied that he had not, and that till this time he was an utter stranger to his person. He saith, that Mr. Mitford and he had some high words upon this occasion; he reproving him for interposing when he apprehended that a further discovery might have been made. They next endeavour to shew, that there was a correspondence carried on in a private manner between the two defendants. In order to shew this, they have produced several persons at whose houses they have met: one of them is Thomas Bab; he saith that he keeps Peel's coffee-house, in Fleet-street; that the latter end of last summer Mr. Hales very frequently came thither, and would sometimes be there for an hour or two; that he often asked whether the minister had been there to ask for him, not asking for Mr. Kinnersley by name, they knowing whom he meant, having often seen them there together; that when Mr. Kinnersley came in, they used to retire into a private room, and stay there together for some time; that one time Mr. Hales observed Mr. Kinnersley going down Fleet-street, went out and went after him; that sometimes they went away together, sometimes asunder; sometimes one went out at the one door into Fleet-street, and the other at the other into the passage to Fetter-lane. He saith, that this their resort to his house was till about a month before that Mr. Hales was taken up, and was then discontinued. Mr. Kinnersley asking him, whether they ever called for pen, ink and paper? To this he replied, No. Of the same nature is the evidence of Thomas Brooks; he saith, that he keeps a coffee-house at Downing-street, in Westminster; that Mr. Kinnersley used to come to his house, send for a porter, and give him a note to Mr. Hales, who thereupon hath come thither to him, and they have gone together by themselves to the further end of the room; that this they did several times, and stayed together sometimes several hours. He saith, that once particularly they staid there till it was so dark that he asked his servant why he had not carried the gentlemen a candle; who said that he had carried them one, but they refused it. Gentlemen, they have then again had resort to the examination before sir Richard Hopkins: they have, as to this,

called Mr. Wright. He saith, that he was present at that examination; and that Mr. Kinnersley, being pressed to answer several questions put to him, was in some emotion, and said, I will tell you all, give me leave; seeming desirous to take time to digest his thoughts: that then one Mr. Mitford came up to him, and bade him hold his tongue, or he would do himself some mischief, or words to that effect. He being examined as to some particulars that Mr. Kinnersley affirmed to have passed between sir Richard Hopkins and Mr. Mitford, and that sir Richard advised him to take his friend's advice, he denieth this, as doth also sir Richard Hopkins himself, to whom Mr. Kinnersley hereupon appealed. He saith, that he thinks that this interruption was after that having owned the other note to be his hand-writing, he had denied this indorsement to be his, whereas sir Richard thought it before, and designed to prevent his answering him on that head. They have also produced Mr. March, who is sir Richard Hopkins's clerk: he gives you much the same account. He saith, that Mr. Kinnersley having owned the other note, and denied this indorsement to be his hand, sir Richard observing the likeness of the hand, advised him to recollect himself, and consider well whether that indorsement was not his hand too as well as the other note, for that the hands were very like; that Mr. Mitford upon that interposed, and said, 'I would have you cautious, and not answer that question.' He denies that sir Richard advised Mr. Kinnersley to take his friend's advice; but on the contrary saith, that sir Richard was a little warm and reprehended him for his interposing, as being an interruption of justice. This is the evidence that hath been laid before you as to this note, both to prove the forgery of this note, and to shew the use that was made of it both by Mr. Hales and Mr. Kinnersley, who is charged with the indorsing this note in order to make it current. They are called upon to make their defence: Mr. Hales stands mute, and saith nothing. The facts bear very hard upon him, he being supposed to procure these franks: it behoved him therefore to give some account how he came by this note. So as to that I apprehend that there is no difficulty, Mr. Hales making no defence. But the question is, How far Mr. Kinnersley is proved to be concerned? His counsel have endeavoured to soften the evidence, or make it not applicable to Mr. Kinnersley. They own that there was a familiarity between him and Mr. Hales: but then they say, that there was also a familiarity between Mr. Hales and Mr. Edwards: they say therefore, that familiarity with Mr. Hales is not a criminal thing. In itself it is not: but the question is, whether a criminal use hath been made of it? They suppose it to be a forged indorsement; but say, that the same person that forged the note might also forge the indorsement: and they say, that supposing it to be Mr. Kinnersley's hand-writing, it may be well supposed that he was easily imposed upon. And they would also have it believed, that this is an usual thing for one person to indorse another's notes among common acquaintance. But how were they common acquaintance, when Mr. Kinnersley hath acknowledged that he had never seen Mr. Edwards in his life till after this? They say, that it may be the easier supposed that Mr. Kinnersley did thus give credit to this as a true note, and not take it to be a forgery, since Mr. Thrup, who is a man in business, was imposed upon by it, and lent 400*l.* upon it. They have called also some evidence, not directly to controvert the fact, but to contradict some things given in evidence, relating to the examination taken before sir Richard Hopkins. To this purpose they have called Mr. John Hayes. He saith, that whether this indorsement was his writing was not the question proposed to Mr. Kinnersley, when Mr. Mitford interposed, he having before denied that; but that there was another question, that was then proposed to him to answer; whether and how often he had been to visit Mr. Hales in Newgate? And he saith, that as to that it was that Mr. Mitford interposed, and advised him not to answer to that question. They have called also Mr. Ward, who was present at the same time, and gives you much the same account. He apprehends that there was a dispute about the minutes that were taken of what had passed, and that Mr. Kinnersley was in a passion, and desired to be examined in the court of aldermen; and that then Mr. Mitford interposed, and advised him not to desire this; that the interruption was upon that extravagant offer of his, and that upon that possibly sir Richard might advise him to take his friend's advice, that is, to be clear and not so rash in answering the questions put to him. Mr. Kinnersley himself hath laid before you what he thought proper. The witnesses that were called (you have doubtless observed) as to that examination, both of them say, that he had denied it before the interposure. Mr. Kinnersley speaks himself and seems to say, that he doth not know but that it may be his hand, though how it came to be obtained he cannot well tell. Indeed it is an extraordinary thing how his name should be obtained on the back of a note signed by Mr. Edwards. Gentlemen, if any other particulars, material for their defence, have slipped me, you have heard them, and they ought to have their weight. The question is, Whether and how far he is a party in this transaction? If he be a party, though he doth but the one part, he is equally guilty: every man that takes part of these things is equally guilty of the whole, and stands undefended.* The note then must be taken for a forged note, and probably in the manner that they have shewn. The thing in question is, How far Mr. Kinnersley is concerned? The name Kinnersley, you see, is upon it: if his name had not been upon it, the note had been of no avail; for there having been no transactions between

* See East's Pl. of the Cr. c. 19, § 52.

them, he could not have demanded the money. But the main business was to indorse it, that other persons that knew not but there might have been such transactions between them, might credit it, and lend money upon it. Whether the proof that is given you that this is his hand, coupled with his own apprehension that it is very like his hand, will satisfy you of it, you must judge. If you judge that it is his hand, the next question before you will be, how far it could be put to a note of Mr. Edwards's? It is plain that there could be no foundation for it: if then you think it satisfactorily proved that his hand was put on the back of this paper by him, knowing it to be a note of such value, and there be no reason given you for it, you must look on him as a party; but if you suppose it put to the back of the note without his privity, in that view of the thing you must acquit him.

Jury called over.

Clerk. Are you all agreed in your verdict?

Jury. Agreed.

Clerk. Who shall speak for you?

Jury. Our foreman.

Clerk. How say you? Is William Hales Guilty of the misdemeanor wherewith he stands charged, in forging a note for 1,650*l.* and indorsing the same, and in publishing the same as a true note and indorsement, knowing it to be so forged and counterfeited, or Not Guilty?

Foreman. Guilty.

Clerk. How say you, Is Thomas Kinnersley, &c.

Foreman. Guilty.

Mr. Strange. My lord, we desire that Mr. Kinnersley may be now committed.

Judge *Reynolds.* Whence was he brought hither?

Mr. Strange. From the Compter.

Judge *Reynolds.* Well, now that he is convicted, he must be committed.

Kinnersley. Whither, my lord?

Judge *Reynolds.* To Newgate.

Kinnersley. But, my lord, there are two writs against me which fix me to the Compter.

Judge *Reynolds.* They will follow you doubtless to Newgate.

Kinnersley. But, my lord, the order of the lord chief-justice was, that I should be committed to the Compter till discharged.

Judge *Reynolds.* Your being ordered to Newgate, is a discharge from the Compter.

Kinnersley. I bless God that I go back innocent of the charge against me.

Judge *Reynolds.* If you do in your own apprehension, it is not so in the apprehension of the jury.

Kinnersley. My lord, I thought I had cleared that matter. If Mr. Hales had brought me that note to sign, I believe that I should have signed it: but I should not have done it, if I had known that Mr. Edwards's name was fraudulently obtained to it. May I never see the face of Almighty God, if I was ever privy to any of Mr. Hales's forgeries! If your lordship please to direct me to Newgate, I desire it may be immediately, for I am ill, having been here so long.

Judge *Reynolds.* It will be presently, for the Court is going to adjourn.

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477. The Trial of WILLIAM HALES,* for fraudulently forging and counterfeiting a Writing, purporting to be a Promissory Note of Samuel Edwards, esq. to Samuel Lee, for Four Thousand Seven Hundred Pounds: 3 GEORGE II. A. D. 1729.

The Jury called over and sworn.

Clerk. OYEZ, Oyez. If any one can inform, &c.

INDICTMENT.

Gentlemen of the Jury, William Hales stands indicted by the name of William Hales, of London, late goldsmith; for that on the 1st day of August, in the 2d year of his majesty's reign, he did fraudulently forge and counterfeit a writing, purporting to be a promissory note, in these words following,

"*March 30*, 1728.

"Six months after date, I promise to pay to Samuel Lee, or his order, the sum of four thousand seven hundred pounds; for ye value received, SAMUEL EDWARDS."

and that he did knowingly and wittingly publish the same as a true note, knowing the same to be so forged and counterfeited.

Mr. Strange. May it please your lordship, and you gentlemen of the jury, this is an indictment against Mr. William Hales, for forging a note in the name of Samuel Edwards, esq. and publishing the same. It sets forth, that on the 1st of August, in the 2d year of his majesty's reign, he forged a note in these words following, &c.

And it further sets forth, that the defendant published the said forged note as a true note of Mr. Edwards's, knowing the same to be forged and counterfeited.

Serj. Whitaker. May it please your lordship, I am counsel in this cause for the king. Gentlemen, this matter is of the same nature with some former indictments: I shall therefore take up but little of your time. It ap-

* See the preceding Cases.

pears, gentlemen, to us, that this is the effect of some frank covers, that Mr. Hales hath fraudulently obtained of Mr. Edwards. I need not now acquaint you, that Mr. Edwards did for some time indulge Mr. Hales with frank covers, which Mr. Hales pretended that they were designed for sending news into the country. This note, gentlemen, is even a grosser forgery than the others can be supposed to be. Here is a sum of 4,700*l.* which Mr. Edwards is supposed to promise to pay within six months after date to Samuel Lee. This Lee we have enquired into the character of. He is one that is worth nothing: he is a sea-faring man, and his wife was nurse to Mr. Hales's children: this man is not very likely to have a promissory note for 4,700*l.* Gentlemen, when you come to look upon this note, you will see on it the plainest marks of forgery that can be. When you come to look upon it, you will plainly see that 'ffree Samuel Edwards' still remains visible. There is the double *f* which Mr. Edwards generally useth, which we shall prove by witness. And then between the *ff* and the *r* there is an *o* struck in, which you will plainly see is not the same writing with the *ff*, nor the same with 'Samuel Edwards.' And then to make out the *y*e you will see the two *ee* are contrived to make a *y* with a stroke at the bottom of the *e*, but that still the two *ee* seem visible, and to be wrote by the same party that wrote the *ff*. I will appeal herein to your own eyesight. Then there is a dot at the end of the *y*, and then 'value received.' You will see a considerable depth beneath, and that it must be cut off from something else. How it was, it concerns Mr. Hales to shew. As to the method wherein this came to be discovered, it is sufficient to tell you, that this had been occasioned by the discovery of a note forged in the name of Mr. Gibson, an apprehension and commitment of Mr. Hales; that this gave occasion for several persons to enquire into the validity of those notes which they had received from Mr. Hales. As upon enquiry several other notes that have been before you were discovered, so at length it came to be discovered, that Mr. Hales had delivered to sir Biby Lake this promissory note, made in the name of Samuel Edwards, esq. payable within six months after date to Samuel Lee, for 4,700*l.* It was upon this occasion that it came to be delivered to sir Biby Lake: Mr. Hales had been harassed with several judgments against him: to keep off the evil day as long as possible, it was necessary to procure some substantial person to be bail for him; sir Biby Lake was applied to, being a very substantial gentleman. It being on a Writ of Error, and for a considerable sum, that he was desired to be bail for Mr. Hales, he made a scruple, and refused it at first: at length to induce him to it, Mr. Hales said to him, Sir, you shall be at no manner of risk; I have a promissory note for 4,700*l.* which is made by Mr. Edwards, who is a substantial man, payable within six months: this will be an ample security, if an execution should come upon you for the affirming of this judgment. Upon this sir Biby Lake was induced to be his security; thus he came to have this note delivered to him. Gentlemen, when we shew you, as we must, it being a fresh case, how he had franks from Mr. Edwards, the method wherein he hath made this use thereof, and then that this note was thus delivered to sir Biby Lake; and you have considered the several circumstances of the case, it will appear both that this is a forged note, and by whom it was forged; that Mr. Hales was the person on whom it must be charged.

Mr. *Strange*. Gentlemen, I would observe to you, which you will plainly see, that here is Mr. Edwards's double *f*, and then an *o* crowded in between that and the *r*; and that there not being sufficient room, therefore the word 'pound' is crowded in, in a narrow manner, and then follows the *ff*, so that it is not possible to suppose that if any gentleman had wrote it before the *ff* was wrote, he would have crowded the word 'pound' into so narrow a room. But there was then a necessity for it.

Thomas Maddox, *Anne Clarke*, and Mr. *Booth*, were called, sworn, and deposed as before; and the note of directions was again read.

Mr. *Spicer* sworn.

Mr. *Strange*. Please to look on that note, and tell us how much thereof you take to be Mr. Edwards's?

Spicer. The name is his, the *ff* and the *r* is also his. The *o* seems not to be of the same ink, and is afterwards crowded in. The *y* is not his.

Mr. *Strange*. What is Mr. Edwards's way of franking?

Spicer. 'Free Samuel Edwards.' 'Free' he usually writes with a *ff*.

Mr. *Strange*. Did you ever know him in franking, make use of the word 'frank'?

Spicer. No, Sir.

Mr. *Strange*. How long have you been acquainted with him?

Spicer. About 24 years, Sir.

Mr. *Strange*. Did you ever know him any ways concerned with Samuel Lee?

Spicer. No, Sir.

Mr. *Strange*. Do you know him?

Spicer. No, Sir.

Mr. *Strange*. Do you think, that being acquainted with Mr. Edwards's concerns, you should have known if there had been any money concerns between them?

Spicer. Yes, Sir, I believe that I should.

Mr. *Strange*. What further reasons have you to believe this not to be his note?

Spicer. I can never believe this to be his note, for he never gives any promissory note for time, nor any note at all, without writing the whole note with his own hand.

Sir *Biby Lake* sworn.

Serj. *Whitaker*. Sir, pray please to give us an account, when you saw that note first, upon what occasion it was brought to you, and by whom it was delivered to you?

Sir *Biby Lake.* About this time twelvemonth Mr. William Hales sent Mr. Kinnersley to me at my house in Crosby-square, who told me that Mr. Hales was arrested upon account of a bond given by him, and Mr. Robert Hales, to Dr. Mapleton of Canterbury; that the Doctor having arrested Mr. William Hales, he desired that I would be bail for him. I desired Mr. Kinnersley to meet me in the evening: we then went to the judges chambers, and gave bail to the action. I thought, that there being no difficulty in the gentleman's appearance, there would be no damage in doing that for a friend. Afterwards Mr. Hales came himself to me, and desired me that I would be bail again for him. I told him that it was somewhat extraordinary; but that however I would meet him at Mr. Turner's at Staples-inn, to consider what to do. He came to me there about four or five, and brought a gentleman with him, who he told me was his attorney. At first, he told me not: but afterwards, we understood that it was to a Writ of Error that I was desired to be put in bail. I was then told by Mr. Turner, that if I was bail to that, I must pay the money if they did not. Upon this I told Mr. Hales that I cared not to be bail in such a matter as this, unless he would give me good security. He told me that he was going to Peel's coffee-house, desired that I would consider of it, and come to him again. I staid to consult Mr. Turner, and told him that I would not be bail except Mr. Hales would give me good security. I then went to Peel's coffee-house, and there found Mr. Hales and Mr. Kinnersley together. I took Mr. Hales to another part of the room, and told him, that I would not endanger myself and my family so far as to engage for such a sum, it being about 1,500*l.* unless he would give me good security. Upon this he put his hand in his pocket, took out his pocket-book, and took out of it this note. He looked upon it, and said, that it was a promissory note for four thousand and odd pounds, and was payable within two or three months after. He put it into my hand: I looked upon it, and thought it was very good security to me for such a sum. He desired that I would keep it in my own hand till the money that I was security for was paid; but said, that he would pay the money long before I could be called upon: I thought I had sufficient satisfaction, and went thereupon before the lord chief-justice Raymond, and gave bail to the Writ of Error.

Serj. *Whitaker.* Sir, I would desire you to look on the note, and on the back of it, and tell us whether it hath had any alteration?

Sir *Biby Lake.* None, Sir, that I know of. But I must give you a particular account of one thing. It was not all the time in the same custody. Before I came there, my servant went and waited for me with my horse in Holborn, I being going out of town. Going therefore to Mr. Turner's, I desired him to lay it by for me in his drawer, where he hath other papers of mine. Accordingly he did lay it up; and from that time it was (I suppose) in Mr. Turner's custody, till after the time that Mr. Hales was taken up. When that happened, Mr. Harle of the million bank sent me word thereof. Upon that, when I came in, I went to Mr. Harle, and told him that I had such a note of Mr. Edwards's in my hand; and (said I) hearing that you have a suspicion that the note that is in your hands is a bad note, I have some reason to desire you to go to Mr. Edwards, and acquaint him, that I have such a note in Mr. Turner's custody, who is now in Derbyshire. All that I could then do, was to desire Mr. Turner's clerk to send to him for the key, that we might take out the note and shew it. The clerk did so; and after some time had the key sent him, took out the note, and I desired him to carry it to Mr. Edwards. It was the same day that the note became due.

Mr. *Turner* sworn.

Serj. *Whitaker.* Mr. Turner, pray please to look upon that note, and give us an account when you first saw it?

Turner. I believe it was one day in the beginning of July last, about five or six o'clock in the afternoon: I cannot be particular as to the day, but I believe that it was the same day that sir Biby Lake gave bail to the Writ of Error. He then brought me the note to lay by for him. I verily believe this to be the same note.

Serj. *Whitaker.* Hath it had any alteration since?

Turner. No, Sir. He desired me to put it for him in a drawer, where I had other of his papers: accordingly I did: I went out of town in August. Afterwards my clerk sent me word, that sir Biby Lake desired that I would send up the key of the drawers, in order to his notes being taken out. Upon that I sent up the key to my clerk, directed him in which drawer the note was, desired that he would take it out, and carry it to sir Biby Lake.

Mr. *More* sworn.

Mr. *Strange.* Do you remember, Sir, to have received a key from Mr. Turner?

More. Yes, Sir.

Mr. *Strange.* Did you thereupon find this note in the drawer?

More. Yes, Sir; in the drawer of the desk.

Mr. *Strange.* Did you make any alterations in it?

More. No, Sir; I took it out, and carried it to Mr. Edwards.

Mr. *Strange.* Mr. Spicer, you are acquainted with Mr. Edwards's way of dealing. When he gives a promissory note, doth he write the whole note?

Spicer. Yes, Sir; I never knew him give any but that he wrote the whole note.

Mr. *Strange.* Doth he use to give notes for time?—*Spicer.* No, Sir, never.

Mr. *Strange.* My lord, we now desire that the note may be read.

Note read. "*March* 30, 1728.

"Six months after date, I promise to pay to Samuel Lee, or his order, the sum of four thousand seven hundred pounds, ffor the value received, SAMUEL EDWARDS."

Indorsed, "SAMUEL LEE."

Mr. Strange. You will observe, gentlemen, the word 'ffree' is legible still, and observe how the word 'pounds' is crowded in.

Mr. *Bird* sworn.

Serj. *Whitaker.* Sir, do you know Mr. Samuel Lee?—*Bird.* Yes, Sir.

Serj. *Whitaker.* What is he?

Bird. A sea-faring man.

Serj. *Whitaker.* Do you know his wife?

Bird. Yes, Sir.

Serj. *Whitaker.* Did she nurse a child for Mr. Hales?

Bird. Yes, Sir; two for several years.

Serj. *Whitaker.* Is he a man of worth?

Bird. No, Sir; he is not worth 5*l.* in the world.

Serj. *Raby.* What say you to this, Mr. Hales? You see that they have given an account of the method that you took to procure frank covers. This note they say, that you published as a true note, how should it come to pass, that such a poor person as this Lee is should indorse over such a note to you?

Hales. Mr. Lee gave it me, there being monies due to me.

Serj. *Raby.* If you can prove any transaction between you and that Lee, to induce the jury to believe that it was given you upon that consideration, it will be proper now to do it.

Hales. He is gone abroad.

Serj. *Raby.* Is there any person that can be witness of any such transaction?

Hales. No, Sir.

Serj. *Raby.* Gentlemen of the jury, William Hales of London, late goldsmith, stands indicted for forging a note for 4,700*l.* payable within six months after date to Samuel Lee, or order, in the name of Samuel Edwards, esq. and for publishing the same as a true note. You see, gentlemen, that there have been several witnesses produced to shew how he got possession of frank covers, on pretence of sending news into the country; and that he sent a paper of directions for some, which directions were very short, and so convenient for the writing in the intermediate space over the name, such a note as this. And they have sworn that these directions are his hand, which were sent over by his servant to Mr. Edwards for franks. Now to shew you that this note was published by this man as a true note, and that he is guilty hereof, sir Biby Lake hath appeared. He tells you, that there were two several applications to him to be bail for Mr. Hales; that he complied readily with the one, but the other he made more scruple of, because it was more dangerous; it being to a Writ of Error, and for about 1,500*l.* He was therefore more cautious, and would not do it without security. He tells you, that upon this, this note was offered and deposited in his hands by the prisoner. This, if you are satisfied of it, fixes the note upon the prisoner. It appears hereby, that it was in the hands of the prisoner. He cannot shew you how he came by it: that then is a strong proof to fix the charge in this indictment upon him. Where a forged note is found in a person's possession, and it appears that he offered it as a true one, and cannot give an account how he came by it, that fixeth the charge of forging it upon him. This note was published in the city of London, and therefore the forgery in the indictment is fixed there: for it is impossible to know certainly where a note is forged, since no one calls evidence to see him forge a note. Thus it appears to have been in his custody, and it cannot otherwise be proved. Other witnesses have been produced, to shew that the note hath not been altered since it was delivered by him. Mr. Turner tells you, that he received it from sir Biby Lake the day that he received it from Mr. Hales, and laid it by for him in his drawer; so that from the time that it was published, it continueth in the same state that it then was. Other circumstances have been laid before you, as the manner of Mr. Edwards's making out any notes. He doth not give out any promissory note made for time, nor doth he ever give out any whatsoever but such as are all of his own handwriting. Another circumstance that hath been laid before you, relates to the person to whom this note is made payable. It looks like a contrivance to have it all in his own management, in the hands of his servant, and within his own reach; that this note should be made payable to a poor man, whose wife was nurse to Mr. Hales's children, and the witness believes him not to be worth 5*l.* in the world. How should he be entitled to this bill for such a sum, which he might have indorsed to any other person? No one sure would trust such a note with such a person. He could not be possessed of it in his own right, and no other person would entrust a man, not worth 5*l.* with a note of this value. This circumstance they offer to your consideration: and they take notice of some letters which shew that there was originally 'ffree,' which is now turned into 'for the,' before 'value received.' It appears that it was 'ffree Samuel Edwards:' and it is almost legible notwithstanding the alteration that hath been made. He hath said nothing in his defence to shew how he came by that note. He saith that Lee gave it him. Is it likely that a man not worth 5*l.* in the world should give out such a note as this? Though there is no direct evidence of his forging it, that makes no alteration: if he directed it to be done, it is the same thing as if he did it himself; nor doth it appear that any but himself is concerned therein. He having published it, is guilty not only of the publication, but of the forging of it: if you believe it to be a forged note, he is guilty of the forgery. His publishing of the

note is a sufficient evidence of it. If a man had received such a note, he would readily say, I received it of such a person on such an occasion: but there hath been no evidence of this nature given. If you ask a man, how he came by this or that thing, he saith another gave it him: that may be said in every criminal case; it is often said, but never regarded except proved. You are then to consider all these circumstances, and to judge thereupon whether it is a forged note; whether it is likely that Lee should have a note of this value, and that there should be any reason for his delivering such a note? There has been no pretence of any transactions between this Lee and Mr. Edwards, nor any colour of proof on what consideration the gentleman should write such a note payable to such a man, and give it him. Gentlemen, here is as full and plain proof as can be expected, if the evidence swear true; so I leave it to you.

Clerk. Are you all agreed in your verdict?

Jury. Agreed.

Clerk. Who shall speak for you?

Jury. Our foreman.

Clerk. How say you, is William Hales Guilty of the misdemeanour whereof he stands indicted in forging a note in the name of Samuel Edwards, esq. for 4,700*l.* and publishing the same, or Not Guilty?—*Foreman.* Guilty.

Serj. *Whitaker.* My lord, the note being found to be forged, we desire that sir Biby Lake may deliver it to Mr. Edwards.

Sir *William Thompson.* That is but common justice.

Mr. *Strange.* My lord, there is another indictment: but we will not trouble your lordship with that; therefore the jury may be discharged.

Serj. *Whitaker.* My lord, we think it proper to take notice, that upon the three indictments whereof he hath been found guilty on the statute of king Henry 8, for obtaining money by false tokens, there can be no fine in the case; we must therefore crave corporal punishment.

Sir *William Thompson.* The question is, what corporal punishment? To be sure he will be pilloried.

Serj. *Whitaker.* The pillory, my lord, is nothing. The gentleman hath endeavoured to get many thousand pounds of several gentlemen: now he is only to look through a wooden casement, and this is to make recompence. We humbly hope, that according to the words of the act of parliament, some punishment will be ordered, not only ignominious but corporal punishment, as the words are very extensive.

Sir *William Thompson.* The Court to be sure will order imprisonment, as well as the pillory, and security afterward.

Serj. *Whitaker.* But should not the punishment left to the discretion of the Court be extended to something further?

Sir *William Thompson.* I am not for extending it to torture. I know not any precedent; nor would I begin any thing of that nature. The king himself is limited by our law.

Serj. *Whitaker.* The penalty seems left to the discretion of this Court.

Sir *William Thompson.* I would not extend it. I do not know but that the parliament may think of something else afterwards.

Serj. *Whitaker.* Well, Sir, I have laid it before you, I submit it.

The Judgment of the Court:

That William Hales and Thomas Kinnersley should stand twice in the pillory; once in Fleet-street, at the end of Fetter-lane, and once at the Royal Exchange, in Cornhill.

That Hales should pay a fine of fifty marks, suffer five years imprisonment, and give security for his good behaviour for seven years afterwards. And,

That Kinnersley should pay a fine of 200*l.* (an hundred on each indictment,) suffer two years imprisonment, and give security for his good behaviour for three years longer.

Mr. Hales begged that two years of his imprisonment might be remitted on account of his age; but it was not granted.

February 11 following, Hales and Kinnersley stood in the pillory at the Royal Exchange in Cornhill.

February 15. They both stood again in the pillory at Fetter-lane end, in Fleet-street. Kinnersley stood both times in his canonical habit, thinking to draw compassion and respect from the populace, but it had the contrary effect.

Feb. 18th following, died in the Press-yard in Newgate the said William Hales; and April 7, 1729, died in the same place, of a fever, Thomas Kinnersley, clerk.

"Forgery is now made felony, without benefit of clergy; as is likewise the publishing any forged deed, will, bond, note, indorsement, &c. knowing them to be forged, by the stat. 2 and 7 Geo. 2, which see for the several particular cases there mentioned."—*Former Edit.*

See, also, East's Pleas of the Crown, c. 19.

As to proof by comparison of hands, to which it appears that recourse was had in some of these Trials, see in this Collection Algernon Sidney's Case, vol. 9, p. 817. See, also, vol. 12, pp. 297, et seq. vol. 16, p. 200.

At the time when these frauds were committed by Hales and Kinnersley, it was usual for privileged persons to frank letters by mere indorsement of their names. By stat. 4 G. 8, c. 24, it is required that members of either house of parliament shall write the whole superscription thereof. A history of franking is inserted in the Gentleman's Magazine, vol. 54, p. 644.

Some years after these cases of Hales and Kinnersley, a curious attempt was made by one Fournier, a popish priest and fugitive from France, to defraud bishop Hoadley of 8,800*l.* by means of a promissory note forged on a frank. The bishop published an account of the transaction, of which an abridgement is inserted in the Supplement to the Gentleman's Magazine for the year 1757. See, also, 2 Vezey, 445.

478. Proceedings against JOHN HUGGINS,* esq. Warden of the Fleet, THOMAS BAMBRIDGE, esq. Warden of the Fleet, RICHARD CORBETT, one of the Tipstaffs of the Fleet, and WM. ACTON, Keeper of the Marshalsea Prison: 3 GEORGE II. A. D. 1729.

A REPORT FROM THE COMMITTEE OF THE HOUSE OF COMMONS APPOINTED TO ENQUIRE INTO THE STATE OF THE GAOLS OF THIS KINGDOM, SO FAR AS RELATES TO THE CRUEL USAGE OF THE PRISONERS; WHICH OCCASIONED THE FOLLOWING TRIALS.

Jovis 20 Die Martii, 1729.

MR. Oglethorpe, from the Committee appointed to enquire into the State of the Gaols of this kingdom, made a Report of some progress which the Committee had made in their enquiry into the state of the Fleet prison, with the Resolutions of the Committee thereupon; and he read the Report in his place, and afterwards delivered the same in at the table, viz.

The Committee find, That the Fleet prison is an ancient prison, and formerly used for the reception of the prisoners committed by the council-table, then called the Court of the Star Chamber, which exercised unlimited authority, and inflicted heavier punishments than by any law were warranted.

And as that assumed authority was found to be an intolerable burden to the subject, and the means to introduce an arbitrary power and government, all jurisdiction, power, and authority belonging unto, or exercised in the same court, or by any the judges, officers, or ministers thereof, were clearly and absolutely dissolved, taken away, and determined by an act made in the 16th year of the reign of king Charles the 1st.

And thereby the Committee apprehend all pretences of the warden of the Fleet to take fees from archbishops, bishops, temporal peers, baronets, and others of lower degree, or to put them in irons, or exact fees for not doing so, were determined, and abolished.

That after the said act took place, the Fleet prison became a prison for debtors, and for contempts of the Courts of Chancery, Exchequer, and Common Pleas only, and fell under the same regulations as other gaols of this kingdom.

That by an act of the 22d and 23d of king Charles the 2d, the future government of all prisons was vested in the lords chief justices, the chief baron, or any two of them, for the time being; and the justices of the peace in London, Middlesex, and Surry; and the judges for the several circuits; and the justices of the peace, for the time being, in their several precincts: And pursuant thereunto, several orders and regulations have been made, which the present warden of the Fleet hath not regarded or complied with, but hath exercised an unwarrantable and arbitrary power, not only in extorting exorbitant fees, but in oppressing prisoners for debt, by loading them with irons, worse than if the Star Chamber was still subsisting, and contrary to the Great Charter, the foundation of the liberty of the subject, and in defiance and contempt thereof, as well as of other good laws of this kingdom.

It appears by a patent of the third year of queen Elizabeth, recited in letters patents bearing date the 19th year of king Charles the 2d, that the Fleet prison was an ancient prison, called Prisona de le Fleet, alias, The Queen's Gaol of the Fleet; and that certain constitutions were then established by agreement between Richard Tyrrel, warden, and the prisoners of the Fleet, and a table of fees annexed, in which the fees to be paid by an archbishop, duke, marquis, earl, or other lord spiritual or temporal, are particularly mentioned, and the fine ascertained which they are to pay for the liberty of the house and irons; and that these constitutions and orders were confirmed by the said letters patent of king Charles the 2d: Which letters patent grant the office of warden of the Fleet, and of the keeper of the Old Pa-

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* See New Parl. Hist. vol. 8.

"And here can I forget the generous band
Who, touch'd with human woe, redressive search'd
Into the horrors of the gloomy jail?
Unpitied, and unheard, where misery moans;
Where sickness pines; where thirst and hunger burn,
And poor misfortune feels the lash of vice.
While in the land of liberty, the land
Whose every street and public meeting glow
With open freedom, little tyrants rag'd;
Snatch'd the lean morsel from the starving mouth;
Tore from cold wintry limbs the tatter'd weed,
Even robb'd them of the last of comforts, sleep,
The free-born Briton to the dungeon chain'd
Or, as the lust of cruelty prevail'd,
At pleasure mark'd him with inglorious stripes;
And crush'd out lives, by secret barbarous ways,
That for their country would have toil'd, or bled.
O great design! if executed well,
With patient care, and wisdom-temper'd zeal.
Ye sons of mercy! yet resume the search;
Drag forth the legal monsters into light,
Wrench from their hands oppression's iron rod,
And bid the cruel feel the pains they give."

Thomson's Winter.

lace at Westminster, the shops in Westminster-hall, certain tenements adjoining to the Fleet, and other rents and profits belonging to the warden, to sir Jeremy Whichcot and his heirs for ever. And the said sir Jeremy rebuilt the said prison at his own expence, as a consideration for the grant thereof. But the said prison, and the custody of the prisoners, being a freehold, and falling by descent or purchase into the hands of persons incapable of executing the office of warden, was the occasion of great abuses, and frequent complaints to parliament, till at length the patent was set aside.

And a patent for life was granted to Baldwyn Leighton, esq. in consideration of his great pains and expences in suing the former patentees to a forfeiture, and he soon dying, John Huggins, esq. by giving 5,000*l.* to the late lord Clarendon, did, by his interest, obtain a grant of the said office for his own and his son's life.

That it appeared to the Committee, That in the year 1725, one Mr. Arne, an upholder, was carried into a stable which stood where the strong room on the master's side now is, and was there confined (being a place of cold restraint) till he died, and that he was in good state of health before he was confined to that room.

That the said John Huggins growing in years, and willing to retire from business, and his son not caring to take upon him so troublesome an office, he hath for several years been engaged in continual negociations about the disposal of the said office, and in August last concluded a final treaty with Thomas Bambridge and Dougal Cuthbert, esqrs. and for 5,000*l.* to be paid unto him, obliged himself to surrender the said patent for his and his son's life, and procure a new patent for the said Bambridge and Cuthbert, which the said Huggins did accordingly obtain, and Cuthbert paid in money, or gave good security to pay 2,500*l.* for one moiety of the said office of warden; and Bambridge gave land and other security, which the said Huggins was then content with, for 2,500*l.* being for the other moiety of the said office.

That Mr. Huggins being examined touching an instrument signed by him in November 1724, appointing Richard Corbett, one of the five tipstaffs of or belonging to the Fleet prison, acknowledged that he had no power by virtue of any patent from the crown to constitute such tipstaff, but that when he came to his office he found that such an officer had been so constituted, and he took that for a precedent to do the same.

That since the said Thomas Bambridge has acted as warden, the books belonging to the office of the warden have been very negligently kept, and the discharges not duly entered, to the great prejudice of many of his majesty's subjects; and he hath not regularly taken charge of the prisoners committed to his care by his patent; and hath not, as he himself confesseth, ever had any authentic list of the prisoners in the rules delivered him, so he cannot have executed the trust of keeping his prisoners in safe custody, when he did not know who or where they were.

The Committee find that the said Thomas Bambridge, who for some years acted as deputy-warden of the Fleet, and is now actually warden of that prison, hath himself been aiding and assisting in an escape: that he caused a private door to be made through the walls of the prison out of the yard where the dogs are, the key of which door was kept by himself, and he with his own hands opened the door and let out Boyce, the smuggler, charged at the king's suit with upwards of 30,000*l.* who was afterwards seen at Islington, and hath been several times let out of the prison by Bambridge.

The Committee find that the said Bambridge hath by himself and his agents often refused to admit prisoners into the prison, though committed by due course of law: and in order to extort money from them, hath often, contrary to an act of the 22nd and 23d of king Charles 2, without their free and voluntary consent, caused them to be carried away from the prison gate unto a public victualling or drinking-house, commonly called a spunging-house, belonging to him the said Bambridge as warden, and rented of him by Corbett his tipstaff, and hath there kept them at exorbitant charges, and forced them to call for more liquor than they were inclined to, and to spend more than they were able to afford, to the defrauding of their creditors, and the distressing of their families, whose substance they are compelled there to consume; and for the more effectual making them stretch their poor remains of credit, and to squeeze out of them the charity of their friends, each prisoner is better or worse treated according to his expences, some being allowed a handsome room and bed to themselves, some stowed in garrets, three in one bed, and some put in irons.

That these houses were further used by the said Bambridge, as a terror for extorting money from the prisoners, who on security given have the liberty of the rules; of which Mr. Robert Castell was an unhappy instance, a man born to a competent estate, but being unfortunately plunged in debt, was thrown into prison; he was first sent (according to custom) to Corbett's, from whence he by presents to Bambridge redeemed himself, and, giving security, obtained the liberty of the rules; notwithstanding which, he had frequently presents, as they are called, exacted from him by Bambridge, and was menaced, on refusal, to be sent back to Corbett's again.

The said Bambridge having thus unlawfully extorted large sums of money from him in a very short time, Castell grew weary of being made such a wretched property, and resolving not to injure farther his family or his creditors for the sake of so small a liberty, he refused to submit to further exactions; upon which the said Bambridge ordered him to be re-committed to Corbett's, where the small-pox then

raged, though Castell acquainted him with his not having had that distemper, and that he dreaded it so much, that the putting him into a house where it was would occasion his death, which, if it happened before he could settle his affairs, would be a great prejudice to his creditors, and would expose his family to destruction; and therefore he earnestly desired that he might either be sent to another house, or even into the gaol itself, as a favour. The melancholy case of this poor gentleman moved the very agents of the said Bambridge to compassion, so that they also used their utmost endeavours to dissuade him from sending this unhappy prisoner to that infected house: but Bambridge forced him thither, where he (as he feared he should) caught the small-pox, and in a few days died thereof, justly charging the said Bambridge with his death; and unhappily leaving all his affairs in the greatest confusion, and a numerous family of small children in the utmost distress.

It appeared to the Committee, that the letting-out of the Fleet tenements to victuallers, for the reception of prisoners, hath been but of late practised, and that the first of them lett for this purpose was to Mary Whitwood, who still continues tenant of the same, and that her rent has from 32*l.* per ann. been increased to 60*l.* and a certain number of prisoners stipulated to be made a prey of, to enable her to pay so great a rent; and that she, to procure the benefit of having such a number of prisoners sent to her house, hath, over and above the increased rent, been obliged to make a present to the said Bambridge of forty guineas, as also of a toy, (as it is called) being the model of a Chinese ship, made of amber, set in silver, for which fourscore broad-pieces had been offered her.

This is the first method of extorting money from the unhappy prisoners; and when they can no longer bear the misery and expence of a spunging-house, before they can obtain the privilege of being admitted into the prison, they are obliged to comply with such exorbitant fees as the said Bambridge thinks fit to demand, which, if they do not, they are sure, under various pretences, of being turned down to the common side, if not put in irons and dungeons; and this has been done to those who were willing and offered to pay the fees established by the regulation made by the judges of the Common Pleas in Trin. Term 1727, which ought to have been hung up in some public place in the prison, to which the prisoners might have free access, but was secreted by the said James Barnes, pursuant to orders of the said Bambridge; which table of fees seems to be unreasonable, because it obliges men who are committed for not being able to pay their debts, to pay such sums of money as their circumstances render them altogether unable to comply with.

And, notwithstanding the payment of such large fees, in order to extort further sums from the unfortunate prisoners, the said Bambridge unjustly pretends he has a right, as warden, to exercise an unlimited power of changing prisoners from room to room; of turning them into the common-side, though they have paid the master's side fee; and inflicting arbitrary punishments by locking them down in unwholesome dungeons, and loading them with torturing irons; some instances of which follow: viz.

Jacob Mendez Solas, a Portuguese, was, as far as it appeared to the Committee, one of the first prisoners for debt that ever was loaded with irons in the Fleet; the said Bambridge one day called him into the gate-house of the prison, called the Lodge, where he caused him to be seized, fettered, and carried to Corbett's, the spunging-house, and there kept for upwards of a week, and when brought back into the prison, Bambridge caused him to be turned into the dungeon, called the Strong Room of the Master's side.

This place is a vault like those in which the dead are interred, and wherein the bodies of persons dying in the said prison are usually deposited, till the coroner's inquest hath passed upon them; it has no chimney nor fire-place, nor any light but what comes over the door, or through a hole of about eight inches square. It is neither paved nor boarded; and the rough bricks appear both on the sides and top, being neither wainscotted nor plastered: what adds to the dampness and stench of the place is, its being built over the common sewer, and adjoining to the sink and dung-hill where all the nastiness of the prison is cast. In this miserable place the poor wretch was kept by the said Bambridge, manacled and shackled for near two months. At length, on receiving five guineas from Mr. Kemp, a friend of Solas's, Bambridge released the prisoner from his cruel confinement. But though his chains were taken off, his terror still remained, and the unhappy man was prevailed upon by that terror, not only to labour *gratis* for the said Bambridge, but to swear also at random all that he hath required of him: and the Committee themselves saw an instance of the deep impression his sufferings had made upon him; for on his surmising, from something said, that Bambridge was to return again, as Warden of the Fleet, he fainted, and the blood started out of his mouth and nose.

Captain John Mackpheadris, who was bred a merchant, is another melancholy instance of the cruel use the said Bambridge hath made of his assumed authority. Mackpheadris was a considerable trader, and in a very flourishing condition until the year 1720, when being bound for large sums to the crown, for a person afterwards ruined by the misfortunes of that year, he was undone. In June, 1727, he was a prisoner in the Fleet, and although he had before paid his commitment-fee, the like fee was extorted from him a second time; and he having furnished a room, Bambridge demanded an extravagant price for it, which he refused to pay; and urged, that it was unlawful for the warden to demand extravagant rents, and offered to pay what was legally due: notwithstanding

which, the said Bambridge, assisted by the said James Barnes and other accomplices, broke open his room, and took away several things of great value, amongst others, the king's extent in aid of the prisoner (which was to have been returned in a few days, in order to procure the debt to the crown, and the prisoner's enlargement,) which Bambridge still detains. Not content with this, Bambridge locked the prisoner out of his room, and forced him to lie in the open yard, called the Bare. He sat quietly under his wrongs, and getting some poor materials, built a little hut to protect himself, as well as he could, from the injuries of the weather. The said Bambridge seeing his unconcernedness, said, "Damn him! he is easy. I will put him into the Strong Room before to-morrow;" and ordered Barnes to pull down his little hut, which was done accordingly. The poor prisoner being in an ill state of health, and the night rainy, was put to great distress. Some time after this he was (about eleven o'clock at night) assaulted by Bambridge, with several other persons his accomplices, in a violent manner; and Bambridge, though the prisoner was unarmed, attacked him with his sword, but by good fortune was prevented from killing him; and several other prisoners coming out upon the noise, they carried Mackpheadris for safety into another gentleman's room; soon after which Bambridge coming with one Savage, and several others, broke open the door, and Bambridge strove with his sword to kill the prisoner: but he again got away, and hid himself in another room. Next morning the said Bambridge entered the prison with a detachment of soldiers, and ordered the prisoner to be dragged to the lodge, and ironed with great irons; on which he desiring to know for what cause, and by what authority he was to be so cruelly used? Bambridge replied, "It was by his own authority, and damn him he would do it, and have his life." The prisoner desired he might be carried before a magistrate, that he might know his crime before he was punished; but Bambridge refused, and put irons upon his legs which were too little, so that in forcing them on, his legs were like to have been broken; and the torture was impossible to be endured. Upon which the prisoner complaining of the grievous pain and straitness of the irons, Bambridge answered, "That he did it on purpose to torture him:" on which the prisoner replying, "That by the law of England no man ought to be tortured;" Bambridge declared, "That he would do it first, and answer for it afterwards;" and caused him to be dragged away to the dungeon, where he lay without a bed, loaded with irons so close rivetted that they kept him in continual torture, and mortified his legs. After long application his irons were changed, and a surgeon directed to dress his legs, but his lameness is not, nor ever can be cured. He was kept in this miserable condition for three weeks, by which his sight is greatly prejudiced, and in danger of being lost.

The prisoner, upon this usage, petitioned the judges, and after several meetings, and a full hearing, the judges reprimanded Mr. Huggins and Bambridge, and declared, "That a gaoler could not answer the ironing of a man before he was found guilty of a crime;" but it being out of term, they could not give the prisoner any relief or satisfaction.

Notwithstanding this opinion of the judges, the said Bambridge continued to keep the prisoner in irons till he had paid him six guineas; and to prevent the prisoner's recovering damages for the cruel treatment of him, Bambridge indicted him and his principal witnesses at the Old Bailey, before they knew any thing of the matter; and to support that indictment, he had recourse to subornation, and turned two of his servants out of places which they had bought, because they would not swear falsely that the prisoner had struck the said Bambridge, which words he had inserted in affidavits ready prepared for signing, and which they knew to be false. As soon as they were apprized of it, they applied to the lord mayor, who ordered the grand jury down to the Fleet, where they found that Bambridge was the aggressor. But the bill against the prisoners being already found, the second inquiry was too late.

The prisoners being no longer able to bear the charges of prosecution, which had already cost 100*l.* and being softened by promises, and terrified by threats, submitted to plead guilty, on a solemn assurance and agreement made with Bambridge before witnesses, of having but one shilling fine laid upon them; but so soon as they had pleaded guilty, Bambridge took advantage of it, and has continued harassing them and their securities ever since.

The desire of gain urged the said Bambridge to the preceding instances of cruelty; but a more diabolical passion, that of malice, animated him to oppress captain David Sinclair in the following manner:

At the latter end of June or beginning of July last, the said Bambridge declared to the said James Barnes, one of the agents of his cruelties, "That he would have Sinclair's blood;" and he took the opportunity of the first festival day, which was on the first of August following, when he thought captain Sinclair might, by celebrating the memory of the late king, be warmed with liquor so far as to give him some excuse for the cruelties which he intended to inflict upon him. But in some measure he was disappointed; for captain Sinclair was perfectly sober, when the said Bambridge rushed into his room with a dark lanthorn in his hand, assisted by his accomplices James Barnes and William Pindar, and supported by his usual guard, armed with muskets and bayonets, and without any provocation given, run his lanthorn into captain Sinclair's face, seized him by the collar, and told him he must come along with him: captain Sinclair, though surprized, asked for what, and by what authority he so treated him? Upon which Barnes and

the rest seized captain Sinclair, who still desiring to know by what authority they so abused him, Bambridge grossly insulted him, and struck him with his cane on the head and shoulders, whilst he was held fast by Pindar and Barnes. Such base and scandalous usage of this gentleman, who had in the late wars always signalized himself with the greatest courage, gallantry and honour, in the service of his country upon many the most brave and desperate occasions, must be most shocking and intolerable; yet captain Sinclair bore it with patience, refusing only to go out of his room unless he was forced; whereupon the said Bambridge threatened to run his cane down his throat, and ordered his guard to stab him with their bayonets, or drag him down to the said dungeon, called the Strong Room; the latter of which they did, and Bambridge kept him confined in that damp and loathsome place, till he had lost the use of his limbs and memory, neither of which has he perfectly recovered to this day. Many aggravating cruelties were used to make his confinement more terrible; and when Bambridge found he was in danger of immediate death, he removed him, for fear of his dying in duress, and caused him to be carried in a dying condition from that dungeon to a room where there was no bed or furniture; and so unmercifully prevented his friends having any access to him, that he was four days without the least sustenance.

It appeared to the Committee by the evidence of a surgeon and others, who were prisoners in the house, that when captain Sinclair was forced into that loathsome dungeon he was in perfect health.

Captain Sinclair applied for remedy at law against the said cruelties of Bambridge, and had procured a Habeas Corpus for his witnesses to be brought before the sessions of Oyer and Terminer, when the said Bambridge, by colour of his assumed authority as warden, took the said writs of Habeas Corpus from the officer whose duty it was to make a return of them, and commanded him to keep out of the way, whilst he himself went to the Old Bailey, and immediately indicted captain Sinclair and such of his witnesses as he knew he could not deter by threats, or prevail with by promises to go from the truth.

Captain Sinclair had temper enough to bear patiently almost insupportable injuries, and to reserve himself for a proper occasion, when justice should be done him by the laws of the realm.

But the said Bambridge has forced others by wrongs and injuries beyond human bearing, to endeavour the avenging injuries and oppressions which they could no longer endure.

And it appeared to the Committee, that the said Bambridge, in order to avoid the punishment due to these crimes, hath committed greater, and hath not only denied admittance to the solicitors, who might procure justice to the injured prisoners, and in open defiance to the law, disobeyed the king's writs, but hath also seduced some by indulging them in riot, and terrified others with fear of duress, to swear to and subscribe such false affidavits as he thought fit to prepare for them, on several occasions; in all which wrongs and oppressions John Everett also acted as one of the said Bambridge's wicked accomplices.

That the said Bambridge being asked by the Committee, "By what authority he pretended to put prisoners into dungeons and irons?" answered, "That he did it by his own authority as warden, to preserve the quiet and safety of the custody of the prison."

But it appeared to the Committee by the examinations of many witnesses, that before the time when Gybbon and the said Bambridge acted as deputy-wardens under Mr. Huggins, the quiet and safety of the custody were very well preserved without the use of irons or dungeons.

That the two dungeons, called the strong room on the master's side, and the strong room on the common side, were both built within these few years; and that the old method of punishing drunken and disorderly persons was putting them in the stocks; and the punishment of those who had escaped, or attempted to escape, was putting them upon a tub at the gate of the prison, by way of public shame, or securing them without irons, in their proper rooms for some days.

And that the said dungeons were built in defiance of, and contrary to the declaration of the lord King, when lord chief justice of the Common Pleas; who, upon an application made to him on behalf of the prisoners of the Fleet, when Mr. Huggins and —— Gybbon urged that there was danger of prisoners escaping, declared, that they might raise their walls higher, but that there should be no prison within a prison.

That upon the strictest enquiry, the Committee could not find that any prisoners in the Fleet for debt had been put in irons before the said Mr. Huggins had the office of warden.

That it is not the only design of the said Thomas Bambridge to extort money from his prisoners, if they survive his inhuman treatment, but he seems to have a farther view, in case it causes death, of possessing himself of their effects. One remarkable proof of which the Committee think proper here to insert, viz.

Mr. John Holder, a Spanish merchant, was a prisoner in the Fleet, and had a room which he fitted up with his own furniture, and had with him all his books, accounts and writings, and other effects, to the value of about 30,000*l.* which he declared by affidavit, upon the following occasion:

The said Thomas Bambridge, by force, turned the said Mr. Holder over to the common side, and took possession of his room, in which all his effects were.

Mr. Holder remonstrated strongly against this usage, and Bambridge refusing to restore him to his room, or possession of his effects, he made a proper affidavit in order to apply to the

judges for relief, and declared that he feared his effects might be embezzled whilst he was thus unjustly forced from them, and that he feared Bambridge's cruel treatment of him would be the cause of his death: the miseries of the common side, which he dreaded, had such an effect upon him (being a man of an advanced age, and accustomed to live in ease and plenty,) that it threw him into such a fit of sickness as made his life despaired of, and in his illness he often declared, "That the villain Bambridge would be the occasion of his death." Which proved true; for Bambridge finding Mr. Holder like to die in the duress which he had put him into, (for his own sake, to avoid the punishment inflicted by law upon gaolers who so inhumanly destroy their prisoners) permitted him to be carried back to his room, where in a few days he died of the said sickness, contracted by the said forcible removal of him to the common side by Bambridge, as aforesaid.

Mr. Holder by his last will appointed major Wilson and Mr. John Pigott trustees for his son, a youth of about 13 years of age, who had accompanied him in the time of his confinement.

This young gentleman, after his father's death, locked up his effects in several trunks and boxes, and delivered the keys thereof to Mr. Pigott as his trustee, who locked up the room and took the key with him: but the said Thomas Bambridge caused the said room to be broke open by Thomas King, another of his accomplices, and caused the said effects to be seized, after that he, Bambridge, had forced Mr. Pigott out of the prison, (though a prisoner in execution) and locked down major Wilson (the other trustee) in the dungeon, to prevent their taking any inventory in behalf of the heir at law, then an orphan.

These evil practices of letting out prisoners, extorting exorbitant fees, suffering escapes, and exercising all sorts of inhumanity for gain, may in a great measure be imputed to the venality of the warden's office; for the warden who buys the privilege of punishing others, does consequently sell his forbearance at high rates, and repair his own charge and loss at the wretched expence of the ease and quiet of the miserable objects in his custody.

Upon the whole matter the Committee came to the following Resolutions, viz.

Resolved, That it appears to this Committee, that Thomas Bambridge, the acting warden of the prison of the Fleet, hath wilfully permitted several debtors to the crown in great sums of money, as well as debtors to divers of his majesty's subjects, to escape; hath been guilty of the most notorious breaches of his trust, great extortions, and the highest crimes and misdemeanors in the execution of his said office; and hath arbitrarily and unlawfully loaded with irons, put into dungeons, and destroyed prisoners for debt under his charge, treating them in the most barbarous and cruel manner, in high violation and contempt of the laws of this kingdom.

Resolved, That it appears to this Committee, that John Huggins, esq. late warden of the prison of the Fleet, did, during the time of his wardenship, wilfully permit many considerable debtors in his custody to escape, and was notoriously guilty of great breaches of his trust, extortions, cruelties, and other high crimes and misdemeanors in the execution of his said office, to the great oppression and ruin of many of the subjects of this kingdom.

The Resolutions of the Committee being severally read a second time, were, upon the question severally put thereupon, agreed unto by the House, and are as follow, viz.

Resolved, *nem. con.* That Thomas Bambridge, the acting warden of the prison of the Fleet, hath wilfully permitted several debtors to the crown in great sums of money, as well as debtors to divers of his majesty's subjects, to escape; hath been guilty of the most notorious breaches of his trust, great extortions, and the highest crimes and misdemeanors in the execution of his said office: and hath arbitrarily and unlawfully loaded with irons, put into dungeons, and destroyed prisoners for debt under his charge, treating them in the most barbarous and cruel manner, in high violation and contempt of the laws of this kingdom.

Resolved, *nem. con.* That John Huggins, esq. late warden of the prison of the Fleet, did, during the time of his wardenship, wilfully permit many considerable debtors, in his custody, to escape; and was notoriously guilty of great breaches of his trust, extortions, cruelties, and other high crimes and misdemeanors in the execution of his said office, to the great oppression and ruin of many of the subjects of this kingdom.

Resolved, That it appears to this House, That James Barnes was an agent of, and an accomplice with the said Thomas Bambridge in the commission of his said crimes.

Resolved, That it appears to this House, that William Pindar was an agent of, and an accomplice with the said Thomas Bambridge in the commission of his said crimes.

Resolved, That it appears to this House, that John Everett was an agent of, and an accomplice with the said Thomas Bambridge in the commission of his said crimes.

Resolved, That it appears to this House, that Thomas King was an agent of, and an accomplice with the said Thomas Bambridge in the commission of his said crimes.

Resolved, *nem. con.* That an humble address be presented to his majesty that he will be graciously pleased to direct his attorney-general forthwith to prosecute, in the most effectual manner, the said Thomas Bambridge for his said crimes.

Resolved, *nem. con.* That an humble address be presented to his majesty that he will be graciously pleased to direct his attorney-general forthwith to prosecute, in the most

effectual manner, the said John Huggins for his said crimes.

Resolved, That an humble address be presented to his majesty that he will be graciously pleased to direct his attorney-general forthwith to prosecute, in the most effectual manner, the said James Barnes, William Pindar, John Everett, and Thomas King, for their said crimes.

Ordered, That the said Thomas Bambridge be committed close prisoner to his majesty's gaol of Newgate, and that Mr. Speaker do issue his warrants accordingly.

Ordered, That the said John Huggins, esq. be committed close prisoner to his majesty's goal of Newgate, and that Mr. Speaker do issue his warrants accordingly.

Ordered, That the said James Barnes be committed close prisoner to his majesty's gaol of Newgate, and that Mr. Speaker do issue his warrants accordingly.

Ordered, That the said William Pindar be committed close prisoner to his majesty's gaol of Newgate, and that Mr. Speaker do issue his warrants accordingly.

Ordered, That the said John Everett be committed close prisoner to his majesty's gaol of Newgate, and that Mr. Speaker do issue his warrants accordingly.

Ordered, That the said Thomas King be committed close prisoner to his majesty's gaol of Newgate, and that Mr. Speaker do issue his warrants accordingly.

Ordered, *nem. con.* That leave be given to bring in a Bill to disable the said Thomas Bambridge to hold or execute the office of warden of the prison of the Fleet, or to have or exercise any authority relating thereto; and that Mr. Oglethorpe, Mr. Earl, the lord Percivall, and Mr. Hughes do prepare and bring in the same.*

Ordered, *nem. con.* That leave be given to bring in a Bill for better regulating the prison of the Fleet, and for more effectual preventing and punishing arbitrary and illegal practices of the warden of the said prison; and that Mr. Oglethorpe, Mr. Cornwall, Mr. Glanville, and Mr. Hughes do prepare and bring in the same.

Which Bills passed into a law.

They also enquired into the state and condition of the Marshalsea prison, and ordered a prosecution against William Acton for murder. See the following Cases.

* As to some of the proceedings hereupon, see 4 Hatsell's Precedents, title Impeachment, chap. 3.

479. The Trial of John Huggins,* esq. Warden of the Fleet Prison, for the Murder of Edward Arne, at the Sessions-House in the Old-Bailey, May 21, before Mr. Justice Page, Mr. Baron Carter, and others his Majesty's Justices: 3 George II. A. D. 1729.†

Tuesday, May 20, 1729.

Proclamation was made for all persons concerned to attend.

Cl. of Arr. YOU good men, that are impannelled to enquire, &c. answer to your names, and save your fines. John Huggins, hold up thy hand. (Which he did.)

Clerk. Thou standest indicted by the name of John Huggins, esq. warden of the Fleet, &c. [The Indictment being inserted with the Special Verdict at the end of this Trial, is omitted here.] How sayest thou, John Huggins, art thou guilty of the felony and murder whereof thou standest indicted, or Not Guilty.

Huggins. Not Guilty.

Clerk. How wilt thou be tried?

Huggins. By God and my country.

Clerk. God send thee a good deliverance.

Wednesday, May 21.

Proclamation was made for information.

Clerk. Thou the prisoner at the bar, these men that thou shalt hear called, and personally appear, are to pass between our sovereign lord the king and thee, upon the trial of thy life and death; therefore, if thou wilt challenge them, or any of them, thy time to speak is as they come to the book to be sworn, before they are sworn.

JURY.

Philip Frushard,	Thomas Clayton,
John Fillebrown,	John Hoar,
Peter Sojourney,	Martin Wardell,
Thomas Gregg,	Richard Pitt,
John Milward,	John Price,
Daniel Town,	James King.

Clerk. John Huggins, hold up thy hand.

* See Fitzgib. 177. 1 Barn. 358, 396. 2 Stra. 882. 2 Lord Raym. 1574. East's Pleas of the Crown, chap. 5, § 92. See, too, 8 Term Rep. 457, and the Cases which follow this Article. See, too, 3 P. Wms. 494.

† These Trials of Huggins, Bambridge and Acton, were all taken in short-hand by Mr. Lake Kenn, (Clerk to the Committee appointed to enquire into the gaols of the Fleet, Marshalsea, &c.) who in his life-time asked 200*l.* for the copy of them. *Former Edition.*

(Which he did.) You of the jury look upon the prisoner (and was going on.)

Huggins. My lord, the distance is too great to be heard: I desire I may come to the inner bar; for, my lord, when any inconvenience happens, it is the constant rule to admit the prisoner to come there: it was done in the Case of Sanders and Clifton.

Mr. Just. *Page.* Whenever the Court conceives an inconvenience, it has been allowed: but I cannot allow it till then.

Clerk. You gentlemen of the jury look upon the prisoner; he stands indicted by the name of, &c.

Prout the Indictment *mutatis mutandis.*

Huggins. I must desire, my lord, to have the indictment read in Latin. (Which was accordingly done.)*

Mr. *Holland.* (Member of parliament for Chippenham.) My lord, and you gentlemen of the jury, I am of counsel for the king; and this is an indictment against John Huggins, for aiding and abetting James Barnes in the murder of Edward Arne; that John Huggins was warden, and one James Barnes was then his agent, who did in November, in the 11th year of his late majesty, make an assault upon Edward Arne, and took Arne involuntarily, and confined him in the strong room (without the comfort of fire, close-stool, or other utensil), built near the place where excrements are thrown out, a place very unwholesome, and most dangerous to the health; that Arne fell sick in the said room, and languished till the 7th of December, and then died; that Huggins, through his cruel disposition, being an oppressor of the prisoners, did, &c.

Serj. *Cheshire.* My lord, and you gentlemen of the jury, James Barnes, who stands indicted for the murder of Edward Arne, is fled from justice; and John Huggins the prisoner at the bar, also stands indicted for aiding and abetting in the said fact. He was then warden of the Fleet, and had the custody and care of the prisoners then committed to his charge; therefore it will be necessary to let you know what bounds the law sets to gaolers, and to prisoners. The law sets fences to them both: the gaoler is to be protected in his duty, supported and maintained in it; and it is justifiable, if, in defence of himself, he destroys a man, and commits an act of felony: on the other hand, if by any unnecessary tyranny, or restraint, any of the prisoners come by an untimely death, it is murder in the gaoler; and this last is principally necessary for your attention.

Edward Arne, on the 12th of May, 1725, was committed upon mesne process; he was a quiet, peaceable, and inoffensive man, and continued so till September in that year; the gentleman at the bar, not content with the same security that his predecessors had, took it in his head to make a strong room, which was built ... three months before the death of Edward Arne; it was like a vault, built over the common sewer, near a laystall, where the filthy matter was lodged, nothing but bricks and mortar, not tiled or pointed; and in this condition, about September, one Barnes, servant of the defendant, came to the said Arne, as he was sitting in the cellar, rushed upon him, and took him away to the dungeon, a place where nobody had been put in before; in this said place of restraint he was confined, though he was in a quiet condition: there was no fire, nor fire-place, no light but through a hole over the door, and a little hole by the side, big enough to put a quart pot in at; there was not the want only of fire, or fire place, but there was no chamber-pot, no convenience for the ease of nature, so that it must fall, and he converse with it: the place was so moist, that drops of wet ran down the wall. The man immediately lost his voice, his throat was swelled, and his clothes rotted with the dampness of the place, and the poor man, having a feather-bed, crept into it, and the feathers stuck close to him, and in this condition he lay; but one day, the door being open, he got out, and ran into the common hall; he looked, gentlemen, more like a feathered fowl, than an human creature. This was represented to Mr. Huggins, who generally lived in the country, and did not come to the gaol so often as he ought; but at one time, when he was at the prison, he saw the man, and the poor man just saw him, his eye fell, the door was closed, and he died: the warden, gentlemen, had the door shut, and ordered him to be locked up, and he continued so locked up from September till the 20th of October; and it is wonderful to think (if he had not been a man of a very strong frame) how he could have continued there so long. It moved the compassion of his fellow-prisoners, who applied to have him released out of that place, but that not being done, a little care was taken to attend him. Gentlemen, at the time when Mr. Gybbon was deputy, some of the prisoners asked him, Why he did not take care of Arne, for the man cannot speak? And answer was made by Barnes, Let him die and be damned; and this was in the presence of the warden. Gentlemen, I must observe to you, that for security of the lives of prisoners, the coroner's inquest ought to sit upon them, to see if any marks could be found to give an information of the cause of death, but this was not done: this is the substance of the evidence, which cannot be aggravated.

Att. Gen. (sir Philip Yorke, afterwards earl of Hardwick and Lord Chancellor). My lord, and you gentlemen of the jury, I am of counsel for the king, and this prosecution is the effect of a useful, compassionate enquiry concerning the gaols, so it was found necessary to bring the cause before you, that gaolers may be punished, who have opportunity, and have endeavoured to oppress the unfortunate persons under their charge and power. It is necessary there should be gaols and prisons, and that persons should be under confinement; but yet for

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* See a Note, in vol. 12, p. 1292.

gaolers to have it in their power to commit oppressions and cruelties, to the loss of the lives of his majesty's subjects: if the evidence be true, which shall be offered to you, this will appear to be an instance of the utmost oppression, and the utmost cruelty. Mr. Huggins was warden of the Fleet prison, and had the care and custody of the prisoners, and ought personally, or by his deputy, to take care of them, and so is answerable for them: Mr. Edward Arne came a prisoner in May 1725, and continued there till he died. At his first coming in, he lodged with one Robert Shaw; but some difference happening between them, he was turned out of that room, and lay in the common hall. This unhappy man was said to be disordered in his senses, which his oppression might reasonably occasion; he was an inoffensive, quiet man; but about this time, there was a new scheme of having a prison within a prison, which was the occasion of their committing oppressions upon the prisoners. This strong room was then erected in the manner of a vault, commonly called a dungeon; there was no window, no chimney; it was built with bare brick and mortar: upon what occasion it was built, the prisoner will give you an account, if he had any authority for building it. Gaolers are to take care of prisoners, but not to build dungeons to put them in; the walls were not dry, but very damp and unwholesome, as usually such places must be. While Arne was standing in the cellar inoffensively, Barnes, who was entrusted with the care of the prisoners, seized him and put him in this place, and he was there put without any manner of provision to sustain life; there was a little hole where you might put a little drink through, sometimes he had an opportunity of having some, and sometimes none. Under this restraint this person was kept, without any convenience to ease nature; the description is such that must move every body to compassion. His bed was dragged in with him, and he ripped it open and crept into it to keep himself warm, and the feathers stuck to him by reason of his being besmeared with his own ordure, which he had not opportunity of doing out of the place. During the whole time whilst Arne was confined, Mr. Huggins, who was then warden, came twice, though he ought to have come oftener, and his duty required him so to do: Mr. Huggins looked upon him there, and saw him lie in that condition, in the place built by his own order; but the prisoner, so far from giving him any relief, or removing him out of that confinement, ordered the door to be locked up in his presence, he being warden, and by his authority. This affecting condition the poor man was in, and in the circumstance he was in, he ought to have relieved him. Several applications were made to Gybbon, and other the servants of the warden, to desire this unhappy man to be released: letters were sent to shew his miserable condition, that he was not likely to live, and to desire that he might be put under a proper custody; but nothing was done. At that time even the prisoner saw him languish; his speech was lost, and then he languished, and continued in the dungeon till the time of his death; this will appear clearly by the evidence, that he died in duress, and that the distemper there contracted was the occasion of his death. The next consideration is, who, and what was the occasion of his death: it is the duty of the gaoler to have a coroner's inquest to enquire into the death of a prisoner, for his own justification, who, by having the custody of, and the power over his prisoners, may destroy them; therefore, if there was no particular reason, why should it not have been done? Though he cannot pretend to shew a particular order why he did not. When I consider, that nothing could be done but by his authority, nothing done but by his direction, that was his particular order.

If he who was the principal gaoler, who had the authority to confine him, and to discharge him from an improper confinement, who saw him there did not release him, but instead of that suffered him to be locked up, he is guilty of his death. In point of law, if a prisoner dies in duress of the gaoler by hard confinement, in a cruel manner, unnecessary to the gaoler's safe custody, it is death by law; if the gaoler is not answerable for the act, what needs the dead persons to be enquired after by a jury? Justice ought be done, let it fall on whom it will; and I do not doubt, but the jury, for the sake of their oaths, will find him guilty.

Sol. Gen. (Hon. Mr. Talbot, afterwards a Peer and Lord Chancellor.) We will call our evidence to prove the facts.

Call Richard Longborn. (Who was sworn, as were all the rest that appeared.)

He produced a copy of Mr. Huggins's patent, bearing date the 22d July, the 12th queen Ann, which he proved to be a true copy, and such part of it was read as proved him to be warden.

Huggins. My lord, I desire the Habendum may be read, by which I have a power to appoint a deputy or deputies for and during my natural life.

Mr. Just. *Page.* I don't know what use you will make of it; but you may call for it in your defence.

Robert Bigrave sworn.

Sol. Gen. Do you know the prisoner?

Bigrave. Very well.

Sol. Gen. How long have you known him?

Bigrave. I knew him when I was Clerk of the Papers, in April 1725.

Sol. Gen. Did he act?

Bigrave. He was warden, but did not act; Mr. Gybbon was deputy to Mr. Huggins.

Sol. Gen. Who constituted you Clerk of the Papers?—*Bigrave.* Mr. Huggins.

Sol. Gen. Were the securities taken in the name of Mr. Huggins?

Bigrave. The security bonds were taken, and returns made in the name of Mr. Huggins.

Huggins. My lord, I desire to come to the inner-bar, for I can't hear.

Mr. Just. *Page.* You shall have all reasonable indulgence, and if you cannot hear you must be allowed to come. (Which he accordingly did.)

Sol. Gen. Mr. Bigrave, did Mr. Huggins continue warden during the whole year 1725?

Bigrave. He did continue warden during the whole year 1725, and returns were made in his name.

Sol. Gen. Do you know James Barnes?

Bigrave. Yes, he was servant to Mr. Gybbon, and was employed as watchman and runner, to take care that the prisoners did not escape.

Sol. Gen. Did he act in this capacity, whilst Mr. Huggins was principal warden?

Bigrave. He did.

Sol. Gen. When did you come there?

Bigrave. In April 1725.

Sol. Gen. What do you know of the building the strong room?

Bigrave. When I came there, there was a stable which was converted into a strong room, but as to the time it was pulled down and rebuilt, I am not certain.

Sol. Gen. What sort of a place is it?

Bigrave. It is a place arched like a wine-vault, and built of brick and mortar.

Sol. Gen. What are the dimensions?

Bigrave. It is eight feet wide, and eleven feet long.

Sol. Gen. Had it any floor?

Bigrave. I did not see it had.

Sol. Gen. Did you see Mr. Arne in it?

Bigrave. I never saw any-body in it, till captain Mackpheadris was put in it.

Sol. Gen. Did the common-sewer run under it?

Bigrave. I can't say whether the common-sewer runs under it or not.

Sol. Gen. How near was the dunghill to it?

Bigrave. The dunghill was as nigh as to the other part of the Court.

Sol. Gen. Was there any fire-place or chimney?—*Bigrave.* No.

Sol. Gen. Was there any place to let the air or light in?

Bigrave. There was a hole in the side of the wall seven or eight inches square, and an opening of two foot over the door.

Sol. Gen. Did not you see Edward Arne confined in that place?

Bigrave. I remember Edward Arne, and I did hear he was confined there.

Sol. Gen. Whom was the place built by?

Bigrave. It was built by Mr. Gybbon; because I saw Mr. Gybbon give directions about it.

Sol. Gen. Do you know Daniel Hopkins?

Bigrave. I do.

Sol. Gen. Whose servant was he?

Bigrave. I esteemed him to be Gybbon's servant.

Sol. Gen. Did not he belong to Mr. Huggins?

Bigrave. He used to be clerk to Mr. Huggins.

Sol. Gen. Did you at any time, during the building the strong room, take any notice of it?

Bigrave. I can't say I did.

Sol. Gen. Was not James Barnes a runner to look after prisoners that had escaped?

Bigrave. Yes.

Sol. Gen. Were not the warrants given to him in Mr. Huggins's name?

Bigrave. They generally were.

Mr. Just. *Page.* What were the dimensions of this room?

Bigrave. The room is eight foot wide, eleven foot long, and nine foot high.

Att. Gen. Did not Hopkins from time to time acquaint Mr. Huggins with the transactions of the gaol?

Bigrave. He was Clerk of the Inquiries to the Warden of the Fleet.

Att. Gen. So he chose to be deputy to Mr. Gybbon?

Juryman. My lord, I desire the witness may be asked if the room was boarded or floored?

Bigrave. I did not observe it till Mackpheadris's time.

Att. Gen. How were the sides of it?

Bigrave. Brick and mortar.

Att. Gen. Were you not in the room till after Arne died?—*Bigrave.* No.

Huggins. My lord, I shall follow the gentleman step by step, and desire Mr. Bigrave may be asked, if the bonds were not made up by Mr. Gybbon's direction, and he took the advantage of them?

Bigrave. He always did, and I filled up several by his order.

Huggins. Did he receive all the advantage and benefit of the office to his own use?

Bigrave. I took it so.

Att. Gen. Can you take upon you to say that Mr. Huggins had no part?

Bigrave. I can't say.

Huggins. Was not Gybbon appointed my deputy?

Bigrave. I found Mr. Gybbon deputy, when I came there, but can't say, whether he was appointed by writing or not.

Huggins. Did he pay no salary?

Bigrave. I heard he paid 400*l.* per ann. and I always apprehended Mr. Gybbon had the whole account.

Huggins. I desire he may be asked, whether the bonds were not filled up by Mr. Gybbon?—*Bigrave.* Always.

Huggins. Returns of writs were made in my name; I desire he may be asked, whether he did not receive direction from Mr. Gybbon to make returns?

Bigrave. I did receive directions from him, for in 1727, I had some difficulty in making a return of a Languidus, and then made returns in writing, and I received two rule fees, and 1*s.* out of each was due to the warden, which I allowed and paid to Mr. Gybbon, and had a receipt under his hand for it.

Huggins. Were warrants in my name for prisoners escaping?

Bigrave. The warrants were generally left

in the public office, and signed and sealed in blank, and they were filled up by Mr. Gybbon, and signed and sealed by Mr. Huggins.

Huggins. In whose name were the warrants returned?

Bigrave. The warrants were returned in the name of Mr. Huggins, but by the direction of Mr. Gybbon.

Huggins. Was Barnes my servant or Mr. Gybbon's?

Bigrave. He was allowed to be a servant to Mr. Gybbon.

Mr. Justice *Page.* I will ask a question or two.

Huggins. I must beg leave, my lord, to ask one question more, and then will make some observations upon the evidence.

Mr. Justice *Page.* It is not proper to break in upon the evidence to make any observations now.

Huggins. This is the grand point.

Mr. Justice *Page.* Whether it is or no, that will come anon. If you insist upon making your remarks now you shall; but I think it will be to your prejudice, for by that you will be precluded from making your remarks upon the close of the evidence.

Huggins. My lord, I will then submit.

Mr. Justice *Page.* If you will ask Mr. Bigrave any more questions, you may proceed.

Huggins. Did you hear of any ill-usage from me to this man (meaning Mr. Arne)?

Bigrave. I remember Mr. Arne was there, though I knew no such man, and heard he was in the strong room.

Huggins. Did you hear of any alteration that was made in the strong room while Mr. Arne was there?

Bigrave. I never heard of any alteration during that time.

Huggins. Did not Gybbon keep two distinct offices in one and the same house?

Bigrave. In the year 1725 he did.

Att. Gen. Pray distinguish nicely as to Barnes, Huggins, and Gybbon, whether Barnes was not employed as watchman while Huggins was principal, and Gybbon deputy-warden?

Bigrave. He was.

Att. Gen. Who put you into your office?

Bigrave. Mr. Huggins put me into the place, and I made an agreement, and was to have 1*s.* paid me out of each day-rule.

Mr. Baron *Carter.* Who made the agreement?

Bigrave. I made the agreement with Mr. Huggins, and paid 700*l.* to Mr. Huggins and fifty guineas.

Mr. Baron *Carter.* Who put Mr. Barnes in?

Bigrave. Mr. Gybbon.

Mr. Baron *Carter.* How do you know?

Bigrave. I heard so.

Call *Richard Bishop.*

Sol. Gen. What are you?

Bishop. I was tipstaff to Mr. Huggins, presently after Huggins came to his office, and paid him 800*l.* for it.

Sol. Gen. Who was deputy then?

Bishop. There was no deputy-warden, only Mr. Dickson, Clerk of the Papers.

Sol. Gen. When did Gybbon come there?

Bishop. In the year 1724.

Sol. Gen. What time did Arne become a prisoner?

Bishop. In 1724 or 1725, I brought him down from the judges chambers, and put him at the Vine as usual.

Sol. Gen. Why did you not bring him into the prison?

Bishop. Because he thought to give security.

Sol. Gen. Was not that a spunging-house?

Bishop. Yes.

Sol. Gen. How long did he continue there?

Bishop. About two months.

Sol. Gen. Where did he lie, when he went into the gaol?

Bishop. When he went into the gaol, I did not trouble myself about it.

Sol. Gen. Do you remember the building the strong room?

Bishop. I do remember its being built in 1725.

Sol. Gen. What sort of a place is it?

Bishop. I have seen the outside, but never saw the inside; I believe it is built over the common-sewer, and but a little way from the dunghill; the ashes and dirt of the house is flung down there.

Sol. Gen. Did you see Mr. Arne there?

Bishop. I saw him once in the long room out of his clothes, before he was brought into the strong room, and I complained to Mr. Gybbon, and said he ought to be sent to Bethlem, but he put him in the strong room.

Sol. Gen. Can you tell of any complaints made about Arne's being put there?

Bishop. I did apply to Mr. Gybbon, and said it was better to keep him in his own room, for if a wise man was put there it would make him mad; and it would have made me mad if I had been put there myself; and I heard Mr. Gybbon speak to Mr. Hopkins to acquaint Mr. Huggins, that as Mr. Taylor was one of the governors of Bethlem, and Mr. Huggins's friend and acquaintance, he might easily get him in there.

Huggins. It was no part of the office of warden of the Fleet; but I might, by a friendly office, use my interest with Mr. Taylor, and that would shew me more a humane man, than one guilty of cruelty.

Sol. Gen. Did you see Mr. Huggins in the gaol, during the time Mr. Arne was in the strong room?

Bishop. I saw Mr. Huggins there several times, but can't say whether then or not when Mr. Arne was in the strong room.

Sol. Gen. Was he any way abusive?

Bishop. I never heard that Arne was any way abusive, or needed any such restraint.

Sol. Gen. What was James Barnes?

Bishop. He was to take up people that the warden directed him to take up, and acted as

watchman in the gaol, and was servant under the warden.

Sol. Gen. What time was Arne put in the strong room?

Bishop. He came into the prison before the strong room was built.

Sol. Gen. Do you remember when it was built?

Bishop. It was built in 1725, I believe at the latter part of the summer season.

Sol. Gen. Do you remember the time while Arne was there?—*Bishop.* I do.

Sol. Gen. Was there any thing of consequence done in the gaol, without the direction of Mr. Huggins?

Bishop. Nothing of consequence was done without his direction; but the common business of the gaol was done by Mr. Gybbon's direction.

Sol. Gen. Did you ever speak to Mr. Huggins in relation to Arne's confinement?

Bishop. I believe I might speak to Mr. Gybbon, and I believe I might speak to Mr. Huggins, for I frequently did speak to him about business.

Sol. Gen. What condition was Mr. Arne in, when brought to the Fleet?

Bishop. I think he was in his senses, he was inoffensive, and I think there was no occasion to confine him; I saw him several times walking about the yard, and if he had been confined to his own room any body might have looked after him, even if it had been a child.

Sol. Gen. Had he any bed whilst in the strong room?

Bishop. I think he had no bed there, it was a dark place, I could not see into it.

Sol. Gen. Did Huggins use to come there after Gybbon was deputy?

Bishop. I saw Mr. Huggins there several times after Mr. Gybbon was deputy-warden, and Huggins used to give directions, during the time Gybbon was his deputy, and Hopkins used to bring orders to Mr. Gybbon from Mr. Huggins.

Sol. Gen. In what condition of health was Mr. Arne when he was brought in?

Bishop. He was in a good condition of health, and in his senses; and I believe, being put in the strong room in the Fleet, would have killed any body, and that that forwarded Arne's death, and he would not have died so soon if he had not been there.

Huggins. When you spoke to Mr. Gybbon to apply to me to make interest to the governor of Bethlem, whether it was *quatenus* warden, or only as I was supposed to have acquaintance or interest?

Bishop. It was to apply to you as warden.

Huggins. Were there not women prisoners, and men's wives in the gaol?—*Bishop.* Yes.

Huggins. My lord, it was very unfit for a man to go naked about where there were women, and it was fit he should be confined somewhere. Whose servant was James Barnes?

Bishop. Mr. Gybbon's.

Mr. Justice *Page.* At the time when he ran about naked, was there no other room that he could have been put in?

Bishop. There certainly were other places where he might have been put.

Mr. Justice *Page.* How often have you seen him naked?

Bishop. I saw him naked but once.

Mr. Baron *Carter.* You said Gybbon gave some directions, and Huggins gave some directions; now during the time that Gybbon acted, did the prisoner, Mr. Huggins, give any directions as to the moving of prisoners?

Bishop. My lord, I never meddled with what was done in the inside of the prison, so can't inform you.

Call Mr. *John Cotton.*

Att. Gen. What officer are you belonging to the Fleet?—*Cotton.* Clerk of the Papers.

Att. Gen. Pray see what time Arne was committed?

Cotton. He was committed the 18th of May, 1725, at the suit of John Martin and others upon mesne process.

Huggins. I desire he may see, when Barnes became a prisoner?—*Cotton.* In Hilary, 1724.

Att. Gen. Is not Barnes still a prisoner, and what is become of him?

Cotton. He was a prisoner, and had the liberty of the gate; and when the order of the House of Commons came for taking him into custody, he ran away, and Corbet has endeavoured to find him out, but could not.

Att. Gen. Was Arne charged in execution?

Cotton. No, he was not.

Call Mr. *Thomas Farrington.*

Att. Gen. Did you know Edward Arne?

Farrington. I did, and the first time, that he came into the prison, it was between the 20th and 28th of June, 1725. He was some time at the Vine before.

Att. Gen. What state of health was he in?

Farrington. When he came into the Fleet prison he was in a good state of health, and free from any sort of deliriousness, and I never saw him do any thing amiss to man, woman, or child.

Att. Gen. Do you remember his being confined in the strong room?

Farrington. I do remember his being confined in September, and that he died in October.

Att. Gen. When was the first time you knew of his confinement?

Farrington. The first time I ever heard of his being confined, I heard he was carried into the strong room by Barnes, by the directions of Gybbon, deputy-warden to the prisoner at the bar, and he had lain before that in number 7, with Robert Shaw, and upon some difference, being turned out of that room, he then lay in the common-hall, upon a bed of his own, which he laid upon part of a broken table-bedstead.

Att. Gen. When was the first time you saw Arne in the strong room?

Farrington. I saw him the very day he was put in.

Att. Gen. What sort of a place is it?

Farrington. It is a room arched over like a vault, and had been new erected about six weeks, and the walls were very damp and wet; you might strike off the drops with your hand like the dew on the top of the grass in a morning; there was no wainscot nor plastering, there were some boards at the bottom, but whether entirely boarded I can't tell. It was a vault arched over, and when Arne was carried in not filed; there was a window over the door three quarters of a yard long, and another on the side of the door seven or eight inches long, and four wide, and no fire-place, and the common-sewer runs under it.

Att. Gen. Who supplied him with victuals?

Farrington. I saw Mr. Louden give him victuals.

Att. Gen. Who kept the key of the room?

Farrington. Barnes.

Att. Gen. From the time that Mr. Arne came into the prison, which was between the 20th and 28th of June, till he was put in the strong room, what state of health was he in?

Farrington. He continued in a good state of health, till a little before he was put in the strong room, and then he grew somewhat disordered; and from the time he was put in the strong room he altered every day, grew hoarse, and at last could not speak, and he grew weaker and weaker every day; about the beginning of October he lost his voice, he grew then delirious, and ript open his bed, and crept into the feathers, and one day came to the chapel with excrement and feathers sticking about him like a magpye, being forced to ease nature in that place; and after that, I saw the prisoner at the bar, and Hopkins, looking into the strong room (the door being open) upon Arne, and Arne was lying in the bed ript open, and covered much about as high as his navel.

Att. Gen. Did you hear Arne speak?

Farrington. He was very hoarse, and could not speak, but lifted up his eyes, and looked at Mr. Huggins.

Att. Gen. Did Huggins then see him?

Farrington. Mr. Huggins must see him, if he was not blind.

Att. Gen. Did you hear them speak?

Farrington. Mr. Huggins and Hopkins whispered, but I did not hear what they said; but Huggins shook his head, then Barnes shut the door, and Huggins and Hopkins were then going away.

Att. Gen. How long after was it before Arne died?—*Farrington.* About fourteen days.

Att. Gen. Did you see Arne between this time of Huggins being there and his death?

Farrington. I saw him the morning before he died, and at that time he was so weak, he could not stir any way, but there lay gaping for life.

Att. Gen. What was the occasion of his lying in that languishing condition?

Farrington. Arne's confinement was the occasion. I was in the strong room three days myself with one Smith, my legs were so swelled, that the small was as big as my thigh, and I never knew a day's sickness till that time, and if I had continued a week longer it would have killed me, and I was forced to buy paper to ease nature in, and fling it out of the window.

Att. Gen. What is the situation of that room?

Farrington. Its situation is at the furthest part of the prison northward, and there is a sewer under it, into which runs the water from the pump to carry off the excrements of the prison, which are emptied into it, and the dunghill was then about six yards from it.

Att. Gen. What distance is there between the strong room and the dunghill now?

Farrington. About eight yards, and all the nuisance of the house is flung there, and there are very bad smells.

Att. Gen. What was the occasion of the death of Arne?

Farrington. I think it was the strong room was the occasion of it, for it was enough to kill the strongest body.

Att. Gen. Did Arne die there?

Farrington. He did, and Mr. Huggins always said he had authority to put persons in the strong room, or irons, which I can prove under his hand (and was going to pull out a paper, which not being allowed as evidence, he desisted.) I saw Mr. Huggins a second time walking upon the Bare with Gybbon and Levinz, between the hours of eleven and one, a week or a fortnight after which he was at the strong room.

Att. Gen. How long did Mr. Huggins stand looking upon Mr. Arne in the strong room?

Farrington. About three, four, or five minutes, and he then stood looking at the door, as I now stand looking at the counsel.

Att. Gen. Was Arne let out of the strong room afterwards?

Farrington. I never heard that Arne was afterwards out of the strong room till he died.

Huggins. Did not you make some affidavits by way of complaint to the Court of Common Pleas?—*Farrington.* Yes.

Huggins. Please, my lord, to ask, Whether or not Mr. Arne was mentioned in that complaint that he made?

Farrington. I never made but three affidavits, two of which I have in my hand in print, but don't remember Mr. Arne's being mentioned in either of them.

Huggins. My lord, the affidavits tend chiefly to the sending of coffins in.

Mr. Just. *Page.* If you intend to make any use of those affidavits, they must be produced and read.

Mr. *Richard Fulthorpe* sworn.

Att. Gen. Did you know Edward Arne?

Fulthorpe. I did, I was a prisoner then myself, he was brought in the latter end of August, and I remember him a prisoner before he was confined in the strong room; I being in the

cellar, one Barnes and two or three other servants of the wardens took him by violence and carried him there.

Att. Gen. Had you been in his company, and had conversation with him?

Fulthorpe. I had several times.

Att. Gen. Was he disorderly?

Fulthorpe. He might be a little in liquor, but he did nothing to offend any one, and gave no disturbance to the company. He was carried by Barnes into the strong room.

Att. Gen. What sort of a place is the strong room?

Fulthorpe. It is a place like a dungeon, with a hole on the side big enough to put in a full pot of beer.

Att. Gen. How big is the room?

Fulthorpe. The room is about half the bigness of the Court where the counsel sit, and stands near the dunghill, and the sewer runs under it. I saw it opened.

Att. Gen. What was over the common sewer?

Fulthorpe. There were boards laid loose over.

Att. Gen. What was between the common sewer and the boards?

Fulthorpe. Nothing. The walls were green. It was not tiled in, and had scarce been built above a week, and was as wet as any thing could be.

Att. Gen. Who put Arne into the strong room?

Fulthorpe. Barnes and some others, then prisoners, who acted under the warden, took him out of the cellar, put him in there, and locked him up.

Att. Gen. Did you see Mr. Huggins during the time Arne was there confined?

Fulthorpe. I saw Mr. Huggins twice there. I saw him at the strong room; he went along with Gybbon and Hopkins, and Mr. Huggins laid his hand upon the door, and looked in, the door being open.

Att. Gen. How long was he there?

Fulthorpe. A minute or two.

Att. Gen. Who was there besides?

Fulthorpe. Several belonging to the Fleet. I believe Barnes was there.

Att. Gen. How long before the death of Arne?—*Fulthorpe.* About a month.

Att. Gen. What condition was Arne in at the time he was put in there?

Fulthorpe. When he was put in there, he was a little out of the way when fuddled, but when sober as well as any man; when I came to the door, there used to be a smell enough to strike one down.

Att. Gen. How long was Arne in the strong room, before you saw him there?

Fulthorpe. I went the next morning, and at several other times.

Att. Gen. How long was Arne there?

Fulthorpe. About six weeks.

Att. Gen. What condition was he in when Huggins looked upon him?

Fulthorpe. He was very ill when Huggins looked upon him.

Att. Gen. What do you think was the occasion of his death?

Fulthorpe. The confinement and the dampness of the room gave him his death.

Att. Gen. Had Mr. Huggins spoke to have Arne taken out?

Fulthorpe. He had not, for the door was shut, Mr. Huggins being then present.

Att. Gen. How came you to be there?

Fulthorpe. I wanted to speak to Mr. Huggins about business, for the payment of the bill drawn upon Huggins by one Lewis.

Att. Gen. How came Arne to cut his bed in pieces, and creep into the feathers?

Fulthorpe. It was occasioned by his confinement; there was no fire there, and I believe the confinement was the occasion of his death.

Huggins. How often did you know him let out?—*Fulthorpe.* Two or three times.

Huggins. How long were you a prisoner after?

Fulthorpe. I was discharged by the Act of Grace.

Att. Gen. How came you to be present at the time Mr. Huggins looked into the strong room?

Fulthorpe. I waited for an opportunity of speaking to him about a note.

Mr. *Tudor Smith* sworn.

Sol. Gen. Did you know Edward Arne?

Smith. I knew Mr. Arne very well, and that he was in the Fleet prison. I remember the time of his coming into the Fleet prison. I was with him in the spunging-house, and then he was carried into the Fleet prison.

Sol. Gen. Where did he lie?

Smith. In the room of one Robert Shaw, and continued there about a fortnight or three weeks; but upon some quarrel was turned out.

Sol. Gen. When Arne came out of the room, was not his bed turned out with him?

Smith. It was; upon which, he then lay in the common-hall for some time.

Sol. Gen. Did you see Arne carried to the strong room?

Smith. I was in the cellar, when he was carried to the strong room; Barnes took him away.

Sol. Gen. What was Barnes?

Smith. I apprehended him to be Mr. Huggins's servant.

Sol. Gen. What did you see done by Barnes?

Smith. I did see Barnes come, and take Arne by the collar, and he said, He must go along with him. Arne said, Where? Barnes replied, No matter where, you must go along with me; and the next morning I saw Arne in the strong room.

Sol. Gen. What state of health was he in, when carried there?

Smith. He was in an ill state of health.

Sol. Gen. What sort of a room was it?

Smith. It was newly built, very damp, and a nauseous place. I knowing him before, was under more than common concern, and asked Arne how he did? And he said Barnes car-

ried him there. I asked him if he had a bed? He said he had no bed; but the next day a bed was brought to him.

Sol. Gen. How long did he lie there?

Smith. A month or six weeks; I visited him often.

Sol. Gen. Was there any fire-place, any candle, or any thing necessary to ease nature in?

Smith. There was no fire-place, no candle, nothing necessary to ease nature in, and he was forced to do all that nature required there; and many a time, when I carried drink, meat, or ale to him, I have been forced to hold my nose.

Sol. Gen. What place was there to let in the air?

Smith. There was a place over the door with iron bars, three foot in length, and another hole on the side, about a foot and half.

Att. Gen. Did you give any notice to Mr. Huggins of the condition this man was in?

Smith. Having been a prisoner some time, I applied for the benefit of the rules, and he received 12*l.* for the liberty of the rules, and Hopkins and Gybbon insisted upon 10 guineas more; and I wrote four letters of the usage I received, having paid several sums of money; which I sent to Mr. Huggins by Robin the porter, and did in one of them, of the 5th of October, mention Mr. Arne's confinement.

Mr. Baron *Carter.* To what purpose was that letter?

Smith. It partly related to my own business, and I mentioned that the strong room was a place not fit for a Christian to be in, and Mr. Arne lay in a very miserable condition; and seeing him in such a condition, I gave him an old night-gown, being in a manner naked for want of covering, he had ripped open his bed, and had got into the feathers.

Mr. Baron *Carter.* Did you take any notice in the letter of his lying in the feathers?

Smith. I had wrote in the letter about seeing him in the feathers, and directed the letter to Mr. Huggins, at his house in St. Martin's-lane, and sent it by Robin the porter. I spoke to Mr. Hopkins.

Mr. Justice *Page.* That was not material.

Mr. Baron *Carter.* Did you ever see Mr. Huggins in the gaol?

Smith. I never did, but watched an opportunity of seeing him.

Mr. Baron *Carter.* What condition was Arne in?

Smith. It was a miserable scene; and I take it that it was the cause of his death; and that he perished by being in such a condition.

Huggins. I desire he may be asked, my lord, if ever I had come into the Fleet prison, he should have seen me?

Smith. I believe I should.

Huggins. Did you ever see me there?

Smith. I saw Mr. Huggins two or three times, at the time the prothonotaries were there?

Huggins. I desire he may be asked, my lord, if he received any answer from me to the letter?

Smith. I received no answer from Mr. Huggins.

Huggins. Did the letter contain other business?—*Smith.* It did.

Robert Saintclair, the porter, sworn.

Att. Gen. Is that the man, Robin?

Smith. It is the man I sent.

Att. Gen. Did you carry any letters for Mr. Smith?

Saintclair. I carried several letters, and brought answers back again to them; but by reason of the distance of the time, cannot remember the delivery of the letters, but gave the answers to Mr. Smith.

Att. Gen. Do you remember about what time?

Saintclair. I cannot say about what time.

Att. Gen. Did you carry any letters from Mr. Smith to Mr. Huggins?

Saintclair. I carried several letters to Mr. Huggins from Mr. Smith, and always returned an answer to whom I delivered them.

Huggins. My lord, I desire he may be asked, if he ever delivered a letter from Mr. Smith to me?

Saintclair. I cannot say I ever saw Mr. Huggins at his own house.

Thomas Paine sworn.

Att. Gen. Did you know Edward Arne?

Paine. I did, and remember his being put in the Fleet prison.

Att. Gen. What state of health was he in when he came there?

Paine. He was in a good state of health. I was in company with him and captain Bateman, who was at cards, and Arne was at play, and did not seem to be lunatic; and one James Barnes came into the room whilst I was in company drinking with them, and Arne was doing nothing disorderly, and Barnes forced him into the strong room, and I was then by.

Att. Gen. Who was Barnes?

Paine. Barnes was a prisoner, and was made a watchman by Gybbon, who gave him the liberty of the gate.

Att. Gen. What was his business?

Paine. He was a watchman.

Att. Gen. Whose servant did you look upon him to be?

Paine. I looked upon him to be a servant of Mr. Gybbon's.

Att. Gen. Did you ever see Mr. Huggins there?

Paine. I never saw Mr. Huggins there, but when the prothonotaries were there.

Att. Gen. What sort of a place was it before it was made so?

Paine. It was a stable where the cocks and hens roosted.

Att. Gen. Did you see it after it was converted into a strong room, before Mr. Arne was put into it?

Paine. I did; and the walls were green; there was certainly a dampness.

Att. Gen. Was there any sewer ran under it?

Paine. I cannot say: but there was an ill smell came both from the necessary-house and from the dunghill.

Att. Gen. What condition was Arne in, after he was put in by Barnes?

Paine. Arne grew outrageous, and tore his clothes and bedding.

Att. Gen. What condition of health was Arne in?

Paine. I never talked to him but through the hole in the wall.

Att. Gen. How was he before he died?

Paine. I was discharged before he died.

Att. Gen. What kind of alteration was there in his voice?

Paine. He was a little hoarser, and I could not see him, but only as I talked to him through the hole.

Att. Gen. Was it a fit place to confine a prisoner in?

Paine. It was not a fit place to confine prisoners in without danger of their lives.

Huggins. Was there a court of inspectors or governors of the Fleet?

Paine. There was such.

Huggins. Did they not ballot once a month?

Paine. We once balloted for steward and inspector.

Huggins. Did not the court of inspectors place Arne in the strong room?

Paine. The inspectors did not so much as visit the strong room.

Huggins. If any complaint had been made, was not the power vested in the court of inspectors to redress?

Mr. Just. *Page.* Mr. Huggins, that is not a proper question.

Huggins. My lord, I desire he may be asked then how long it was before Mr. Arne died that he left the prison?

Paine. I was discharged in September, about the 8th.

Huggins. The 8th of September, my lord, which was about six weeks before Mr. Arne died.

Mr. Just. *Page.* When was the strong room built?—*Paine.* In Mr. Gybbon's time.

Huggins. My lord, if Mr. Gybbon built the strong room, there is reason to believe he paid for it.

John Bouch sworn.

Att. Gen. Did you belong to the Fleet?

Bouch. I did, I was turnkey there.

Att. Gen. When was the strong room built?

Bouch. It was built in 1725, the latter end of the summer, by the direction of Mr. Huggins.

Att. Gen. During the time that you belonged there, did not Mr. Huggins come frequently?

Bouch. He came now and then, not very often.

Att. Gen. When was Arne put in the strong room?—*Bouch.* He was put in about August.

Att. Gen. Did you know him before he was carried there?

Bouch. I knew him very well, and never saw any ill offered by him.

Att. Gen. Whose order was he put in by?

Bouch. He was put in by the order of Mr. Gybbon and Mr. Huggins.

Att. Gen. Did he die in that place?

Bouch. He did.

Att. Gen. How long was he there?

Bouch. About a month or six weeks.

Att. Gen. Did you see Mr. Huggins there during the time Arne was in the strong room?

Bouch. I cannot say I did.

Att. Gen. Who was it over-looked the building the strong room?

Bouch. Mr. Huggins, when he came to the lodge.

Att. Gen. Was he there when the building was a-raising?

Bouch. I cannot be certain, but I remember there was a direction of the Court of Common Pleas for Mr. Huggins to inspect the gaol, and that he came once a week after the order from the Court of Common Pleas.

Att. Gen. What was the condition of the room?

Bouch. The room was newly built and green.

Att. Gen. Did you carry any letter to Mr. Huggins relating to Mr. Arne?

Bouch. I did carry a letter from a friend of Mr. Arne's, and he was so weak then that he could not speak.

Att. Gen. Where did you carry it from?

Bouch. From the Fleet prison.

Att. Gen. What was it about?

Bouch. It was about getting Arne his liberty; a gentleman gave me the letter, and desired me to bring an answer as to Arne's having the liberty of the rules; and I went myself, and saw Mr. Huggins, and gave him the letter; he opened it, and said he would send an answer by Mr. Hopkins.

Att. Gen. When was this?

Bouch. It was in October, about a week before Arne died.

Att. Gen. Where did Arne die?

Bouch. He died in the strong room, I saw him two days before he died; he was just as if dead then, and very weak and ill.

Att. Gen. What kind of a place was the strong room?

Bouch. It was a very sickly place, because of the common sewer running under it.

Att. Gen. What message did Mr. Huggins send by Mr. Hopkins as to the letter?

Bouch. Mr. Huggins sent word by Daniel Hopkins, that he would inform Mr. Arne's friend what was to be done.

Att. Gen. Who was it built the strong room?

Bouch. One Fry, a bricklayer, took directions from Mr. Huggins, at Mr. Huggins's own house, and I was present when Fry was there.

Att. Gen. Who paid for the building?

Bouch. I believe Mr. Huggins, for Fry was a master bricklayer, and I saw him there about business after the building was finished.

Att. Gen. How came you to be there?

Bouch. I went there then to get a place of Mr. Huggins.

Att. Gen. When were you turnkey?

Bouch. I was not turnkey till after Mr. Arne's death.

Att. Gen. Did you see him in the strong room?

Bouch. I saw him in the strong room twenty times, for I was then endeavouring to get to be turnkey.

Att. Gen. Whom had you the place from?

Bouch. From Mr. Huggins; and during the time I was endeavouring for it, I saw Mr. Arne in the strong room.

James Tucker sworn.

Att. Gen. Do you know the place that is called the strong room in the Fleet prison?

Tucker. I do, and was employed by the bricklayer and carpenter to make the iron-work.

Att. Gen. Whom did you make out your bill to?

Tucker. I made it out to Mr. Huggins, as debtor.

Att. Gen. Who paid you?

Tucker. I made the bill out in Mr. Huggins's name, and was paid by Pindar, and a receipt was given in full of that bill.

Mrs. *Eliz. Le Points* sworn.

Att. Gen. Did you know Edward Arne?

Le Points. I did.

Att. Gen. Do you remember him a prisoner in the Fleet, and his confinement in the strong room?

Le Points. I do; he had been confined two or three days before I went to him; the first time I saw him sitting upon a bench, and the next time in his feather-bed, and he was covered therein, and his bed lay on the floor.

Att. Gen. What condition of health was he in?

Le Points. I never found him any way distempered, only disordered by the cold and dampness of the place.

Att. Gen. Was not his voice altered?

Le Points. He had a shivering hoarseness upon him.

Att. Gen. How long did he continue there?

Le Points. He continued there seven weeks, or thereabouts.

Att. Gen. What condition was the place in?

Le Points. It was building in July, and I remember the finishing of it some time in August.

Att. Gen. When was Mr. Arne put in?

Le Points. He was put in as soon as it was finished.

Att. Gen. Do you believe that was the occasion of his death?

Le Points. It was impossible to be otherwise; for the building was so very green, that you might pull the mortar from the bricks with your fingers, and it was impossible any body could be continued therein for seven weeks without being killed by the dampness of the place; and I verily believe that confinement was the occasion of Arne's death.

Att. Gen. Did you ever speak to any body about his releasement?

Le Points. Whilst he was in this place, I met with Mr. Hopkins, and spoke to him to acquaint Mr. Huggins, that it was impossible but that Arne must perish, if continued in that place; and if he did not speak to Mr. Huggins, I would send to him myself; to which Hopkins replied, he would; and afterwards I met with him, and asked him, whether he had spoke? He told me he had spoke to Mr. Huggins, who said it was no business of his.

Mr. Just. *Page.* That cannot be given in evidence, for it is only hearsay.

Le Points. [Standing up again.] I saw Mr. Huggins upon the Bare, with one Levinz, a Quaker, then a prisoner in the house, and Mr. Gybbon, during the time Arne was in the strong room.

Serj. *Cheshire.* Which way did he come upon the Bare?

Le Points. I cannot tell; there were then but two ways, one by the strong room, and the other through the house.

Serj. *Cheshire.* Whereabouts is the strong room?

Le Points. The strong room was built near the Bare, and joins to the end of the house; and I saw them walking together; and that he could not well come in or out without coming near the strong room.

Serj. *Cheshire.* What did you think was the occasion of his coming there?

Le Points. To take a survey of the walls, which were then finished, for that I saw him look up at them.

Serj. *Cheshire.* Did you know Mr. Huggins?

Le Points. I knew him very well.

Serj. *Cheshire.* When was this?

Le Points. I take it to be some time in October, about fourteen days before Arne died: it was after the fire happened in Bell-Savage yard.

Thomas Levinz was called, and being a Quaker,* refused to take an oath, and therefore could not be admitted an evidence.

Huggins. It is a great while ago since this matter happened; there is no notice taken by the course of the evidence how this matter has gone on, and therefore it was very difficult to answer particularly thereto; this I do solemnly affirm, that during the time Arne was there, I never heard of his name, that he died, or was in the strong room, till that I was in the Fleet to be examined: that I never was seen in the Fleet prison while Arne was in the strong room; and that no one of the king's witnesses has said, that I used any hard words about

* "In the case of Bambridge *(postea)* the appellant's counsel called a Quaker, and insisted that this is a civil suit, in which he might be a witness. But the chief justice said, it was to this purpose a criminal proceeding, and therefore he could not be a witness. Strange's Reports, vol. 2; p. 856."—*Former Edition.*

Mr. Arne. There was a suggestion of my getting Arne into Bethlehem, it was no part of my office as warden of the Fleet, but I might by a friendly office use my interest with Mr. Taylor; and that would shew me more a humane man, than one guilty of cruelty.

That some of the prisoners, who were witnesses, were discharged the prison the 7th of September, so it was not likely that they should be able to swear as to Arne's death, who did not die till October.

As to Gybbon being deputy, the first evidence to be produced will be the act for insolvent debtors in 1725, to prove that Gybbon carried in a list pursuant to that act; and delivered it as gaoler, and swore to it; and I must desire, that Mr. Tanner may read the clause in that act of parliament, where gaolers are directed to make out a list of prisoners.

Att. Gen. If you would prove Mr. Gybbon warden, you must prove what consideration he gave, and what stile he bore.

Mr. Just. *Page.* Did the commissioners in that act take notice who was deputy-warden or not? Let it be deputy, or how it would, they took no notice of that. It would be no evidence for the king.

Huggins. It will prove that Gybbon acted.

Mr. Just. *Page.* We shall see that when the act of parliament is read. I allow Gybbon did act in fact.

Att. Gen. If he has a mind to prove Mr. Gybbon deputy, he must prove it by his deputation.

Serj. *Cheshire.* It is too early to offer this before the deputation lies before us; therefore I submit it, if it is not too soon to offer this in evidence.

Mr. Just. *Page.* I cannot direct the prisoner how he should proceed; whether this may be of advantage to him I cannot find. If he be charged from a particular fact that did arise by Gybbon, why should not Huggins, by the same rule of reason, justify himself by any other act done by Gybbon?

Vide Act.] Then the clause in the Act of Insolvency in the year 1725, was ordered to be read.

Mr. Just. *Page.* I do not see, upon reading of the act, it affects any thing that has been said. I take it that the officer acts, and makes returns, and the law does not say whether it is the warden or the deputy-warden. Mr. Huggins, I dare to say you yourself will own it; and the use that you would make of it is to shew, that he acted as warden.

Huggins. Fulthorpe was discharged the 7th of September. I desire Mr. Tanner may produce the list, and that it may be read to shew that.

Mr. Just. *Page.* If Fulthorpe's evidence was laid aside, yet there are witnesses enough to prove, that they saw you there: however, I must take notice of what Fulthorpe said; he said, that Arne was a peaceable man, and then gave a description of the room; and said, that the floor was covered with a few boards; and that he saw the prisoner twice in the Fleet, and that he was there at one time, and looked in at the door, and then the door was shut, and he went away. This defence seems but trifling.

Huggins. I intended it as to the credit of the witness.

Mr. Just. *Page.* The man has sworn honestly, and if it was struck out of the evidence it would not signify; and I must a little assist you, as no counsel is allowed but in cases of high treason. You were going to shew the act of the deputy, without shewing what authority was given to the deputy. If you have any instrument or agreement by which you constituted Gybbon deputy, you must produce it.

Huggins. My lord, I cannot produce it, because it is in the hands of the widow Gybbon, or some other person; and we are at this time in equity.

Mr. Just. *Page.* Affairs of this nature have always been done by indenture—as the sheriffs of London to their under-sheriff—and then you must have a counterpart.

Huggins. My lord, I never made any such indenture; I desire Mr. Tanner may be asked, who appeared as warden upon the Insolvent Act?

Tanner. Mr. Gybbon, my lord.

Mr. Just. *Page.* Do you believe he was deputy or not?

Tanner. I looked upon Gybbon as a proper officer.

Mr. Just. *Page.* Who do you think was warden?

Tanner. I cannot say who was warden.

Mr. Just. *Page.* I thought you would not have equivocated. You are a good officer, but I shall never examine you as a witness.

John Jeffreys, Keeper of the Compter, sworn.

Huggins. Mr. Jeffreys, pray acquaint the Court what agreement was made between Mr. Gybbon and me.

Jeffreys. There was a writing made, and I was a witness to it, but did not know what it was.

Mr. Just. *Page.* Mr. Huggins, the questions that you ask, you must first explain to the Court.

Huggins. I desire Mr. Jeffreys may be asked, if he was present at the agreement?

Jeffreys. I was present.

Huggins. Was there any writing signed?

Mr. Just. *Page.* You must take care to produce the writings if you examine to them.

Huggins. I have sent a man for the receipt of 1,000*l.*

Mr. Just. *Page.* I cannot comply for the same title made under your grant to be given in evidence for the grantor: it was a title from you, and how you will do to prove this by word of mouth, I cannot see how it can be done; for when a treaty comes into articles and writing, the treaty by word of mouth is at an end without the writing is produced.

Huggins. I was going to explain myself, and was over-ruled.

Mr. Just. *Page.* When once articles are come to be a conveyance, except it is to explain that conveyance, and except it is to discover some fraud even in the conveyance when given, it cannot be spoke to.

[Mr. Baron Carter being gone out of Court, now returned, and Mr. Justice Page took notice to him of what had passed in his absence.]

Mr. Huggins's aim is to shew, that Mr. Gybbon was sole, entire, acting warden; and that no act of Gybbon's should affect him; and had the late Act of Insolvency read, and thought to have read the schedule, but that could not be read. Mr. Huggins asked who brought in that schedule, and asked Mr. Tanner, whether Mr. Gybbon brought in that return as deputy or not; who said that he did not know who was warden, but that Gybbon was the proper officer: now Huggins carrying this matter further, would have Gybbon appear to be his deputy, and has now called Jeffreys to prove that deputation. Jeffreys says, that it was in writing, and I could not allow Jeffreys to give in evidence what was in writing. Huggins said in answer, that there was no counterpart, and that Gybbon's widow had such appointment. I submit it if it was not his act and deed, if Mr. Gybbon allowed of it.

Huggins. My lord, it is only a receipt.

Jeffreys. My lord, it was a receipt for 1,000*l.* and no agreement.

Huggins. Mr. Gybbon agreed with me for 500*l.* per annum; and liking the bargain made a deposit of 1,000*l.* and this was all the writing between us, and in it declared that he was to pay 900*l.* per ann., on condition of having the rents of the house and shops in Westminster-hall, and required a deposit of 1,000*l.* and a parole of three years may amount to a lease or demise.

Mr. Baron *Carter.* At six months' end Gybbon desired to have it renewed, and came to the subsequent agreement for 900*l.* per ann. for three years. If the Court could see that agreement, whether it do not amount to a lease, there may be a demise in it, but how far the Court will lay their commands to produce it, we shall not now determine; it would be very hard to have it out of his power, and not to admit him to give evidence.

Att. Gen. The law requires the best evidence that is to be given; supposing that that writing was lost, he might be admitted to give evidence that it was lost. If it was in the hands of any officer of the crown, and they wanted to be admitted to give evidence as to the contents, whether upon giving evidence, that the thing was in being, and in the hands of a third person, they should give parole evidence as to that.

Mr. Just. *Page.* Suppose a man receive money by false tokens, but by some accident it is got into other hands, and he uses all the care and art he can to get it, and proves that he cannot come at it, it would be hard to convict a man, if he cannot come at the writing. It is the same in cases of life and death, by forgery and false deeds.

Mr. Baron *Carter.* I agree your notion is right in cases of civil actions, for if he can't give such evidence as the law gives against it, he has a remedy at equity; but in this case, where a man stands indicted for murder, where can he have his remedy? I am sure we should be guilty of murder, if we insisted on it; Huggins ought to give an account that he can't come at such agreement.

Huggins. Mr. Jeffreys says, that he applied to Mrs. Gybbon, and Mrs. Gybbon told him, that it was in the hands of one Wilson, her clerk in court, and he could not tell whose hands it was in.

Jeffreys. I have a copy of that writing, which has been in my hands long before any contest happened to Mr. Huggins, for it was written at the same time the receipt was given.

Mr. Just. *Page.* Is it a true copy?

Jeffreys. I believe it to be a true copy, and that there has been no alteration made in it.

The Copy of the Writing read——And it appeared to be witnessed by Mr. Jeffreys, the 26th of June, 1723.

Huggins. Have you had any conversation with Mrs. Gybbon lately?

Jeffreys. Mrs. Gybbon came to me about fourteen days ago.

Huggins. Was there any talk of any such thing as a lease or articles of agreement?

Jeffreys. There was no such word mentioned as a lease or articles of agreement.

Huggins. Do you know of any articles of agreement?

Jeffreys. I don't believe there were any, for I was very conversant with Mr. Gybbon, but never heard him ask after them.

Huggins. How long did Gybbon continue in that office?—*Jeffreys.* Three years.

Att. Gen. What do you mean by that office; did he continue to act for those three years?

Jeffreys. He did, and one year longer, which I applied to Mr. Huggins for him to do.

Mr. Just. *Page.* You were present at the settling of the account between Mr. Huggins and Mr. Gybbon: at the bottom of the account there are some items that have no sums to them; pray how did that happen?

Jeffreys. My lord, it was not settled.

Mr. Just. *Page.* Was any thing mentioned, who was to be at the charge of repairs during the four years?

Jeffreys. Mr. Huggins made a memorandum at the bottom of the paper.

Huggins. It was settled at the end of four years.

Mr. Just. *Page.* The repairs of the prison were left a blank.

Huggins. I answer to that, my lord, that it was settled at the end of four years: Mr. Jeffreys was then present. Your lordship seems to take it for a lease of three years.

Mr. Just. *Page.* It is neither the one nor the other, either lease or agreement.

Huggins. My lord, Jeffreys said there was no other agreement.

George Welland sworn.

Huggins. When did Gybbon enter upon his office?

Welland. Mr. Gybbon entered at Christmas, 1722, and I was concerned for Mr. Gybbon before, and by his direction acted, and he always paid me my fees, and I never received any thing from Mr. Huggins.

Huggins. Who bore all expences relating to the gaol?—*Welland.* Mr. Gybbon.

Huggins. How long did he act?

Welland. Mr. Gybbon was in four years and a half.

Huggins. What do you know about Arne?

Welland. I was there then, and Arne was committed about the middle of May, and at the latter end of September, Hopkins was sent into the country to Shropshire, and I acted till October, and I was requested by Mr. Gybbon to go to the Company of Upholders relating to Mr. Arne. He was brought in May, and put at the Vine, and made his escape, and then grew disordered in his senses. Some of the prisoners came and brought a bed of Mr. Howard's, and I saw him stark naked; and it being desired, he was put in the strong room at the request of the prisoners.

Huggins. What was done upon your application to the Company of Upholders?

Welland. They took care of him.

The witness had a book in his hand, which he called a check-book.

Huggins. Pray give an account, whether I gave any direction relating to the prisoners?

Welland. I never saw Mr. Huggins there but twice, and that was when the Prothonotaries were there.

Huggins. When had you that book delivered to you?

Welland. Two days before Mr. Fitch died; the book was brought into my hands, which I continued to act in till Mr. Bigrave came in.

Huggins. By the writing in that book, I can prove Hopkins out of town. When was Hopkins out of town?

Mr. Just. *Page.* I will call Fulthorpe to clear up this matter.

Fulthorpe was called again.

Mr. Just. *Page.* When was it you saw Mr. Huggins at the Fleet prison?

Fulthorpe. It was some time before I was discharged. It was about a month before Mr. Arne died, and I likewise saw Mr. Farrington at the same time. Mr. Hopkins was there, and then came in with Huggins.

Mr. Just. *Page.* How often did you see Mr. Huggins there?

Fulthorpe. I saw him twice at the prison, but once at the strong room.

Mr. Just. *Page.* What time of the day was it you saw Mr. Huggins there?

Fulthorpe. It was between eleven and twelve, and there were there Mr. Huggins, Mr. Hopkins, and Barnes; and I saw Mr. Huggins walking upon the Bare, when Levins the Quaker was there, and I believe Mr. Gybbon with them.

Thomas Farrington was again called.

Mr. Just. *Page.* Who was at the strong room when you saw Huggins there?

Farrington. There were Mr. Huggins, Hopkins, and Barnes there.

Huggins. I beg leave to observe, that Fulthorpe was discharged on the 7th of September, and whether I may not be allowed to examine Welland again, to know if Mr. Gybbon did not give all orders, and to prove that the constant usage was not to have the coroner sit upon bodies in mesne process?

Mr. Just. *Page.* You may ask what questions you think proper, for I will stay here till to-morrow morning, to give you an opportunity of going on with your defence in your own way.

Huggins. I desire then, my lord, he may be asked, whether Gybbon did not give all orders relating to the prisoners?—*Welland.* He did.

Huggins. Whether the coroner was called in to sit upon any bodies, but in execution?

Welland. We never had the coroner, but upon execution.

Huggins. Whose servant was Barnes?

Welland. Mr. Gybbon's servant, I saw Gybbon pay him money.

Huggins. Did you ever see me and Barnes together?

Welland. I don't believe I ever did.

Huggins. At whose request was Arne put in the strong room?

Welland. At the request of the prisoners.

Mr. Just. *Page.* Name at whose request he was put in.—*Welland.* I can't tell.

Mr. Just. *Page.* How came you to know it?

Welland. I was in the lodge.

Mr. Just. *Page.* Were you then present?

Welland. I was.

Mr. Just. *Page.* Can't you name one of them?

Welland. No, none of them are now in gaol.

Mr. Just. *Page.* Was not Farrington then a prisoner?—*Welland.* He was.

Mr. Just. *Page.* How long is it since you were concerned in the prison?

Welland. In Michaelmas 1722, and I know nothing of it before.

Mr. Just. *Page.* Was there not a benefit to the warden for day-rules?—*Welland.* Yes.

Mr. Just. *Page.* To whom was the money accounted for?

Welland. It was accounted for to Bishop. The Clerk of the Papers always received the money, and I have been there several times at the payment of money.

Mr. *Lee.* Was it not usual to give money for the liberty of the rules?

Welland. Mr. Gybbon made it a custom to take two guineas for every 100*l.* for the liberty.

Mr. *Lee*. Do you know of any money paid to Mr. Huggins?

Welland. I don't know any was.

Mr. *Lee*. Were you there when the strong room was built?

Welland. I was, and Arne was the first person that was put in.

Mr. *Lee*. I ask you, whether it was all finished?—*Welland*. I believe it was floored.

Mr. *Lee*. Was it not an arched vault?

Welland. It was a kind of a vault, and there was a bench in it.

Mr. *Lee*. Where was it situated?

Welland. It was about three yards from the dunghill.

Mr. *Lee*. Had Arne a bed there?

Welland. He had a bed in it.

Mr. *Lee*. Was he not in a naked condition?

Welland. He was in a naked condition, which proceeded from his madness.

Mr. *Lee*. Was that a place fit for a man in his condition to be kept in?—*Welland*. It was.

Mr. *Lee*. Is there any place so bad in the prison?

Welland. There was a worse place where I lay, called Julius Cæsar's ward.

Mr. *Lee*. How could it be worse?

Welland. Because many people lay in it.

Mr. *Lee*. Whether writs were not directed Deputato, or Locum Tenenti?

Welland. They were.

Mr. *Lee*. Whom were the writs returned by?

Welland. By Mr. Huggins.

John Browning sworn.

Huggins. How long have you known the Fleet prison?

Browning. I have been a prisoner there above twenty years.

Huggins. When any body died in the Fleet, except in execution, was there any coroner's inquest?

Browning. Never, but when in execution, Mr. Dickson, who was Clerk of the Papers before Huggins came, told me so.

Huggins. My lord, the prison being very full, it being against the time of an insolvency, the prisoners grew very riotous, and Mr. Gybbon could not come in, so that there was no place but the strong room to put Arne in.

Mr. *Samuel Green* sworn.

Huggins. What was the state of the prison, and the condition of it in 1725?

Green. I was had in, in February 1724, and came out the latter end of June 1725, and I applied to Mr. Gybbon in February 1724 for a room: Mr. Gybbon said he could not help me to one; then I applied to the prisoners, and gave a guinea and a half to them for one.

Huggins. Was there a court of inspectors?

Green. Yes, and I was one of them, and every prisoner that came in paid 5*s*. in order to apply to the Court of Common Pleas to regulate the fees.

Huggins. You did place people in rooms. Did you punish any prisoners?

Green. I can't say we did.

Huggins. Did the warden dare to come in?

Green. He did not.

Mr. Just. *Page*. Could the prisoners set open the gates?

Green. They could not set open the gates, because there was a turnkey.

Huggins. Did Mr. Gybbon offer to come in?

Green. He did.

Mr. *William Howard* sworn.

Huggins. Did you know Edward Arne?

Howard. Mr. Arne came in about three weeks before I went out, and he was in the same room where I was, and wanting some goods, Arne offered me much more than I thought they were worth; for which reason I did not apprehend him to be in his right understanding.

Huggins. Did you desire him to bring some friend?

Howard. I think I might desire him to bring some friend.

Huggins. How much might he offer?

Howard. He offered me nine guineas, but I took three, when I sold them to his friends.

Mr. *Daniel Woodcock* sworn.

Huggins. What do you know of Edward Arne?

Woodcock. He came into the Fleet prison in 1725, and I was a prisoner a year and a half before that, in July 1723, and continued there till September 1725: and I remember Arne's being there some time before I was discharged.

Huggins. Were you there when he was carried into the strong room?

Woodcock. I was.

Huggins. Were you in the cellar when he was taken from thence?

Woodcock. I were upon the stairs when he was carried into the strong room: He lay up and down in the gaol in the common-hall and cellar, till he was carried into the strong room, and he was in it till I came away.

Huggins. Were you ever in the strong room?

Woodcock. I was.

Huggins. Do you remember the building of it?—*Woodcock*. I do.

Huggins. How near to the laystall and dunghill is it?

Woodcock. Within eight or ten yards.

Huggins. Are there any lights?

Woodcock. There is a place to put in drink at, on the side of the door.

Huggins. What is the wall made of?

Woodcock. Lime and brick, as other walls are.

Huggins. How long was it finished before Arne was carried in?

Woodcock. I can't be certain.

Huggins. Did you see Arne let out at any time?

Woodcock. I saw him let out, and he ran about stark naked.

Huggins. Did you ever see him naked before he was put in there?—*Woodcock*. No.

Huggins. Did you ever see me at the prison?

Woodcock. Yes, when the prothonotaries were there.

Huggins. Did you think you should have known, when I came there?

Woodcock. It was as well known, as if the king had made a public entry.

Huggins. Was it not for the prisoners' security to have Arne put there?

Woodcock. I think it was.

Huggins. Who sold Arne his goods?

Woodcock. Captain Howard sold Arne his goods.

Huggins. My lord, I must observe that the court of inspectors punished prisoners. Did not the inspectors punish their own prisoners?

Woodcock. Yes, they put them in the stocks.

Huggins. Could Mr. Gybbon come into the prison?—*Woodcock.* He could not.

Mr. Just. *Page.* Why then did you not all go out of prison?

Huggins. Did not the court of inspectors dispose of rooms?

Woodcock. I can't say.

Huggins. Did you see Barnes carry Arne to the strong room.

Woodcock. I saw Arne as he was going to the strong room with Barnes; and there was a complaint made to the court of inspectors; but not about this man, but about others.

Huggins. Was he a quiet man?

Woodcock. I saw no other, than his running about like a madman.

Huggins. How many days was Arne in the strong room before you were let out of prison?

Woodcock. I was let out about the 4th or 5th of September, there was an application made to the Court of Common Pleas, and I made an affidavit against Barnes.

Mr. *Samuel Humphrys* sworn.

Huggins. Were not you steward of the court of inspectors?

Humphrys. I was steward for some considerable time.

Huggins. When was the court first erected, and upon what occasion?

Mr. Baron *Carter.* Mr. Huggins, how you can apply this, I can't apprehend. Mr. Humphrys, what do you know of Arne or the strong room?

Humphrys. Mr. Arne was a prisoner there, when I was there first.

Mr. Baron *Carter.* Where was he when he came first?

Humphrys. A person of his name came there, whom I knew, and I went with him to see Mr. Arne, and he lived intemperately. This gentleman, after he had been there, had supplied him with money, which he spent in liquors; and after some time he was much altered in his way, and I saw him one day walking with his hat and wig off in the rain, and took notice of it; and after that he proceeded to further extremities, and took up a brick-bat, and throwed it upon the Bare.

Mr. Just. *Page.* Do you believe he had any design against any body?

Humphrys. I believe he had not.

Mr. Just. *Page.* Did he ever hit any body?

Humphrys. I do not know that he did, but we had apprehensions, that he might, after being in that condition; he was an object of great compassion.

Huggins. What was his behaviour?

Humphrys. His behaviour was such, that he was not fit for a bed-fellow.

Huggins. Do you know any thing of his being put into the strong room.

Humphrys. Before he was put into that place I was discharged.

Huggins. Do you remember that you saw me there?

Humphrys. I don't remember I saw you there, except when the prothonotaries were there.

Huggins. Was that room built when you were there?

Humphrys. According to the best of my memory, that room was built while I was there.

Huggins. Was it not a stable before?

Humphrys. There was a stable, but I don't apprehend it was built on that spot.

Huggins. Were you present at any time, when the prisoners desired to have Arne put into the strong room?

Humphrys. I do not know it; it was after that I came away.

Huggins. Did Gybbon dare to come into the prison without leave of the inspectors?

Humphrys. Mr. Gybbon was very unwilling to come in, and I believe the reason was, he could not come in with any safety. Mr. Gybbon sent one day to some gentlemen of the master side to know, if he might venture with safety to the Fleet prison, for that he had a mind to see the repairs; upon which answer was returned, that he might come in; and Mr. Gybbon came in, and I went about with him.

Huggins. I desire he may be asked, whether if any man was injured, would they not have complained of it?

Humphrys. I was there when Arne came in, and discharged before he was put in the strong room.

Mr. *Thomas Dean* sworn.

Huggins. Did you see me in the prison during the time Mr. Arne was there?

Dean. During the time I was there, which was till the 12th or 14th of September, you were not there; I was discharged on the 7th, but stayed a week after.

Huggins. Was it the opinion of the prisoners that Mr. Arne should be confined?

Dean. It was.

Huggins. Who provided him victuals?

Dean. One Mr. Louden found him in meat and drink, and he was allowed for it. I have seen Mr. Louden in the room.

Huggins. Who kept the key of the strong room?

Dean. I don't know who kept the key.

Huggins. Did you see Arne there?

Dean. I have seen Arne in the strong room.

Huggins. When was he carried there?

Dean. He was committed to the strong room in July, or the beginning of August.

Huggins. Did you see me with Gybbon?

Dean. I went round the Bare when Mr. Gybbon was in the prison, and was upon the Bare with him.

Att. Gen. Did not Gybbon's servants come in?

Dean. They did, and Gybbon came to chapel.

Att. Gen. Whereabouts is the chapel?

Dean. The chapel is within the walls of the prison.

Att. Gen. If Mr. Gybbon dared to venture to come to chapel; how came he not to come at other times?

Huggins. Please to ask, whether, if between the hours of ten and twelve I had been there, I must not have been seen?

Dean. Captain Pattison and others went round the prison with Mr. Gybbon.

Huggins. The question is, If I had been there, whether you would not have seen me?

Dean. I should.

Huggins. Had not Arne a broken constitution?

Mr. Baron *Carter.* Mr. Huggins, I cannot admit you to go into that evidence; I don't know what advantage it will be to you, you are going to prejudice yourself; for if he had a broken constitution, there was less reason to put him into the strong room.

Mr. *John Louden* sworn.

Huggins. My lord, be pleased to ask Mr. Louden, whether he had the care and custody of Mr. Arne?

Mr. Just. *Page.* Answer that question.

Louden. I knew Mr. Arne before he came to prison, I had some acquaintance with him; he came into prison about the latter end of June, and some gentlemen spoke to me to have Mr. Arne table with me, and he allowed me 5*s.* per week; but the gentlemen grew uneasy at his dining with them, because that he was something out of order, and some time after growing worse, the gentleman with whom he lay quarrelled with him, and I could not afford to board him any longer, he not being able to pay me; and after he was turned from my table, some of the Upholders' Company came and desired me to dine him as usual; and every morning I carried him a breakfast, and a plate of hot victuals and drink, and I had the key of the room in two or three days after he was put in.

Mr. Just. *Page.* How came you by the key?

Louden. Sometimes it was half an hour, sometimes an hour before I could find the officer, and I said, if they would not let me have the key, I would not furnish him with victuals.

Mr. Just. *Page.* You had the liberty of going in, could you let him out?

Louden. Though I had the key, and had the liberty of going in, I had no power to let him out. He was never out, from the time he was put in, but once, and that was when some servants of the Upholders' Company came to see him, and then Barnes locked him up again; and when he was out he was stark naked, and ran into the chapel with the feathers all about him, and I went to take him to carry him in again, but he was very sturdy, and would not let me.

Huggins. In all the time you had the key, and the custody of him, which was from the third day after his going into the room, till three days of his coming out, did you see me in the prison?—*Louden.* I did not.

Huggins. Do you think you should, if I had come?—*Louden.* Yes.

Huggins. If I had been in the house, should you have seen, or heard of it?

Louden. I should.

Huggins. Did any-body sit up with Mr. Arne?

Louden. There was somebody sat up with him a few nights before he died.

Huggins. I submit it to you, my lord, whether I shall produce the people of the Upholders' Company that sat up with him.

Mr. Just. *Page.* That will be of no great use to you.

Huggins. Was there a court of inspectors, who governed the prisoners?

Louden. Yes, there was.

Huggins. Do you remember you saw Mr. Gybbon there then?—*Louden.* No.

Huggins. Did the prisoners dispose of their rooms?—*Louden.* Yes.

Mr. Baron *Carter.* I don't understand very well what way you propose to make your defence; if Mr. Gybbon had the sole power, then the court of inspectors could not; first Mr. Huggins is not concerned, because Gybbon was; and then he could not be concerned, because the court of inspectors was. Mr. Huggins I take to be warden, and Gybbon deputy-warden.

Att. Gen. What kind of a place is the strong room?

Louden. It is a brick-wall, and arched over with bricks, and the floor is boarded, and at that time a bench went across the room. There is a hole over the door, with four or five iron bars, and a hole big enough to put a quart-pot in by the side; it was a new built room, about six or eight weeks before Arne was put in, there was no chimney, fire-place, nor any convenience to ease nature.

Att. Gen. Was it not the occasion of his death?

Louden. It was possible it might. I believe it might do him prejudice as to his health.

Att. Gen. Did it hasten his death?

Louden. I do not know but it might; I believe it did hasten his death.

Att. Gen. Who gave you the key?

Louden. The turnkey; and I restored it to him again.

Att. Gen. As you came to take charge of it, did you always keep the key?

Louden. Sometimes I had it, and sometimes they had it.

Mr. Just. *Page.* Do you believe you could have lived there six weeks, if you had been put in that room?

Louden. I don't believe I could.

Morgan Gwyn sworn.

Huggins. Were you a prisoner all the while Mr. Arne was there?—*Gwyn.* Yes.

Huggins. Did you see me in the house during that time?

Gwyn. I did not hear that you had been in the house all the time he was a prisoner there, nor did I see you.

Huggins. Do you think if I had come, you should have seen me?

Gwyn. I do think I should.

Huggins. My lord, I have witnesses to prove that I was in Hampshire from the beginning of September till the middle of September; that one part of the time that Hopkins and myself are said to be at the strong room I was out of town, and another part that Hopkins was out of town.

Wm. Huggins sworn.

Mr. Just. *Page.* You are son to the prisoner?

Wm. Huggins. I am, my lord; I have a house in Hampshire, and I remember by several circumstances, that my father came there the 1st of September, and continued till the 14th or 15th.

Huggins. Was I from your house during that time?

Wm. Huggins. Neither my father nor myself were; that being the long vacation, my father was absent from his business, and was out of town at sir George Oxenden's.

Richard Smith sworn.

Huggins. I desire he may be asked, my lord, whether he saw me in Hampshire, in 1725, at my son's?

Smith. My lord, I saw Mr. Huggins in Hampshire about the 14th or 15th of September in that year; and he was likewise there some time in August.

Mr. Just. *Page.* Was Mr. Huggins twice there in that summer?

Smith. He was there for a great many days at one time.

Mr. Just. *Page.* Did he go up to London, and come down again?

Smith. I cannot say whether he did or not.

Mr. Just. *Page.* Did he come up and down several times?

Smith. He was constantly there for some days.

Mr. Just. *Page.* What are you?

Smith. I am tenant to the estate which Mr. Huggins purchased.

Robert Knight sworn.

Huggins. Do you know of my being at my son's house in Hampshire, in 1725?

Knight. You were there between the 4th and 11th of September, and stayed 15 days.

Huggins. When did I return?

Knight. The 15th.

Huggins. Was I there in August too?

Knight. You were there between the 9th and 14th, and stayed seven days.

Charles Bird sworn.

Huggins. Do you know of my being at my son's house, in Hampshire, in 1725?

Bird. You were there in August, 1725, about the 7th, but I cannot say how long you stayed there; then you came down on the 1st of September, and returned the 15th of the same month.

Huggins. My lord, I went from thence into Berkshire.

James Green sworn.

Huggins. Did you see me in Hampshire at my son's in 1725?

Green. I was a servant then, and lived in Hampshire at the same time; and you came there on the 1st of September, and continued till the 11th; and in the same year you were there in August.

John Tucker sworn.

Huggins. Whom are you servant to?

Tucker. To sir George Oxenden.

Huggins. Was I any time in Berkshire in 1725?

Tucker. You were there in September, 1725; and on the 17th I carried you from Witternham, in Berkshire, to Henley upon Thames.

Huggins. Did you carry me any farther?

Tucker. No.

Mr. Just. *Page.* When did Mr. Huggins come there?

Tucker. I did not mind that; I know the time when I carried him from thence, but cannot tell when he came there.

Sir *George Oxenden* sworn.

Sir *G. Oxenden.* My lord, Mr. Huggins said he came from his son's about the 15th of September, and came to Henley about the 17th. I remember very well that Mr. Huggins was at my house in Berkshire, because sir Cecil Bishop being there (it was the day before or after Watlington fair, which was the 18th), Mr. Huggins offered to purchase a little farm of him, which Mr. Huggins said he would make a present of to his son, which, I thought, was a kind, good-natured act: he went away on the 17th or 18th, and I rather believe it was the 18th, because on that day I went to Watlington fair.

Mr. Just. *Page.* How long did Mr. Huggins stay at your house?

Sir *G. Oxenden.* Mr. Huggins was not there above two days, and said that he came out of Hampshire.

Daniel Hopkins sworn.

Huggins. I must observe, my lord, the wit-

access said, that Mr. Hopkins was with me, that he was present at the strong room.

Mr. Just. *Page.* Mr. Hopkins, pray when did you go out of town?

Hopkins. I went in the Oxford coach on Monday, the 27th of September, 1725, and got to Oxford that night; and on Tuesday took the Worcester coach to Moreton in the Marsh, and went from thence to a place called Barton, to one Mr. Oakley's, a relation's.

Huggins. When did you return?

Hopkins. I came back on the 14th of October in the same year.

Huggins. I desire, my lord, he may be asked, if ever he saw me in the prison in the month of September?

Hopkins. No, nor in October; for you were not come back on the 19th.

Huggins. Were you at the door of the strong room with me?

Hopkins. No, I was there by myself.

Serj. *Cheshire.* Do you know Mr. Farrington?—*Hopkins.* Yes.

Serj. *Cheshire.* Don't you remember that he was there with you?

Hopkins. I don't remember any company was there then.

Serj. *Cheshire.* Was Barnes there?

Hopkins. No.

Serj. *Cheshire.* Who opened the door?

Hopkins. I cannot tell.

Serj. *Cheshire.* Did you see Mr. Arne?

Hopkins. I saw him there; he was naked; he had something about him white, but I cannot say what.

Serj *Cheshire.* Had you no discourse about this man?—*Hopkins.* No.

Serj. *Cheshire.* Did not Mr. Gybbon send you to Mr. Huggins about Arne?

Hopkins. No.

Serj. *Cheshire.* When you were at the door, did you not whisper to any one?

Hopkins. No.

Serj. *Cheshire.* Whose servant was Barnes?

Hopkins. He was servant to Gybbon.

Serj. *Cheshire.* Who named him a watchman?

Hopkins. He was a watchman when I came there; and I saw Gybbon pay him several times.

Serj. *Cheshire.* Whom were you appointed by?

Hopkins. I was recommended to Mr. Gybbon by Mr. Huggins.

Serj. *Cheshire.* Did you do any business for the prisoner?

Hopkins. Yes, and attended him constantly at his house every morning; but I never had any thing for that trouble.

Serj. *Cheshire.* Did you buy your place?

Hopkins. No.

Serj. *Cheshire.* Did you take all those journeys to Mr. Huggins for nothing?

Hopkins. He had seldom any thing for me to do; I was in the morning generally with him about seven o'clock, and left him by nine.

Serj. *Cheshire.* Do you know Mrs. Le Pointe?

Hopkins. Yes.

Serj. *Cheshire.* Had you no discourse with her about Arne as to his condition?

Hopkins. I do not remember I had.

Serj. *Cheshire.* Mr. Hopkins, pray consider with yourself, and answer directly, whether or no Mrs. Le Pointe did not desire you to speak to Mr. Huggins about Arne, and you said you would, and that you came to her after, and told her, that you had spoken to Mr. Huggins, and that he said it was no business of his? Pray consider, and recollect yourself.

Hopkins. I cannot recollect it.

Serj. *Cheshire.* How did Arne come into the strong room?—*Hopkins.* I do not know.

Serj. *Cheshire.* How long was he there?

Hopkins. Six weeks.

Serj. *Cheshire.* How long was it in that time before you heard he was there?

Hopkins. It could not be long.

Serj. *Cheshire.* How long after the beginning of the six weeks was it that you saw him there?

Hopkins. I cannot tell how long; it could not be long.

Serj. *Cheshire.* Was there any matter in the gaol that you did not acquaint Mr. Huggins with?

Hopkins. I seldom acquainted him with any of the transactions.

Serj. *Cheshire.* Do you remember you acquainted him with this man's being in the strong room?

Hopkins. I do not know I did.

Serj. *Cheshire.* Did you hear any complaint of his being in that place?

Hopkins. I cannot say that I heard any complaint of his being there.

Serj. *Cheshire.* I have in my hand, Mr. Hopkins, an examination of your's, and I would have you consider with yourself, and I will ask you one question or two. Do you think the keeping the man in that place was the cause of his death?

Hopkins. I had been very credibly informed of the indisposition of Arne before.

Serj. *Cheshire.* Upon the oath you have taken, was not Arne's being confined in that place the occasion of his death?

Hopkins. I cannot say, upon the oath that I have taken, that it was, as he was mad and sick before he was put in the strong room. I believe the madness was the occasion of his death.

Att. Gen. How long after Mr. Arne was confined was it that you saw him?

Hopkins. I cannot say how long; I believe it was in the month of September.

Att. Gen. Did not you see him more than once?—*Hopkins.* I do not remember.

Att. Gen. I ask you again, Did not you see him more than once?

Hopkins. I do remember I saw him a second time lying on the floor, and the upper part of his body was then naked.

Att. Gen. Was any prisoner in the Fleet confined in such a strong room before?

Hopkins. None was put in there before, nor in any such.

Att. Gen. What kind of room was it?

Hopkins. The roof was arched; it was built even with the ground, and built not long before Arne was put in there.

Att. Gen. Did you observe the condition of the wall?—*Hopkins.* The room was damp.

Att. Gen. What officer were you belonging to the Fleet?

Hopkins. I was Clerk of the Inquiries.

Att. Gen. Did not you go to Mr. Huggins frequently?

Hopkins. I went to Mr. Huggins three or four times a week.

Att. Gen. What did you go to Mr. Huggins upon?

Hopkins. I went to him about his own business.

Att. Gen. Did you never attend him on mornings about the business of the prison?

Hopkins. I have acquainted him with some things.

Att. Gen. Did not you acquaint him with matters of consequence in the prison?

Hopkins. I did, if they were matters of any consequence, or extraordinary.

Att. Gen. Did not you acquaint Mr. Huggins with Mr. Arne's being there?

Hopkins. The reason is why I did not, that I went out of town on the 27th of September, and did not return till the 14th of October.

Att. Gen. I ask you, Whether you believe in your conscience you did acquaint Mr. Huggins or not?

Hopkins. It is very likely I did, if I was desired.

Att. Gen. Do you believe in your conscience you did, if you were desired?

Hopkins. Why, I verily believe in my conscience I did, if I was desired.

Att. Gen. How do you know Arne was mad?

Hopkins. I heard that he was.

Att. Gen. Would not his own room have been a sufficient confinement?

Hopkins. I believe it would.

Att. Gen. Did you receive any order from Mr. Huggins for the relief of this man?

Hopkins. I do not know that I did.

[Upon which his Examination, which was taken before Edward Hughes, esq. upon oath, was read, to shew his prevarication.]

Mr. Just. *Page.* I ask you, Whether in the month of September, there were not a great many people discharged out of custody, and whether there was not any one room that became empty?

Hopkins. I believe there was, for fifty or sixty persons were then discharged; but I had nothing to do with the affair of rent.

Mr. Just. *Page.* Was there any room better than the strong room empty?

Hopkins. Any room was better than the strong room.

Mr. Just. *Page.* How long was Arne continued there after the 7th of September?

Hopkins. He was continued there till he died.

Mr. Just. *Page.* Was there any room in the house so bad as that?

Hopkins. I do not know of any.

Mr. Just. *Page.* When so many were discharged, might there not be a room that Arne might be put in?

Hopkins. I do not remember any disposition of rooms.

Mr. Just. *Page.* Were there no places empty where the fifty or sixty lay?—*Hopkins.* Yes.

Mr. Just. *Page.* Was there not a room then for one man to lie in?—*Hopkins.* Yes.

Att. Gen. Had you any discourse with Bishop about Arne?

Hopkins. I do not remember he ever spoke to me about him.

Att. Gen. Did Mr. Gybbon never speak to you in the presence of Bishop, to speak to Mr. Huggins, that some care might be taken of Arne?—*Hopkins.* He did not.

Att. Gen. Did Mr. Gybbon order you to speak to Mr. Huggins to get him into Bethlehem, and to speak to Mr. Taylor to get him in?

Mr. Just. *Page.* I must observe that Mr. Huggins owned that he only did it (speaking of Arne's being got into Bethlehem) as a friend, and not *quatenus* warden.

Mr. *Lee.* Mr. Hopkins. I ask you, Whether you at any time spoke to Gybbon, or any one else, to give Mr. Huggins notice of Arne's being in the strong room?

Hopkins. I do not know that I did.

Thomas Smith sworn.

Huggins. What resolution did the Upholders' Company come to, as to the discharging Arne out of the Fleet?

Smith. He was servant to the Company of Undertakers at Exeter Change.

Mr. Just. *Page.* Do you know if Arne was to be discharged, or how?

Smith. Martin and others, members of the said company, first arrested him, and he was carried to a bailiff's in Hare-court, and lay there a considerable time, and then was carried to the Fleet; and upon an application to the Company of Upholders, they agreed to discharge him, and get him into Bethlehem.

Huggins. My lord, he was a very sickly man before he came there; and I desire the witness may tell you what condition he was in.

Smith. In the month of April, 1725, he was in a weakly condition.

Mr. Just. *Page.* Mr. Huggins, I cannot admit you into that evidence.

Huggins. I desire to call people to his character.

Mr. *Thomas Arne* sworn.

Huggins. He was chief mourner to Arne; I desire he may acquaint you what relation he was to him.

Arne. Edward Arne was my uncle's son: I know that he was in prison; he lay some time at an officer's house, and from thence was removed to the Fleet.

Huggins. When did you go to him?

Arne. A week or ten days before he died I saw him there; I enquired for him, and they said he was locked up, and directed me to go to Mr. Louden, Mr. Jerningham's man.

Huggins. Was the door shut?

Arne. It was padlocked; he lay down at the side of the room near the door, and I found some rags about him. He knew me, and took me by the hand; he was then very ill, and could hardly speak. I asked him, what was become of his ring, seal, gold-headed cane, and other things of value? He spoke very faint; I with much difficulty understood by a word now and then, that one Searls, a mercer, had got some of them; and afterwards upon enquiry found, that he had his gold watch, which he had lent him fourteen guineas upon.

Huggins. Did he make any complaint to you?

Arne. He was not capable of complaining, being so very weak.

Huggins. What state of health was he in before he came there?

Arne. I believe he was in a wasting condition before he was arrested.

Att. Gen. Did you hear any complaint as to his being in the strong room?

Arne. By him I did not.

Att. Gen. At the time when you came to visit him, was the room in a condition for a sick or a well man?

Arne. I believe it was not fit for a sick or a well man to be in it.

Att. Gen. How long do you think you could have lived if you had been confined in that room?

Arne. I could not have lived six or seven days, and could not believe any man alive could be there six or seven weeks.

Att. Gen. How often were you there?

Arne. I never saw it but once.

Att. Gen. Do you think you could have lived there six weeks?

Arne. I think I could not live six weeks in the damp without fire or candle.

Huggins. My lord, I desire to call some gentlemen to my character.

Mr. Just. *Page.* That you may do if you think fit.

Sir *George Oxenden*, bart. sworn.

Sir *G. Oxenden.* My lord, I have known Mr. Huggins about nine years, but have been more particularly acquainted with him these four or five years last past; I never took him to be an ill-natured or barbarous man, and do not believe, willingly, he would do an inhumane thing to any one.

Sir *John Hinde Cotton*, bart. sworn.

Huggins. Pray give an account how long you have known me.

Sir *J. Cotton.* My lord, I have known Mr. Huggins about four or five years, and have had occasion to be a good deal with him. I believe him to be a good-natured, humane man; and believe in my conscience, he would not have been guilty of the cruelty laid to his charge.

Robert Viner, esq. sworn.

Viner. My lord, I have known Mr. Huggins ever since I can remember any thing at all, he has been concerned for our family these forty or fifty years, and I lived with him two years together; and I take him to be a good-natured and humane man; and, in my conscience, believe he would not be guilty of a cruel thing to any man.

John Hedges, esq. sworn.

Hedges. My lord, I have known Mr. Huggins about six years, and always took him for a good-natured and humane man; and have since had an opportunity of knowing several instances of his generosity and good-nature without fee or reward: I have known him six or seven years as a general acquaintance, and he was very good natured and humane; and some time since I have known some instances of great generosity and good-nature, merely for the pleasure of doing good, without fee or reward.

John Knight, esq. sworn.

Knight. My lord, I have known Mr. Huggins these eight or nine years past, and frequently had opportunities of being in conversation with him, and I always took him to be, as far as any man living from doing any thing that was cruel; and always acted agreeable to the character of a humane man; and I am very sorry any such thing should be laid to his charge.

Christopher Tillson, esq. sworn.

Tillson. My lord, I have known Mr. Huggins these five-and-thirty years, not superficially, but in particular friendship, and have found him in all instances a man unblamable; and I never saw any thing tending to cruelty or ill usage; and have always found him so for these thirty-five years.

Major *Churchill* sworn.

Major *Churchill.* My lord, I have known him these forty-five years, and have had frequent communication with him, and always found him a friend and a man of humanity, despising of money; there was one thing, in a most particular manner, I will acquaint your lordship of.

Mr. Just. *Page.* I can't admit you into a particular character, but you may go on with a general one.

Major *Churchill.* I never thought him capable in thought, word, or deed, of doing a cruel thing.

Thomas Gibson, esq. sworn.

Gibson. My lord, I have known Mr. Huggins for these seven or eight years past, and found him to act with good-nature, integrity, honour, and humanity.

The Rev. Dr. *Pearce* (Rector of St. Martin's in the Fields, afterwards Bishop of Rochester,) sworn.

Dr. *Pearce.* My lord, Mr. Huggins is a vestry man; and I have had more particular reason to converse with him frequently on that account, and I never found any thing in him, that was any way consistent with what is laid to his charge, and have constantly found him at church.

Edward Thompson, esq. sworn.

Thompson. My lord, I have known Mr. Huggins these seven years, and have had frequent experience of acts of his friendship and good-nature, and never discovered any thing in his behaviour, but the utmost good-nature.

Thomas Wodford, esq. sworn.

Woodford. My lord, I have known Mr. Huggins many years. I have been with him both sober and mellow, and never have discovered any thing barbarous or cruel in him; and I verily believe he could not be guilty of any such act if he knew it at all.

Joseph Taylor, esq. sworn.

Taylor. My lord, I have transacted a great deal of business with Mr. Huggins, and found him act with candour. Sometimes I have been concerned against him, and sometimes with him; and, if ever I had suspected any thing in him tending to cruelty, I assure you, my lord, I would have shunned his company instead of seeking it, as I have done.

Martin Bladen, esq. sworn.

Bladen. My lord, I have known Mr. Huggins many years, and have lived by him in the country these eight or nine years; and the character that he has had is, that he is a good-natured, humane man; it has been his whole business of life to leave a good character; and, therefore, I can't believe he would do an ill-natured act.

John Lade, esq. afterwards sir John Lade, bart. sworn.

Lade. My lord, I have known Mr. Huggins these forty years, and have seen a great many kind, compassionate things of him.

Sir *Charles Cox*, knt. sworn.

Sir *Charles Cox.* My lord, I have known Mr. Huggins these forty years, and have had frequent dealings with him, and always observed him to be a man of charity and humanity; and I have courted his company from the good opinion I have had of him, and don't believe that he would be guilty bf any inhumanity.

Edward Halsey, esq. sworn.

Halsey. My lord, I have known Mr. Huggins near thirty years, and have been conversant with him, and the observation I have made of him is, that I have found him zealous to do good offices, where he had no fee or reward, and never found him covetous or cruel.

Sir *James Thornhill*, knt. sworn.

Sir *James Thornhill.* My lord, I have known Mr. Huggins for these twenty-five years, and I was proud of the honour of his acquaintance. I have never seen or heard of the least cruel act that he has done by any one; and if I was to repeat the instances of good-natured acts——

Mr. Just. *Page.* Sir, you can't be admitted to do that.

Thomas Martin, esq. sworn.

Martin. My lord, I have known Mr. Huggins these thirty years, and that he has done a great many kind and good natured things. I never knew him a vain man, but that he did it through good-nature.

Colonel *Negus* sworn.

Col. *Negus.* My lord I have known Mr. Huggins, a great many years, and always looked upon him to be a good-natured man; and that it was impossible to think he could do so ill-natured an act, as laid to his charge.

——— *Campbell*, esq. sworn.

Campbell. My lord, I have known Mr. Huggins from fifteen to twenty years, and always found him behave himself with integrity in his profession, as a good natured man, and always thought his genius far superior to do an ill-natured thing. I always had, and still have a good opinion of him.

Huggins. My lord, it appeared to your lordship, that Mr. Gybbon was the acting-warden, and that Barnes was his servant, not mine. No argument can be drawn from the coroner's not sitting, the custom of the place is otherwise, but as to any application to get him into Bethlem, that, my lord, can't be applied to me *qualenus* warden, for it would be only in me a good-natured act: If Barnes put him in, he is not my servant; if so, then the indictment must fail.

That as to the witnesses they were prisoners, and they are natural haters of their keepers.

I never went to the prison, but had a hundred people about me, and I must have been seen by many; there was no pretence of using any barbarity to any man, no money to be extorted: and when I could no way be benefited by it, no one can think, my lord, I could be guilty of murder, where no benefit or advantage by it could arrive.

Mr. Louden, my lord, who had the custody of the man, and had the key till three days before his death, had never seen me there; and if he that had the key did not know of my being there, who should? I shewed, my lord, that I was out of town in September, and Hopkins was out of town till the 14th of October, so that it was impossible, that we two could be there together. All the other witnesses, that have been called against me, would not have

lain from that day to this in prison, had they not lost their honour, or lost their designs.

I never saw the man, nor heard there was such a prisoner, and to murder a man for nothing, God Almighty knows there never stood a man at this bar with more innocency than myself.

Serj. *Cheshire.* It is plain on the king's side, that a subject has been murdered; and what Mr. Huggins has endeavoured to show is, that he never acted, but had a deputy, and that deputy was accountable, if any body, for he had no acquaintance of this thing; your lordship has heard the witnesses, and I don't doubt but will relate the evidence fully.

The Counsel for the Prisoner objected to Mr. Serjeant Cheshire's replying.

Mr. Just. *Page.* I am of opinion, brother, you can't reply.

Serj. *Cheshire.* But I may say something to what has not been given already in evidence.

Att. Gen. Mr. Huggins endeavours to shew that Gybbon was the acting-warden. No, my lord, neither by a lease or deputation Gybbon could not be appointed warden.

Mr. Just. *Page.* Mr. Attorney, I cannot admit you to enter into any reply, but if you have any evidence you may call them.

Elijah Beavis sworn.

Att. Gen. Were you a prisoner in the Fleet, in the year 1722?

Beavis. Yes, and I had the liberty of the rules, in the year 1723; and in the year 1724, I was entitled to be cleared by the Act of Insolvency, but because I could not give the warden money enough, was continued till the year 1725, and I used to see Mr. Hopkins at Pindar's, where Gybbon kept his office, and it was generally accepted by every body, that Hopkins brought directions from Huggins to Gybbon every day.

Att. Gen. Have you heard Hopkins say, that he had directions from Mr. Huggins to Gybbon, and that he came from Huggins.

Beavis. I did not hear any particular directions.

Richard Bishop sworn.

Att. Gen. Who gave directions, as to the management of the gaol?

Bishop. The particular things were done by Huggins's directions; but the common things without.

Joseph Johnson sworn.

Att. Gen. Do you know of any directions brought from Mr. Huggins by Mr. Hopkins, to Mr. Gybbon

Johnson. I have heard Mr. Hopkins say, that he came from Mr. Huggins, and that he bid him come every morning to him; and that one time Mr. Huggins sent word back by Hopkins, that I should be locked up.

Edward Hughes, esq. (a member of the House of Commons) sworn.

Att. Gen. Sir, what have you heard Mr. Huggins declare, as to the acts he did during the time Gybbon was his deputy?

Hughes. My lord, it appeared to me ——

Mr. Baron *Carter.* Sir, you are not to tell us of what appeared to you, but what you know of your own knowledge.

Hughes. My lord, I can't tell how knowledge should come to me, until it appeared to me. (After some pause Mr. Hughes went on.)

My lord, Mr. Huggins was ordered to attend the committee, and while Mr. Huggins was there, he was asked, what escapes had happened during the time he was warden? He said, he could not give an account of them, there had happened so many; but said, that Oliver Read had escaped, and when he was taken, that he Mr. Huggins had ordered Corbett the tipstaff to put him in irons, which were sent for from Newgate by his, Huggins's directions, and owned that he did it by virtue of his authority for an escape; this confession Huggins made himself, and owned, that he had paid 500*l.* for such escape that Read had made.

Mr. Baron *Carter.* Was it Mr. Huggins or Mr. Gybbon ordered him to be put in irons?

Hughes. I did not say it was Mr. Gybbon bid him be put in irons, but it was Mr. Huggins, and that he ordered him to be put in irons as warden, and in all escapes he acted as principal, for he paid 500*l.* for that escape.

Mr. Baron *Carter.* About what time was this?

Hughes. It was upon the first escape that Read made; it was in the year 1726, that Read got off those irons, and made his second escape, and was re-taken; and then he was put in the dungeon.

Mr. Baron *Carter.* Was there any particular time mentioned?

Hughes. I have recollected, and it was in the year 1726; what points out the time, is Read's escape.

Serj. *Darnell.* That paper produced by Jeffreys amounts to a lease.

Mr. Just. *Page* and Mr. Baron *Carter.* Whenever an agreement is made to make a lease, that can never be esteemed a lease.

Proclamation was made to keep silence.

Mr. Just. *Page.* Gentlemen of the jury, this is an indictment against Mr. Huggins the prisoner at the bar, and one Barnes, for the murder of Edward Arne. The indictment is indeed particular; the indictment takes notice, that Huggins was warden of the Fleet the 1st of October, in the late king's reign; that he being warden, had the government of the prisoners in the gaol that Barnes was an agent of his, who is fled from justice. It sets forth, gentlemen, that Barnes seized upon the said Arne, and carried him to a place, called the Strong Room; and that Huggins was aiding, abetting, and assisting in carrying him to that place, and he was continued there the space of six weeks; that this is a place of cold restraint, and a room newly built, made of brick and mortar, very wet and unfit to live in; that this

Barnes did continue him in this place for six weeks in a most barbarous and vile manner, and not allowed him any necessaries, insomuch that he had no chamber-pot, he was without fire or fire-place, and had only a little bed. This is the nature of the dungeon. It is a vault arched over, and in the wall a little hole big enough to put a quart-pot in at. It is built over a common sewer adjoining to a laystall, where all the dirt and filth of the prison lies, which made it not only so noisome, but very unwholesome, that the continuing this person so long in this place was the occasion of his death. That Mr. Huggins was acquainted with it, but shewed him no favour; he was not let out, and died in the middle of October. He died, gentlemen, by this duress of the prisoner. I will say but little to what the law is in this case; a prisoner for debt is only taken like a distress, and kept there till he or his friends can pay the debt for him. Imprisonment is no punishment, it is not taken as part of the debt; for let a man lie ever so long, his heirs at law cannot be exempt from the debt, but if they have effects, are answerable for it. He is kept only in such manner as he may be forth-coming and safe; this being the case, he is to be kept in here in a becoming way, as the warden may be safe, and the prisoner forth-coming, but in no other degree that the prisoner should be punished, by any unreasonable restraint. If this Arne was kept in no other way than became the subject of the king, in that reasonable manner, so that you may take it, there was no torture, ill usage, or any act, but such as was fit and decent for confinement, no duress; then and in that case, though he died there, it will not be murder.

But if by the evidence that has been called, it appears that this room was an unfit place to lay this man in, that it must be the means of his destruction, that (being in such imprisonment as the gaoler cannot justify) will be duress; if they carry that point, it is part of the common law, the ancient law, and very rightly observed by the counsel, that it will be murder. It would be very hard to take away this law, though in his own defence; as he was entrusted with the life of the king's subject, he was answerable for him, and the coroner's inquest ought to have sat upon his body; the law is so much afraid of the loss of the life of a subject, that the king will have an enquiry to see what is become of the life of the prisoner. It was opened by the counsel for the king, that it was wilfully omitted; on the other hand it was urged that this custom seemed to be asleep, and that it was hard to lay a great weight, where it had not been so long practised. Gentlemen, there have been great numbers of witnesses called, and therefore I cannot give it word for word, but will repeat as far as is necessary.

Mr. Longborn was called to prove the first part of the indictment, that Huggins was warden; and he proved the copy of the letters patent granted to Mr. Huggins, who might act by himself or deputy.

Bigrave gave an account, that Huggins's patent bore date on the 25th of July, in the 12th year of the late queen; that Mr. Huggins, though warden, did not act himself, but appointed Gybbon as deputy; and that securities were taken by Huggins not by Gybbon, that is to be considered in point of law, that the act must be brought against him as warden, and the making of a deputy does not discharge him of his duty; in several cases he does not continue answerable, for in civil cases the deputy is answerable, therefore the security is lodged with him. It is a very strong evidence that the warden still continues warden, that he ought to see to the escape of prisoners, for that is not only trusted to the honesty of the warden, but he is to take the best care he can of escapes. He says, that Gybbon did buy his place, that he did oversee and look after the affairs of the Fleet, and filled up several warrants, but always in Huggins's name; that he did apprehend that Barnes was only a servant to Gybbon, and that Gybbon, no doubt, had the immediate trust of the gaol; and that Barnes was a runner to Gybbon, and not Huggins's servant. He agreed what this place was; that it was arched over; that it was eight feet wide, eleven feet long, and nine feet high; that it was built very little time before Arne was committed there; he could not describe the whole situation, but gave an account that it was very nigh the dunghill and filth, had no chimney nor chimney-place, and had only two little holes to let the air in. He gives an account of Hopkins; that he looked upon Hopkins to be Gybbon's servant, besides that he was clerk to Mr. Huggins at his house in St. Martin's-lane, and generally went backward and forward most days to Mr. Huggins, and was able to give him an account of what happened in the gaol.

Hopkins tells you, he was Clerk of the Inquiries, and that all the security-bonds were left with Gybbon, but left in blank; and when he had enquired into the securities, the security-bonds were filled up by Gybbon; that Gybbon received all the money, and he heard that Gybbon was to pay 400*l.* per annum for it, but that all went on in the name of Huggins.

Bishop says, that he was tipstaff under Huggins; that he did pay for his place, which cost him 200*l.*; and that about 1724 or 1725 Arne was brought a prisoner first, and was carried to the Vine, and there continued about a month, and afterwards was carried into prison, and lay with one Shaw, and upon a quarrel was turned out, and the strong room was built at the latter end of the summer; and it must be granted, it was not fit for mortal man, scarce any beast, to be in. Gentlemen, this room is totally unfit for any man to be put in; and that it was strongly proved, that from the nature of the place, and the circumstances of the weather, it was the occasion of his death; that it was new built, not above three or four yards from the dunghill, and that every thing of nature was done in it; there was no chair, no provision, only an old bed. That he saw him before run-

aing about naked in the common-yard, and upon this did tell Gybbon of him, and that it was not fit for the poor man to be left alone, so it was fitter for him to go to Bethlehem; and very soon after the man was put into the strong room. To go along with Mr. Huggins, I must take notice of an observation he made: that it was very unfit for a man to go naked about where there were women; and it was fit he should be confined somewhere. He (speaking of Bishop) gives some account of Barnes, and some account when the room was built, just at the latter end of the year; that he did hear he was in a very wild condition; that Barnes nor none of them did apprehend Gybbon to have the sole power; but that Gybbon acted by the authority of Mr. Huggins; but that he would apply to Mr. Huggins about it, and did ask the prisoner if it was not proper to get him into Bethlehem; and Huggins observed it was not part of the office of warden of the Fleet, but he might by a friendly office use his interest with Mr. Taylor, and that would shew him more a humane man than one guilty of cruelty. When any thing special happened, that was still done by Huggins; that though Arne was in that condition, though there was no occasion or hazard, and no cause for putting him into that room, Huggins not only a principal, who is answerable for his deputy, was often in the Fleet, and saw him several times whilst Gybbon was deputy, and Arne in that confinement, and did give orders about several things of moment. Arne he knew was disordered, but never did any ill thing to put him in fear and hazard; the man never did any hurt, he might drink, but then there were other rooms to put him in; no place could be found to put this man in so bad as this. When he was turned out from Shaw he had a little place that he put up in the common-hall, and his goods were carried down there. It was very hard to imagine, if he was not very well, if he was a little distempered, it was very strange that no place could be found but the strong room to put him in. When I came to ask the question, if there were other rooms where the man might be kept with safety, it was said, that there were rooms where he might be put in safety; but it was not thought fit he should go into a place fit for a Christian to go in, but into this place.

Mr. Cotton, by the book, shews, he was admitted a prisoner on mesne process in 1725, to shew he did not require to be kept in the same strictness as on execution. The care of the gaoler is to keep a safe custody, but not so great on mesne process: if a man in execution for 1,000*l.* was to escape, he must pay the whole money: no action of debt lies on mesne process; then the gaoler is not answerable, the gaoler could not pay the debt, the gaoler is no further answerable than for the person; so that the terror was not so great, the danger was not so close, and that may be the reason that the coroner does not sit upon prisoners in mesne process, because the hazard is not so great; and he says, that about Hillary term 1724 Barnes came in; and that he was a watchman and a runner there.

Farrington apprehends, that Arne came in about the middle of June, and that he was in good health when he came in, and that he never knew him do an ill thing, nor that he would drink; that there was no danger of his breaking prison. That he was put into the strong room in September, and continued therein till the middle of October. When he first came into the prison he lodged with one Robert Shaw, and Shaw threw his bed out of the room; he then put his bed upon a settle, and he lay there till he was carried to the Strong Room.

He did not see Arne locked in the Strong Room, but did see him taken away, and says, that the room was not built above six weeks before the poor man was carried there. That it was so very wet, green, and so much oozing from the mortar, that one might with one's hands strike the drops off the wall; and gave the same account as to the manner, that it was not tiled in, and he was continued there from the middle of September, to the middle of October, and lay in a miserable condition, not only having his own excrements sticking about him, but the feathers of the bed, having opened it and crept into it for warmth. I need not take notice of the situation of the place, that has been fully described. There were only two small holes to let in the air, there was no fire, nor fire-place. He says, that after some time the poor man grew hearse. One of the witnesses says, that he had a shivering hoarseness, and so continued lingering on till he died: before he died he came to a bad hoarseness, and his senses and voice were so far gone afterwards, that he could not speak; then nature failed, he fell away, and death grew upon him, then he grew delirious, and in this poor condition he had nothing but a feather-bed, which a gentleman had lent him, laying in the dirt in his own excrements, and in a nasty condition, and no way left to preserve life, but to cut his bed open, and to lie in the feathers as long as he could; being in this miserable condition, he came into the church more like a feathered fowl, than a human creature, that the feathers stuck all about him; he burst out and came to the church; he was remanded back again, and had no comfort or relief. Farrington, one of the evidences says, that he saw Hopkins and Huggins at the door of the Strong Room, and the door was open, and Huggins looked upon him, and Hopkins and Huggins whispered, and talked together, but he was not near enough to hear what was said, but Huggins shook his head; not only Gybbon but Huggins himself locked him up, with Barnes, and this was at the time when the door was open, and Barnes kept the key. It was when the door was open, and Huggins looked in upon him, the discourse you will best judge of; his (meaning Huggins) eyes were there fixed. This is very strong upon the prisoner; whether Huggins before knew of it,

Huggins knew of it then, and then might have saved his life; he might have taken the proper care as he ought to have done of him; if Mr. Huggins had done his part, it would have been no objection to Huggins, and if he did nothing at that time, you will judge how far he did pity the man, whether he did know of it before or no, if he was privy to his being kept in that duress, he had sufficient power, and nothing could bar him of having the superior power, for, in the presence of his deputy, he might act; he that put the man under duress not only was told of it, but saw the misery of it; it makes him in law a principal. That place was so damp, that he himself was in there, but three days, and was almost killed in that time. It made his legs swell, and he had been dead, if he had continued there longer. That man died there from the noisomeness of the place.

Fulthorpe says, that Arne and another prisoner were drinking with him a pot of ale (that gentlemen, don't create great anger in the Fleet.) The witness says, that he paid five shillings per week for boarding, and Barnes came up and seized upon Arne and carried him away, but he did not go to follow him; that Arne was very quiet, and he went the next day to see how it was with him, and there were loose boards, which he apprehended to lie on the common sewer, and the walls were all green and wet, and that it was a miserable place: that the man continued six or seven weeks in this Strong Room.

He says, that he saw Huggins come twice into the Fleet, while Arne was in the Strong Room, but whether it was the time that Farrington was there can't be certain; but that Huggins, Hopkins, and Barnes were there, and were looking upon him. When he came there a second time, he can't say that Huggins came to look on Arne, for that he stayed there only half an hour, to take care of the prison and prisoners; that Arne was in health at, and before the time he was put in there, and that he went to give him some drink at the hole, and the stench of the room was so great that it was like to strike him down. He says that to the best of his judgment on viewing the place, that it was impossible for a man to live there. He did see Arne out two or three times, but they turned him in again.

Smith says, that Arne, for whom he had a great concern (which matter is of great consequence, that requires the utmost attention), was carried to the Vine, and then carried to the gaol; that Barnes, who was a servant to Huggins, as Arne was drinking in the cellar without being the least troublesome, seized upon Arne, and carried him to the Strong Room: he lay upon the bare ground, and had nothing to rest him upon; the description of the room that he gives, is, that there was no fire-place, no candle, nothing to ease nature in, such a stink that he was forced to hold his nose, extremely wet, and in no condition fit for any one to lie in; he having no credit with Gybbon, wrote to Huggins several letters, and in one of them mentioned the said state of Arne, and sent it by Robin the porter, he sent it by the common porter, but did not prove that Robin delivered the letter to Huggins, or brought an answer, and was of opinion, this barbarous treatment was the death of the poor man.

Robin was examined as a witness, he said he did not know what the letters were: he did what he was paid for, but can't take upon him to swear, whether the letters were delivered to Mr. Huggins, and what the contents of the letters were; there is a chasm in that part.

Paine says, that Arne was in a good state of health, that he might drink, but there was no ground or occasion to put him in the strong hold, that Barnes was servant to Gybbon, and that Gybbon acted as chief-warden, and that the prisoner at the bar did not act. He gave an account how the room was built, that it was very damp, that Arne grew hoarse, and lost his voice; and he believes any person could not be there without danger of losing his life.

Bouch says, that he was turnkey, and gave an account when the strong room was built, and apprehended it was built by Huggins; that Huggins did come to the lodge, but can't say whether he came into the prison or no; he says, that the poor man died after in October, and that he carried a letter to Mr. Huggins, wrote by one of Arne's friends: that he gave it to Huggins, who opened it, and read it, who said, that he must leave it, and Mr. Huggins would acquaint him with the nature of the rules; he further said, that Mr. Huggins did not act singly and solely, and I don't know how indeed he could, I don't know how he could controul a principal, he might controul a deputy; he says, he did apply to Mr. Huggins to be turnkey, and was very often in the prison, and saw Arne, and gave an account of his being in that languishing condition, and that he died there; the chief of his evidence is, that Mr. Huggins came often to enquire about the affairs of the gaol, and that he was still principal warden, and if any thing wrong was done, he ordered it to be rectified.

Tucker was employed to make the iron work, but don't say by whom ordered.

Mrs. Le Pointz says, she saw Arne in the Strong Room, and when Mr. Huggins was last there, she saw him on the Bare, and that he could not come in or out, without coming near the strong room, and that it was impossible for him to go out upon the Bare, but to go by that room.

For the prisoner, he does insist upon several ways of making his defence. He says this was in 1725, and therefore it is not to be expected, that he can give so good an account as if it had been a more recent prosecution; this thing had slept for three or four years. It was taken notice by Mr. Attorney how this came now by a strict examination, and a very honourable one, and that he mentioned was the reason it could not escape the eyes that were so diligent; that is the answer to that part of the defence. Another part of his defence is, whether he was

made warden at the time, that the letters patent bore date? He takes notice of his coming to an agreement with Mr. Gybbon, who, he says, had the sole management, he was willing to put himself into a state of inaction.—He did agree at first for the prison only for half a year, and then Gybbon, willing to take the whole rents and profits, was to pay together 900*l.* per ann. which was agreed on. Another part of his defence that he made, was, that he entrusted Mr. Gybbon with the management of the office; he had so little knowledge, that he had never seen nor heard of the name of Arne, nor never knew that there was such a prisoner.

Another matter insisted upon, that there were three witnesses, that were all mistaken, and that no credit at all ought to be given to them; and it won't be very material. Some of his witnesses say, that they never heard of his being there, and others that he was not at London, looking upon it, that he was not concerned at all. To prove this he calls witnesses, and called Mr. Tanner to read the Insolvent Act, that deputies were to make returns of prisoners. To prove the list of the prisoners was returned by Mr. Gybbon, he would have produced an affidavit, but it was not sufficient to be proof. Mr. Tanner was asked, whether at the time the list was delivered, Mr. Huggins was not warden? He did not think fit to answer that question, and I did not press it very far: but I shall shew you Gybbon was only deputy. The next witness that was called was Jeffreys, to shew how far Gybbon was concerned in the office; he was by when the agreement was made, and signed by Mr. Huggins, and when it came to be a question, when that was to be read, whether it was an agreement or not, he could not tell where it was, it was out of his power, he could not produce it then. Jeffreys said it was an acquittance: upon that Huggins endeavoured to get the paper, and that this was a copy of it taken, and that it was a true copy, then that receipt was proper to be read: when that came to be read, you will consider what it was; it was neither lease nor deputation, only an agreement for a lease, what rent was to be paid, and how long he was to have it. It was a receipt for a deposit of 1,000*l.* wherein there was a proper covenant and clauses to be performed. I don't go to argue the validity of it, if a man had agreed to hold land for three years, that would be a lease; and if Huggins and Gybbon had agreed certainly for three years, that would have been a grant of the office, and a sufficient evidence of a deputation, but it is nothing but an agreement for a deputation, or a lease. In strictness of law it is nothing; though this may not be in point of law, it is sufficient between them for Gybbon to be deputy in fact, who came with the good liking of Mr. Huggins and with his consent; that he was deputy in fact still carry with you, and that Huggins was chief in the office, and had the controul thereof. That a deputy is controulable by the principal, and when the principal is there no man can make a deputy to execute the office. This was dated 26 June, 1723, for 1,000*l.* and 900*l.* per annum.

The next was Mr. Welland; there was a good deal said by him about the coroner's sitting upon dead bodies, not very much to the purpose; and then he gave an account that Gybbon did act during four years, but what was become of the repairs, who was to do that, I do not find; as to the repairs and taxes, it is not settled to this day. If upon the foot merely from the trust and confidence one had of the other, if all the expences were paid by Mr. Huggins, then he built the strong room; however he was liable to the charge. You will consider, gentlemen, by what law this can be built; it was putting a show of cruelty in this office, which they were no way justified to build: things for torment, and not for the service of the custody, things of that kind are not to be done at the will of the gaoler, it always ought to be done by order of their superiors; if in the city, the act must be done by the mayor and aldermen; if not, by the common-council: if in the county, it is not in the power of the gaoler, it must be done by the sessions; there are so many gentlemen of the sessions to see what is proper to be done and decent for Christians, that there is no danger of erecting any place of torment. I do not know what authority either Gybbon or Huggins had to build it; Huggins might have pulled it down, and Gybbon would have been answerable for the contempt. There is no agreement appears between Huggins and Gybbon that would clear it up; besides, as to the repairs we are left in the dark still.

Welland says, that in the year 1725, Arne was stark naked before he was put in the strong room. Huggins urged, that it was not designed for any such purpose. Welland does not deny, but that there were other places in the gaol to put him in: this was in the very year when the act passed for insolvent debtors, when fifty or sixty were discharged on the 7th of September, before that time.

Another part of his defence is, that the room was neither his nor Gybbon's to answer for; that there was a court of the prisoners, who formed themselves into a jurisdiction, and made what order and rules they pleased, and that they were so troublesome that Gybbon was afraid to go into the gaol: I do not know what excuse this is, it would have been very fit for them to have applied to another place: and though Welland does say, that there was a request of some of the prisoners to have him put into the strong room, all the terror this man put any body in, was flinging a brick-bat on the Bare, not aiming at any one, and this forced them to put this man under the restraint of the strong room. It was the request of nobody, it was nobody did it; it was very much to have such a combination, but every body knows that Welland is an attorney, and has been taken notice of in the courts. They

have not given any account of any man's being put in there before. This man being in a sick condition, Welland was desired to go to the upholders at Exeter-change, they are very compassionate, and do assist people of their fellowship; and he had some relief given him. He says, that he never knew Mr. Huggins give any direction in the management of any matters after Mr. Gybbon became deputy, and gave an account as to the coroner's sitting upon dead bodies; that he took Barnes not to be Huggins's servant, and Gybbon therefore was answerable for the act of Barnes. He never so much as saw Mr. Huggins and Barnes together, and that he did not so much as know any rule-money paid to Huggins; that Gybbon generally was paid the fees, for Gybbon paid 900*l.* per annum to Huggins. Whether a man takes the fees all at once or not, it is the same thing.

Green says, that he applied to Mr. Gybbon in order to have a room, and Mr. Gybbon could not go into the gaol for fear of this court of the prisoners; but at last says, that he did get himself a room in the house, and did lie there; that he apprehended Gybbon was the principal, and did act.

The next witness was one Howard, who was a prisoner there before Arne came in; he was first carried into the spunging-house, and at last brought into the gaol. When he came there he had nothing to lie on, and Howard had a bed to sell, which Arne had a mind to purchase. Howard, gentlemen, did not give an account of any freeness Arne was guilty of; but that Arne offered more for the things than he sold them for: whether Arne was not in haste for them, or whether offered more for them than they were worth, I cannot think an argument of madness.

Woodcock gave an account of the poor man's being there, that he was let out, and after a little time drove in again, and during all this time he never saw Huggins there; for he should have seen him if he had come. Gentlemen, Mr. Huggins put it hard upon calling these people.

Humphreys says, that Arne was a man of some substance, and said that he did no harm nor hurt; that he did some odd acts, and then he was carried and put in the Strong Room in the manner you have heard, and staid there till he died; and never saw Huggins there till about the middle of September.

Louden says, that he kept a boarding-house, and boarded a good many there at 5*s.* per week, and Arne was one; that afterwards, when he came to quit the house and was carried into the Strong Room, he was desired by the Upholders Company to take some care of him; that the key was kept by Barnes, so that there was a difficulty to carry and supply him with provisions; that he said he would give it up unless he had the key; that he had no authority to let him out; and that he did keep the key till three days before he died, and then delivered it up. He has given an account of that act of Arne's running about with the feathers, and said he never saw Huggins and Gybbon there, at the time that Arne was in the strong room; and that Huggins was warden, and Gybbon was deputy. He has given an account of the room when built, and of the sad condition of it.

Gentlemen, Mr. Gwyn said the same; but that he never saw Huggins there.

Another matter that Mr. Huggins insisted upon, to prove the evidence not to be true, was, that he was not in town.

The first witness that he called was his son, who said, that from the first of September in that year his father came down to him in Hampshire, and continued till the 14th or 15th, and staid 14 or 15 days; I do not find but it might be after that that he was at the Strong Room.

Smith proves the same, and that he was down there before in August.

Knight said, that he was there in August.

Bird, servant to Mr. Huggins, junior, said, that he was there in August seven days; and that he was there the 1st of September likewise.

Tucker says, that he was employed by sir George Oxenden, and that he sent his coach with Mr. Huggins from Wittenham to Henley-upon-Thames about the 15th of September.

Sir George Oxenden agrees with the servant; and says, that on the 17th or 18th the prisoner came to his house, and went away the 18th or 19th.

I must observe to you, gentlemen, that from that time to the death of this man, there is no account given to you where he was.

Hopkins gave evidence to shew the witnesses mistake. Farrington swore, that when Huggins looked in, Hopkins was with him at that time; and Hopkins said, that he went out of town to Oxford, and did not return till the 14th of October. Huggins came from sir George Oxenden's about the 18th or 19th, and I do not hear from any body that he continued out of town; and it is natural to believe he came to town, for Henley is the road to come up to London. Hopkins said, he did not go out of town till the 27th of September, so that from the 19th to the 28th both might have been at the Strong Room; and I believe this was the time, may be it may be the 19th. Hopkins did not go till the 27th. What I must leave to you, gentlemen, is, that this witness said, it could not be true that he and Huggins could be together. There were about ten days from the 17th to the 28th, and it appears they were both in town; and it does seem to come pretty nigh the time. You see, gentlemen, Huggins came again a second time; the first time does seem to tally, and run very well, if not both.

Gentlemen, you must take this with you, whether Hopkins does not confirm what Farrington says, though he said he was out of town. Farrington says, once upon a time, he was at the Strong-Room door; the door was open,

and that he did see the witness, (meaning Hopkins) and that Arne crept into the feathers of his bed; and Hopkins said, that he was there, but he could not see the feather-bed; that he was in something half up and half naked, which evidence rather confirms than weakens the evidence. He (Hopkins) does contradict another matter; that he does not know that Mr. Huggins was there at the room, or that he ever saw him there; that he (Hopkins) was at the strong-room door, and that he was in the same manner as the witness that was there said. And he does contradict, that Barnes was a servant of Huggins's, and says that Huggins was not to be at the charge of executing the office. All that Hopkins says, is, that he was Clerk of the Inquiries, and that he did apply to Mr. Huggins, and that Mr. Huggins did not think fit to put him in, but he sent him to Gybbon to be Clerk of the Inquiries. But that he was clerk to Mr. Huggins at his home, he did own it; but in a very extraordinary manner, that he took him to do his business for nothing. He said, that the management of this office was not solely and clearly under Mr. Gybbon; but, gentlemen, as to things of consequence, there Mr. Huggins was called in, so that it appears that there was a view of his looking after the prisoners; and it was very well, gentlemen, that he should, for he was the first resort upon all occasions. Hopkins says, that he does not remember any discourse about Arne with Mr. Huggins, but if he was desired he believes he might do it; but does not remember he was desired to do any thing as to Arne. It seems, gentlemen, that he was examined in a strict manner, and a wise enquiry made, as appears by an examination taken before Edward Hughes, esq. which was produced, and shews, that he had given evidence to you contrary to that examination. In that he says, Huggins was warden; and that he (Hopkins) went from the Fleet to him every day, and told Huggins whatever was considerable that was done there; and told him of Arne. He agrees, that there was a discharge of prisoners on the 7th of September, 1725, when 50 or 60 were discharged; and cannot say, but when they were gone, but that there was room enough to put Arne in. He denies that Bishop and Gybbon spoke to him about Arne, which Bishop swears.

The next witness is Mr. Arne, who was a relation to the deceased; he says, that the first account he received of his miserable condition was about a week or ten days before the poor man died; he then went to see him, and found him grovelling at the door, that he was not only become hoarse, but almost speechless: he was crept down and fallen at the door, and lay like a dog. He found him, upon opening the door, in a bad condition: his voice was so far gone, that it was a difficulty to understand him. He had a gold watch, and he did get out of him by half words and sentences where it was; and said, that the place was not fit for any creature whatsoever, neither sick nor well; and that he could not have lived a week in it. Gentlemen, I asked one of the witnesses, who appeared to be a very strong man (Louden), if he had been there half the time, would it not have been the occasion of his death? Who owned that it would.

The observation my brother Carter made is very just: that if a strong man, being put into that filthy, vile place it would kill him, to put into such a place him that wanted health, death was more sure. If he was a weak man, there was no danger of his escaping, no danger of going out.

As to his being in that room being the occasion of his death, there need not much be said.

And what is said by Mr. Huggins, except one thing, carries little or no weight; and there is only that can deserve your consideration, whether he did die by the cruelty of Gybbon or Huggins? That he did die by duress, it is not to be supposed to the contrary.

That in point of law, wherever there is a deputy appointed, the superior must answer; for had a prisoner of 20,000*l.* escaped, Mr. Huggins must have paid the money.

In criminal cases I do not think, that the warden or any other officer should answer for murder, unless he was privy and consenting. If this sole act was Gybbon's, and Huggins no ways consenting, I think the murder lies upon Gybbon, not Huggins. Though this was the act of Gybbon and Barnes, whoever has a hand in it, and the authority and power as he had, if it is true that he saw him, and he would not give a helping hand to assist him, the excepted rule of Scripture would be true, 'That he that is not for me must be against me:' and if he was any way privy to the carrying him and confining him there, he must answer for the murder both in this and the next world.

If this is the act of Gybbon solely, Huggins is not to answer for it; but if Huggins was privy, and he was warden, he could and ought to have relieved him.

One thing more, in the latter part of the defence Mr. Huggins made for himself, was, to call vast numbers of gentlemen of the first quality; sir George Oxenden, sir John Hynde Cotton, in all about twenty he called to his character and credit; and if these gentlemen are not sufficient, I do not know what will be: his character has been fully established; but I must observe to you, whatever the character a man bears, if he is guilty of that act which destroys his character, his character goes for nothing: if there was difficulty or great doubt happened upon circumstances, whether Mr. Huggins was guilty or not, then it was the constant practice to be governed by a character: I think nobody can have a better; he has had a very great character given him.

Not long since a person produced twenty-seven people, that gave him a character, with no comparison to this, only the greatness of numbers.

Notwithstanding which, it there was not doubted, he had committed the fact; and the

jury very justly brought in their verdict, guilty.

Verdicts, in convicting of people, are to be founded upon the evidence that the jury has had before them: and I hope I do not express myself so for them to found themselves upon any thing I have said; for they will determine according to the evidence that has been before them.

Mr. Attorney General produced three witnesses, that came to nothing.

I must take notice of one piece of evidence given by Mr. Hughes, a gentleman of probity and distinction, one of the committee appointed by the House of Commons. He tells you, that when Mr. Huggins was under examination before the committee relating to escapes during the time he was warden, Huggins confessed so many had escaped, he could not remember them all: he owned one Oliver Read had escaped, and was retaken; and that he himself sent to Newgate for irons, and ordered Read to be stapled down and ironed; and that he owned he paid 500*l.* to Read's creditors for the escape of Read: This was whilst Gybbon acted as deputy.

Mr. Huggins does give this answer to that; that Hopkins proved that Gybbon acted, and so he was warden in law; I cannot tell what condition Gybbon was in, and what security he had given; Huggins was liable for all escapes.

I have taken pains to state the evidence to you as fully as I can; and I hope you will consider it; and that God will direct you to do for the best.

Then one was sworn to keep the Jury, and they withdrew, and Mr. Justice Page and Mr. Baron Carter left the bench; and Mr. Serjeant Raby with the lord mayor remained there; and in about two hours and an half the Jury returned.

Clerk of Arraigns. Are you all agreed in your verdict?—*Omnes.* Yes.

Clerk. Who shall say for you?

Omnes. Foreman.

Clerk. John Huggins, hold up thy hand. (Which he did.) Look upon the prisoner: Is he Guilty of the felony and murder whereof he stands indicted, or Not Guilty?

Foreman. We are agreed to bring in our verdict special to the Court.

Att. Gen. What is there doubt in point of law?

Serj. *Raby.* What that doubt is, must be referred to the Court.

Foreman. Was there any medium between bringing him in Guilty or Not Guilty?

Serj. *Raby.* You may find the fact specially, and refer the special matter to the Court. If any matter of law arises upon that doubt, it will be explained. You may give a general verdict in order to refer that to the judgment of the Court. You must agree upon the fact; you must state the special matter: It is usual to state the point of law that you doubt in. If you have any doubt as to the law, that you must refer to the Court; but as to the fact, you must determine yourselves.

Att. Gen. What is it makes the question doubtful?

Serj. *Raby.* The jury do believe the prisoner in some measure guilty, but not of the whole indictment.

Foreman. We cannot find any of the evidence come up to shew he was aiding, abetting, and assisting Barnes in putting him into the room.

Serj. *Raby.* Call over the jury.

Cl. of Arr. Answer to your names. (Which they did.) Are you all agreed in your verdict? Is John Huggins Guilty of the murder and felony whereof he stands indicted, or Not Guilty?

After considering some time among themselves, the Foreman spoke as follows:

Foreman. We agree the prisoner was accessary to the murder committed upon Edward Arne, but that it was not premeditated in him; that he has been privy to the cause of this man's death, and might have prevented it. Two witnesses swore, that Mr. Huggins was at the door of the dungeon, and saw Arne there; and, as he did not discharge him at that time, he was accessary to that.

Serj. *Raby.* If he was privy, he was guilty of that: if he was privy and consenting, if he did concur in that act, he is guilty; for it will imply malice.

If he died by duress, and he was concurring and consenting to it, then he was guilty of this act, in that he had power to redress it, and did not. If he was privy, you must consider if he was concurring.

Att. Gen. If he was privy and consenting, it does imply it.

In all special verdicts the jury never find malice.

In no special verdict they find malice.

Foreman. Several of us don't think him guilty of the malice.

Att. Gen. The law will imply the malice.

Serj. *Raby.* You are to consider and find the fact.

Foreman. We all agree that Arne died by duress; there are two witnesses to prove that; but that the prisoner had no forethought.

The Jury again considered among themselves; but not immediately agreeing, withdrew, and staid out some considerable time, and then returned.

Clerk of Arraigns. Are you all agreed?

Foreman. "We are agreed, that there is sufficient evidence to prove, that they saw Mr. Huggins at the strong room.

"We agree that he was warden of the Fleet prison; and that he was head-warden at the time the fact happened, as mentioned in the indictment; and that Gybbon was deputy, and acted as such.

"That James Barnes appeared to us to be servant to Gybbon, and was employed and acted under him in taking care of the prisoners,

and had the custody of them; and particularly of Edward Arne."

Att. Gen. Mr. Tanner, you must write down the verdict of the Jury.

Serj. *Raby.* Get pen, ink, and paper ready. Gentlemen, you must tell him what he is to write: (which is as follows) viz.

That James Barnes, at the time mentioned in the indictment, made an assault upon Edward Arne, being then a prisoner in the Fleet prison; did take and imprison him without his consent, *prout* in the indictment.

Att. Gen. They will find the description and situation of the room as in the indictment; they can have no reason to doubt of that.

That James Barnes and John Huggins, at the time of the imprisonment of the said Arne, knew that the room was newly built; and that the walls were moist and damp, as in the indictment.

Mr. *Strange.* Mr. Huggins did not know it at first, at the time he was there, when the door was open.

Att. Gen. Are the jury satisfied that Mr. Huggins knew the state and condition of the room during the time Arne was there?

Foreman. We agree he saw the building, and that he must know it an unwholesome room, as described in the indictment.

Att. Gen. Let me see the indictment. (Which he did, and read the words as to the description of the strong room.) He must know it when he was at the Strong Room door.

Serj. *Darnell.* It is necessary that the jury should know what the Attorney reads.

Att. Gen. Mr. Tanner has twice taken it. How long (speaking to the jury) before the death of Arne do you find the prisoner knew the condition of the room?

Foreman. I believe it to be fifteen days at least before the death of Arne.

Att. Gen. That during this imprisonment and detention in this room, the said Arne, by reason of the duress of such imprisonment, became sick and languished there, and died, *prout* in the indictment.

Huggins. The jury are upon their oaths, will they find him dead by my means?

Mr. *Strange.* I desire the fact may be found as it is.

Att. Gen. Mr. Tanner mind, that on the 7th of September he was aiding, abetting, and assisting James Barnes.

Foreman. We apprehend the man continued from the 7th of September, and we apprehend he died about the 23d of October.

Att. Gen. That John Huggins being principal warden during the imprisonment and detention of the said Arne, was present at the said room, and saw Arne in that room under the duress of that imprisonment; and that he being present, the room was locked up with the said Arne in it.

That fifteen days before the death of Arne, John Huggins being then warden of the Fleet, and Mr. Gybbon deputy-warden, he saw Arne under the duress of that imprisonment; and the said Arne was confined in the said room, and the said Huggins being then present, he was locked up by James Barnes, and continued in the said confinement.

Mr. *Strange.* That is not according to the evidence. It should be found thus:

That during the imprisonment of the said Arne, and fifteen days at the least before his death, John Huggins being then warden of the Fleet, and the said Thomas Gybbon, deputy and acting warden, was once present, and saw the said James Barnes lock up the door of the said room, the said Arne being therein imprisoned.

And at the time Huggins turned away, James Barnes locked to the door; and Arne continued under the said imprisonment therein, until the time of his death; and the jury don't find, that Huggins knew the said Arne was in the strong room when he was first put in there.

Att. Gen. I insist upon adding the words, 'aiding, abetting, and assisting.' And 'that Huggins knew of the badness of the room.'

Mr. *Strange.* They don't find, that during the whole time Arne was there, Huggins knew of the badness of the room.

Att. Gen. The jury cannot find what they don't know.

Foreman. We find the letters patent constituting John Huggins, esq. warden of the Fleet, *prout* in the indictment.

That during the time that Gybbon was deputy-warden, Huggins acted as warden.

Mr. *Strange.* That does not appear.

Att. Gen. Who sent for irons from Newgate?

Ask whether or no they do find, that at the time Gybbon was deputy-warden, Huggins acted as warden.—Beavis said in 1725, Hopkins came from Huggins about business; that at the same time, during the time that Gybbon acted as deputy-warden, John Huggins acted as warden.

The Verdict was removed, at the prayer of Mr. Attorney, into B. R. and there argued by Mr. Willes and Serjeant Eyre; after which, it was argued at Serjeant's-inn-hall in Chancery-lane, before all the judges, by Serjeant Cheshire, Mr. Attorney, Mr. Solicitor, and Mr. Willes, for the king; and by Serjeant Darnell, Serjeant Eyre, Serjeant Hawkins, Mr. Peere Williams, Mr. Strange, and Mr. Foster, for the prisoner. But as every thing insisted on by either side, is taken notice of in the Opinion delivered by the lord chief justice Raymond, it will not be necessary to state the arguments of counsel.*

Mich. Term, 4 Geo. 2 Regis, B. R. 1730.

REX *ver.* HUGGINS.

Raymond, Chief-Justice.†

This was a Special Verdict, found at the Old Bailey, on an indictment of murder against James Barnes and John Huggins. The in-

* Strange's Reports, vol. 2, p. 883.

† Ld. Raymond's Reports, vol. 2, p. 1574.

dictment sets forth, "That John Huggins, from the 1st day of October, in the 12th year of the late king, to the 1st day of January next following, and long before and after, was warden of the prison of the Fleet, &c. and that James Barnes was, during that time, servant to John Huggins, and employed about the care of the prisoners; and that James Barnes, 'existens persona crudelis naturæ et immanis 'dispositionis erga prisonarios in eadem prisona 'existentes,' on the 1st day of November, in the 12th year, &c. made an assault upon one Edward Arne, then being a prisoner in the same prison, under the custody of the said John Huggins, and him the said Edward Arne, then and there, with force and arms, &c. unlawfully, feloniously, wilfully, and of his malice aforethought, and without the consent of the said Edward Arne, took, and him with force and arms, &c. to a certain room, within the prison aforesaid, then newly built, unlawfully, &c. conveyed and led, and him the said Edward Arne, with force and arms, &c. in the said room, for a long time, to wit, for the space of six weeks, then next following, unlawfully, &c. imprisoned and detained, and him the said Edward Arne, then and there, with force and arms, &c. for all the time last mentioned, in that room, 'absque solamine ignis necnon sine 'aliqua matula, scaphio, vel aliquo alio hujus- 'modi utensili,' unlawfully, &c. forced to remain and be (the walls of the aforesaid room, made of bricks and mortar, at the aforesaid time of the imprisonment of the said Edward Arne, in the same, being very moist, and the room aforesaid being situate over the common sewer of the said prison, and near the place 'ubi sordes et fimus prisonæ predictæ necnon 'excrementa prisonariorum predictorum ad- 'tunc usualiter posita fuerunt,' by reason whereof the room aforesaid then was very unwholesome, and greatly dangerous to the life of any person detained in the same.") And the indictment further sets forth, "That the said James Barnes and John Huggins, at the said time of the imprisonment of the said Edward Arne in that room, well knew that the said room had then been newly built, and that the walls of that room, being made of bricks and mortar, were then very moist, and that the said room was so situate as aforesaid." And the indictment further sets forth, "That the said Edward Arne, during the imprisonment and detaining aforesaid, in the said room, viz. the 7th of November, &c. by duress of the same imprisonment and detaining, became sick, and thereby from the same 7th day of November, until the 7th day of December, then next following, in the room aforesaid, languished, on which said 7th day of December, the said Edward Arne, by duress of the imprisonment and detaining aforesaid, in the room aforesaid, died," &c. The indictment further sets forth, "That the said John Huggins, being a person of a cruel nature, and savage disposition, and a grievous and inhumane oppressor of the prisoners in the same prison, under his custody being, during his said imprisonment and detaining of the aforesaid Edward Arne, in the room aforesaid, viz. the said 7th day of November, &c. and divers other days and times, during that imprisonment and detaining, at London, &c. feloniously, wilfully, and of his malice aforethought, was present, aiding, abetting, comforting, assisting, and maintaining the aforesaid James Barnes, feloniously, wilfully, and of his malice aforethought, the said Edward Arne, in manner aforesaid, to kill and murder: and so the jurors aforesaid, upon their oath aforesaid, say, That the said James Barnes and John Huggins, the said Edward Arne, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the peace," &c.

On Not Guilty pleaded by the prisoner, Huggins, the jury find a Special Verdict, as follows: "That queen Anne, by her letters patent, bearing date the 22d of July, in the 12th year of her reign, granted to John Huggins, named in the indictment, the office of warden or keeper of the Fleet, and keeper of the prison, and gaol of the Fleet, situate, &c. and of the prisoners then committed, or to be committed to the prison and gaol of the Fleet aforesaid; and the capital messuage for the custody of the prisoners, and thirteen messuages in the parish aforesaid, and all other messuages, &c. and all that rent, fee or salary of 7*l.* 12*s.* 1*d.* yearly, payable and to be paid by the hands of the sheriffs of her city of London, and her county of Middlesex, &c. and all other rents, &c. and him the said John Huggins, warden or keeper of the Fleet, and of the prison and gaol of the Fleet aforesaid, for herself, her heirs and successors, did make, ordain, and constitute, by the same letters patent: to have, hold, enjoy, and exercise the said office, messuages, lands, &c. to the aforsesaid John Huggins, by himself, or by his sufficient deputy or deputies, for and during his natural life, in as ample manner and form as sir Jeremy Whichcot, baronet, or any other warden of her prison of the Fleet aforesaid, the said office and other the premisses, or any of them, had before had, held, used or enjoyed, or ought to have had, held, used, or enjoyed; with the usual averments: and they farther find, that the said John Huggins, 1st of September, in the 12th of the late king, and for divers years before, and continually from thence after, until the 1st of January then next following, was warden or keeper of the said prison of the Fleet; and that one Thomas Gybbon for all the same time was deputy of the said John Huggins in the said office of warden or keeper of the prison of the Fleet aforesaid, by the same John Huggins appointed, and acted as such his deputy: and they further find, that James Barnes, in the indictment named, for all the same time was servant of the said Thomas Gybbon, deputy of the said John Huggins, in the same office so as aforesaid being, and acted under the said Thomas Gybbon, &c. in and about the care of the prisoners committed to the said prison, and

in the same prison being, and particularly in and about the care of Edward Arne, in the indictment named, then and there a prisoner in the same prison being: they farther find, that the said James Barnes, the 7th of September, in the 12th year, &c. in and upon the said Edward Arne, a prisoner in the same prison then as aforesaid being, in manner and form as in the said indictment is specified, made an assault, and him the said Edward Arne, then and there without his consent, in manner and form as in the said indictment is specified, took, and him the said Edward Arne to a certain room within the said prison then newly built, in the same indictment mentioned, without his consent, in manner, &c. conveyed and led, and him the said Edward Arne, in the said room for a long time, to wit, for the space of forty-four days from thence next following, without the consent of him the said Edward Arne, in manner, &c. imprisoned and detained, and him the said Edward Arne, then and there for all the time last-mentioned in that room, 'absque 'solamine ignis necnon sine aliqua matula, 'scaphio, vel aliquo alio hujusmodi utensili,' to remain and be without his consent in manner, &c. forced: and they further find, that the walls of the said room were made of bricks and mortar; and at the said time of the imprisonment of the said Edward Arne in the same were very damp; and that the said room was situate over the common sewer of the said prison, near the place 'ubi sordes et fimus pri-'sonæ prædictæ necnon excrementa prisonario-'rum prædictorum adtunc usualiter posita fue-'runt,' by reason whereof the said room was then very unwholesome, and greatly dangerous to the life of any person detained in the same: and they further find, that the said James Barnes, at the said time of the imprisonment of the said Edward Arne in that room, well knew that the said room had then been newly built; and that the walls of that room were made of bricks and mortar, and were then very damp; and that the said room was situate so as aforesaid: and they further find, that during the said imprisonment, and detaining of the said Edward Arne in the said room, to wit, by the space of fifteen days at least before the death of the said Edward Arne, the said John Huggins knew that the said room had been then newly built, and that the walls of that room were made of bricks and mortar, and then were damp; but whether the said John Huggins knew, that on the said 7th day of September, in the 12th year, &c. the jurors know not: and they further find, that the said Edward Arne, during the said imprisonment and detaining of him the said Edward Arne in the said room, to wit, the 10th day of the same month of September, in the 12th year abovesaid, by duress of the same imprisonment and detaining, became sick in the said room; and thereby from the same 10th day of September, in the 12th year abovesaid, until the 20th day of October then next following, in the said room languished; on which said 20th day of October, in the 12th year abovesaid, the said Edward Arne, by duress of the said imprisonment and detaining in the room aforesaid, died, to wit, at London, &c. And they further find, that during the imprisonment and detaining of the said Edward Arne in the said room, to wit, by the space of fifteen days at least before the death of the said Edward Arne, the said John Huggins was once present at the said room, and then and there saw the said Edward Arne in that room, under the duress of the said imprisonment, and then and there turned away; and the said James Barnes locked the door of the same room, at the same time in which the said John Huggins turned away as aforesaid (the same Edward Arne, at the said time in which the said door was locked by the said James Barnes, being in the said room under duress of the said imprisonment.) And they further find, that the said Edward Arne, in the said room, under duress of the said imprisonment remained, and was continued from the said time in which the said door of the said room was so locked by the said James Barnes as aforesaid, until the said time in which the said Edward Arne so as aforesaid died: and they further find, that the said John Huggins sometimes acted as warden or keeper of the said prison, during the time in which he the same Thomas Gybbon was deputy of the said John Huggins in the said office as aforesaid; but whether upon the whole matter," &c.

The Record of this Indictment and Special Verdict being removed into the King's-bench by Certiorari, it was argued on Tuesday the 16th of June, 1730, by Mr. Willes, for the king; and Mr. Serjeant Eyre, for the prisoner. And on the last day of Michaelmas term following, after the case had been argued on the 14th of November, at Serjeant's-inn-hall, before all the twelve judges, the lord chief-justice (Raymond) delivered the opinion of the judges.

In this case two questions have been made, first, What crime the facts found upon Barnes in the Special Verdict will amount to? Second, Whether the prisoner at the bar is found guilty of the same offence with Barnes?

First, As to the first question it is very plain, that the facts found upon Barnes do amount to murder in him. Murder may be committed without any stroke. The law has not confined the offence to any particular circumstances or manner of killing; but there are as many ways to commit murder, as there are to destroy a man, provided the act be done with malice, either express or implied. Hale P. C. 46, 3 Inst. 52. Murder is, where a person kills another of malice, so he dies within a year and a day. Hale P. C. 43. And malice may be either expressed or implied. In this case the jury have found the malice express; for the facts charged on Barnes are laid in the indictment to be 'ex malitia sua præcogitata,' to wit, that he, having the custody of Arne, assaulted him, and carried him to this unwholesome room, and confined him there by force against his will, and without his consent, and without pro-

per support, 'ex malitia sua præcogitata;' by means of which he languished and died. And the jury have found that Barnes did all these facts, 'modo et forma prout in indictamento 'prædicto specificatur.'

But upon finding of these facts there is also a plain malice arising in construction of law. Hale P. C. 46. The law implies malice in respect of the person killing. If a prisoner, by duress of the gaoler, comes to an untimely end, it is murder. It is not necessary to make it duress, that there should be actual strokes or wounds. And in 3 Inst. 35, the putting into a dungeon is duress, or into a place too strait, 3 Inst. 91,' pluis arctment que devoit,' Cromp. 90. The untimely end, mentioned by lord chief justice Hale, is what is meant by Briton, cap. 11, fol. 18. If a man die in prison, the coroner is to take an inquest upon the view of the body; and if it is found by the inquisition, that the person was brought nearer to death, and farther from life, 'per dure gard del gaoler,' it is felony.

The reasons why the law implies malice in such cases are plain. Because it is a breach of his duty, and of the trust which the law has reposed in him. A prisoner is not to be punished in gaol, but to be kept safely. Flet. 38, Bract. 105. The act also is deliberate. And the nature of the act is such, as that it must apparently do harm. It is also cruel; as it is committed upon a person that cannot help himself. And it is committed by force, and without the consent of the prisoner. So that the charge in the indictment against Barnes is murder; and these facts found in the verdict, as to him, fully maintain the indictment, and amount to murder, But Barnes is not before the Court, he having fled (as it is said) from justice.

Second. The next question is, Whether the prisoner, Huggins, is found guilty of the same offence as Barnes; or how far it appears, by this Special Verdict, that he has been aiding and assisting to Barnes in the committing of these facts?

In the indictment the offence is as strongly charged upon Huggins as upon Barnes. The indictment charges, that the prisoner at the bar, during the imprisonment of Arne in the said room (the situation and condition of which the indictment expressly charges Huggins to have the knowledge of), on the 7th of November, 'et diversis; diebus et vicibus,' during that imprisonment, feloniously, voluntarily, and of his malice aforethought, was present, aiding, abetting, comforting, and assisting the said Barnes, the said Arne feloniously, and of his malice aforethought, to kill and murder, &c. which if found by the verdict, would certainly be murder in the prisoner. But there is a great difference in the finding the verdict. As to Huggins, the jury have only found these facts, viz. That he had the office of warden of the Fleet, &c. granted to him by letters patent of 22 July, 12 Ann. to hold for his life, and to execute by himself or his deputy: That he, 1 Sept. 12 Geo. 1, and before and from thence to 11 Jan. 12 Geo. 1, was warden of the Fleet: That Thomas Gybbon was, and for all that time acted as his deputy in that office: that James Barnes was for all that time servant of Gybbon, and acted under him about the care of the prisoners, and particularly about the care of Arne: then they find, that Barnes assaulted and carried by force the said Arne into the room, and kept him there against his consent, prout in the indictment, forty-four days: then they find the situation and condition of the room, whereby it was very unwholesome, and dangerous to the life of any person kept therein: that Huggins, during the imprisonment of Arne in that room, viz. for fifteen days before Arne's death, knew that the room was then lately built, and that the walls were made of brick and mortar, and were then damp; but whether he knew it the 7th of September, ignorant: that Arne, the 10th of September, 12 Geo. 1, by duress of imprisonment, became sick, and languished to the 20th of October, and then died by duress of imprisonment in the said room: that during the imprisonment of Arne in that room, viz. 'per spatium quindecim dierum ad minus' before his death, Huggins was once present at that room, and then saw the said Arne in that room, 'sub duritie imprisonamenti prædicti ac adtunc et ibidem se avertit,' and the said James Barnes, the same time as Huggins turned himself away, locked the door; the said Arne, at the time when the said door was locked by Barnes, being in the said room, 'sub duritie 'imprisonamenti prædicti;' and that Arne remained under that duress till his death: that Huggins acted sometimes as warden, during the time Gybbon was deputy: but it is not found that he acted as warden during the confinement of Arne.

The judges are all unanimously of opinion, that the facts found in this Special Verdict do not amount to murder in the prisoner at the bar; but as this Special Verdict is found, they are of opinion that he is not guilty. Though he was warden, yet it being found that there was a deputy, he is not, as warden, guilty of the facts committed under the authority of his deputy. He shall answer as superior for his deputy civilly, but not criminally. It has been settled, that though a sheriff must answer for the offences of his gaoler civilly, that is, he is subject in an action to make satisfaction to the party injured, yet he is not to answer criminally for the offences of his under officer. He only is criminally punishable who immediately does the act, or permits it to be done, Hale P. C. 114. So that if an act be done by an under officer, unless it is done by the command or direction, or with the consent of the principal, the principal is not criminally punishable for it. In this case the fact was done by Barnes; and it no where appears in the Special Verdict, that the prisoner at the bar ever commanded, or directed, or consented to this duress of imprisonment; which was the cause of Arne's death. 1. No command or direction is found. And 2. It is not found that Huggins knew of it. That

which made the duress in this case was, 1. Barnes's carrying and putting, and confining Arne in this room by force and against his consent. 2. The situation and condition of this room. Now it is not found that Huggins knew of these several circumstances, which made the duress. 1. It is not found that he knew any thing of Barnes's carrying Arne thither. 2. Nor that he was there without his consent, or without proper support. 3. As to the room, it is found by the verdict, 1. That the room was built of bricks and mortar. 2. That the walls were *valde humidæ*. 3. That the room was situate on the common sewer of the prison, and near the place where the filth of the prison and excrement of the prisoners were usually laid, *ratione quorum* the room was very unwholesome, and the life of any man kept there was in great danger. But all that is found with respect to the prisoner's knowledge is, that for fifteen days before Arne's death he knew that the room was then lately built, *recenter;* that the walls were made of brick and mortar, and were then damp. But it is not found, nor does it appear, that he knew they were dangerous to a man's life, or that there was a want of necessary support. Nor is it found that he directed or consented that Arne should be kept or continued there. The chief thing relied upon is, that the verdict finds, that once the prisoner at the bar was present at the room, and saw Arne 'sub duritie imprisonamenti prædicti, et se avertit,' &c. which, as was objected, made him an aider and abettor. But in answer to this, 1. Being present alone, unless he knew all the circumstances, and directed that Arne should continue, or at least consented that he should, cannot make him an aider or abetter in the murder. Kelynge 113. A man may be present, and be entirely innocent. He may be casually present. 2. The verdict is, 'vidit sub duritie imprisonamenti prædicti.' He might see him, and see him while he was 'sub duritie imprisonamenti prædicti,' that is, while he was in fact under the duress by Barnes; but it does by no means follow from thence, that he knew that the man was under this duress, and it is not found that he did know it. It was objected, that if he saw the man under this duress he must know it, and it was his duty to deliver him. But we cannot take things by inference in this manner. The *vidit* does not imply a knowledge of the several facts that made the duress. If the nature of this duress be considered, it is impossible that it should be discovered by one sight of the man. It consists of several ingredients and circumstances, that are not necessary to be discovered upon sight: for though he saw Arne in the room, yet by the view he could not tell that he was there without his consent, and by force, or that he wanted necessary relief. It is not found that the man made any complaint to him, or that any application was made to him on the man's behalf. If he was there with his consent, it would take off the duress. His seeing is but evidence of his knowledge of these things at best, and very poor evidence too. And therefore the jury, if the fact would have borne it, should have found that Huggins knew that Arne was there without his consent; and that he consented to and directed his continuance there. Which not being done, we cannot intend these things, nor infer them. For in special verdicts in criminal cases the Court must never intend nor infer facts, but judge upon the facts found, and not on the evidence of the facts. Kelynge 78. Whether a man is aiding and assisting in murder or no is matter of fact, and ought to be expressly found by the jury. Kelynge 111, Rex vers. Plummer. It does not appear by the special verdict there that Glover, or the person unknown, who shot off the gun, did discharge it against any of the king's officers, but it might be for aught that appears for another purpose: though upon the particular circumstances in the special verdict there are things found which were a sufficient evidence, that the gun was discharged against the king's officers, and so it might be reasonably intended, considering they were all armed, and in prosecution of an unlawful act in the night, which they designed to justify and maintain by force; especially when the gun was shot off upon the watch-word given; and as the king's officers were endeavouring to seize the wool; the jury thereupon might well have found that the fusee was discharged against the king's officers.* But since they had not found it, the Court were confined to what they had found positively; and were not to judge the law upon evidence of a fact, but upon the fact when it is found. See Kelynge, 118.

This case was so well argued on both sides, that some objections on the part of the crown must be taken notice of, though they are already in a great measure anticipated. As,

1. That Huggins, as warden, though he had made a deputy, had still the care of the prisoners; and it was incumbent on him to see that there was no illegal duress: and to explain what the law means by duress, Brit. cap. 11, fol. 18, was cited. If a prisoner is brought nearer to death and farther from life 'per dure 'gard del keeper;' and Stannf. P. C. lib. 1, cap. 35, If he keeps him more strictly than of right he ought, it is duress. And the duress need not be by the hand of the gaoler; for if it is done with

* I take it that the point on which the case turned was this, it did not appear from any of the facts found, that the gun was discharged in prosecution of the purpose for which the party was assembled. But had it been positively found, that it was discharged against the officer or his assistant, the Court, upon this finding, might, without encroaching on the province of the jury, have presumed that it was discharged in prosecution of their original purpose. In cases so circumstanced, *Res ipsa loquitur*. Foster's Reports, p. 352, *Former Edition*.

his privity, it will affect him. But that is a mistake; for when an officer has power to make a deputy, and has appointed a deputy, he has discharged himself of the whole care: the deputy has the whole power, and it is incumbent upon the deputy till the principal resumes his office. Indeed, when the principal comes to execute his office himself, the power of the deputy ceases; but a bare accidental coming to the place will not determine the deputation, unless he comes with an intent to resume his office. The case of a disseisee coming to dine with a disseisor, or to see his pictures, may be very properly compared to this.

2. It was objected, that this murder was done with his privity; it is found that he saw Arne under this duress, *et se avertit.* He ought to have taken notice of it, and removed him, as it was his duty to take care of his prisoner's life. *Vidit sub duritie* implies that he knew it; and therefore he was privy to the duress of which Arne died.

But his consent to this duress is not found; it entirely depends on his seeing the man, which does not import his consent, for want of his knowledge of the particular facts.

3d Objection. When he was present, the power of his deputy ceased; and then he should have eased the man of this duress; and his suffering him to continue afterwards under the same duress infers that he knowingly suffered him to continue till his death; and his not reforming this abuse implies his consent to it. But these inferences are by much too strong; and the not reforming an abuse does by no means infer a consent to all the consequences of it.

4th Objection. A person absent may be principal in murder, as in the case of poisoning. An infant was laid in a hog-stye, and a sow eat it; and held murder, Palm. 547, 548. The same opinion in the case of a sick man laid in the cold. So in the case of laying an infant under leaves in an orchard, and a kite struck it, Poph. 13. Ow. 98. Hale P. C. 53. There the person who did the act occasioned the death; but in this case no act was done by the prisoner at the bar. There are indeed cases of murder where no act was done by the persons guilty, as the letting loose a wild beast, which the party knows to be mischievous, and he kills a man. 3 Edw. 3. Corone 311. Staunf. 17. Crompt. 22 b. the owner of the beast is guilty of murder. In answer to those cases, there is a difference between beasts that are *feræ naturæ*, as lions and tygers, which a man must always keep up at his peril, and beasts that are *mansuetæ naturæ*, and break through the tameness of their nature, such as oxen and horses. In the latter case an action lies, if the owner has had notice of the quality of the beast; in the former case an action lies without such notice. As to the point of felony, if the owner have notice of the mischievous quality of the ox, &c. and he uses all proper diligence to keep him up, and he happens to break loose and kills a man, it would be very hard to make the owner guilty of felony; but if through negligence the beast goes abroad, after warning or notice of this condition, it is the opinion of Hale (H. P. C. vol. 1, 431,) that it is manslaughter in the owner. And if he did purposely let him loose and wander abroad, with a design to do mischief; nay, though it were but with a design to fright people and make sport, and he kills a man, it is murder in the owner.

5th Objection. It is found that Barnes shut the door in the presence of Huggins; and therefore the continuing of Arne under that confinement will affect Huggins. But there is no consent found to his confinement. What is found is, at most, but evidence of a consent; and even not that, it is only *vidit et se avertit.*

6th Objection. It is not necessary for the jury to find the consent in express words, and if facts are found that amount to a consent, the Court will judge it a consent. As in the case of malice, the Court will judge it upon the facts found; and malice is an act of the mind as well as consent. To this it is answered, that malice is matter of law, and proper for the Court to judge, but the consent of one man to the malicious acts of another, is matter of fact which ought to be found by the jury. And here is no consent found, nor that Huggins aided or abetted Barnes; nor is there any positive fact found, that must necessarily be construed an aiding and abetting.

There is another matter which the king's counsel insisted upon, that if the Court were of opinion that they could not give judgment upon the facts found in this verdict, that the prisoner was guilty of murder; that yet the verdict was so uncertain, as that they could not give judgment of acquittal: and therefore, that a Venire Facias de novo ought to go. And this brought it under the consideration of the judges, whether a Venire Facias de novo ought to be granted in this case. And to speak to that point, the counsel on both sides were heard before all the judges on Wednesday the 24th instant.

It was said by the counsel for the king, that they spoke to this point without prejudice. For they insisted, that as to the verdict itself there were sufficient facts found affecting the prisoner, to induce the judges to be of opinion that they amounted to murder. But for argument's sake, in case the judges should be of opinion, that they were too uncertain to found a resolution upon, that the prisoner was guilty of murder, then they argued that a Venire Facias de novo ought to go, though it was in a capital case.

1. In a civil case, if a verdict is found so uncertainly and ambiguously as that no judgment can be given, a Venire Facias de novo must issue. Co. Lit. 227. 2 Roll. Abr. 693. Venu. vers. Howell. Cro. Car. 322.

It was observed that the book of Co. Lit. 227, speaks of verdicts in general, and does not say in what cases: but as to civil cases there is no doubt.

2. In criminal cases writs of Venire Facias de novo have been granted. Co. Inst. 393, b. Hil. 4. Car. 1. B. R. rot. 32. Rex v. Fisher.

3. In capital cases a Venire Facias de novo

must go. 1. In cases of mis-trial. 6 Co. 14. a. Arundel's case, the point agreed. 2. For misbehaviour of the jury in giving in their verdict. Hil. 8 Hen. 7. rot. 3. placit. reg. Rex vers. Wayner. Agreed. 3. As to granting a Venire Facias de novo, after a special verdict found, they were so candid as to own, that though there was search made with the greatest diligence, yet they could not find one instance, nor so much as an opinion of a judge, except what was said by lord chief-justice Holt, in the Case of the King vers. Keite, Comberb. 408.* Holt says, "I should not be much against a Venire de novo." (Comyns 17.) And this was remembered by some others that heard that opinion. The jury had found in that case that the prisoner had killed the man; but it did not certainly appear whether the fact was murder or manslaughter. Mr. Attorney General insisted, that if there was such an uncertainty, as that no judgment could be given in a capital case; the same reason held in such case as in civil and other criminal cases; though there is no precedent of it as yet; for 'ubi eadem est 'ratio, est eadem lex.' And therefore supposing (for in this it was argued upon a supposition) that the verdict was too uncertain to give judgment against the prisoner, they insisted that a Venire Facias de novo ought to go.

But the judges came to no resolution, that a Venire Facias de novo could not issue after a special verdict in any capital case; it being unnecessary for them to determine that question: for as every special verdict depends upon the particular finding of the verdict, so the present question relates only to the present verdict before us as found. And as to that we were all of opinion, that this verdict was not so uncertain as that judgment could not be given upon it. For the facts found are all positively found; but those facts in the nature of them joined together, are not sufficient to make the prisoner guilty of murder. And if so, then the prisoner must be acquitted; for it is not that the verdict is uncertain, but it is not full enough to convict him. Perhaps the jury might have found other facts which they have not, but the Court can judge only upon what is found. (Kelyng, 78, 79.) We all agreed in the case of Green and Bedell, on a special verdict, that the verdict was not full enough as to them, for us to judge it treason in them; because the verdict only found that they were present, and found no particular act of force committed by them; and did not find that they were aiding and assisting to the rest. And it is possible they might be there only out of curiosity to see; and whether they were aiding and assisting is matter of fact, which ought to be expressly found by the jury, and not left to the Court upon any colourable implication; and accordingly those two persons were discharged. And yet as to Green, he was found to be among the persons assembled, &c. casting up his cap, and hallooing with a staff in his hand; and that whilst he was among them he was knocked down by a party of the king's soldiers that came to suppress them; and was then taken. And as to Bedell, it was found that he was there, and being pursued by one of the king's soldiers, called out to the rest of the company to face about, and not to leave them.*

Upon the whole, there is no authority against the Court's giving judgment of acquittal, upon a verdict that is not sufficient to convict; and therefore this verdict not finding facts sufficient to make the prisoner guilty of murder, he must be adjudged Not Guilty. And he was discharged.

* S. C. 5 Mod. 287. Skinn. 666.

* Strange, in his Reports, vol. 2, p. 888, after mentioning this case of Messenger, Bedell, and Green,† in the opinion delivered by the chief-justice, adds to it, (from Kelyng, p. 66) "On a special verdict it was found, that Thompson and his wife were fighting, and Dawes endeavouring to part them was killed by Thompson; and it not being found, that Thompson knew Dawes intended only to part them, it was held manslaughter, without sending it back to the jury to be certified of his knowledge. These are cases directly in point as to this head; and I must observe that Plummer's case was after the case of Keit, wherein Holt, chief-justice, had had this point under his consideration." *Former Edition.*

† See it in this Collection, vol. 6, p. 879.

480. The Trial of THOMAS BAMBRIDGE, esq. late Warden of the Fleet, for the Murder of Mr. Robert Castell, before the Right Hon. Sir Robert Baylis, knt. Lord Mayor of the City of London, the Hon. Mr. Justice Page, the Hon. Mr. Baron Carter, and Mr. Serjeant Raby, Deputy-Recorder; with other of his Majesty's Justices of the Peace for the City of London and County of Middlesex, at the Sessions-House, in the Old-Bailey, May 22: 3 GEORGE II. A. D. 1729.*

Tuesday, May 20, 1729.

Proclamation was made for all persons concerned to attend.

Clerk of Arraigns. YOU good men that are empannelled to enquire, &c. answer to your names, and save your fines.

Cl. of Arr. Thomas Bambridge, hold up thy hand. (Which he did.) Thou standest indicted, &c.

Cl. of Arr. How sayest thou, Thomas Bambridge, art thou Guilty of the felony and murder whereof thou standest indicted, or Not Guilty?

Bambridge. Not Guilty.

Cl. of Arr. How wilt thou be tried?

Bambridge. By God and my country.

Cl. of Arr. God send thee a good deliverance.

Thursday, May 22, 1729.

Proclamation was made for information.

Cl. of Arr. Thou the prisoner at the bar, these men that thou shalt hear called, and personally appear, are to pass between our sovereign lord the king and thee, upon the trial of thy life and death, therefore if thou wilt challenge them, or any of them, thy time is to speak as they come to the book to be sworn, before they are sworn.

Then the pannel was called over, and Mr. Bambridge challenged twenty.

Mr. Just. *Page.* You have challenged the full number allowed by law, without any reason assigned, now take care.

JURY.

George Baker,	Oliver Slowcock,
John Goodinch,	John Nemes,
Robert Hampshire,	Thomas Playseed,
Richard Mason,	William Mills,
William Bernard,	Robert Everett,
Roger Penny,	Moses Freeman.

Cl. of Arr. Hold up thy hand. (Which he did.) You, gentlemen of the jury, look upon the prisoner, hearken to his charge, he stands indicted by the name of Thomas Bambridge, &c. (*prout* in the indictment *mutatis mutandis.*)

Bambridge. I desire the indictment may be read in Latin, as it is.

Mr. Just. *Page.* That you shall have done.

Mr. *Holland.* May it please your lordship, and you gentlemen of the jury, I am of counsel for the king. This, gentlemen, is an indictment against Thomas Bambridge, esq. late warden of the Fleet prison, for the murder of Mr. Robert Castell; and the indictment sets forth, That Thomas Bambridge, upon the 14th of November, had the care and custody of the prisoners in the said prison, but being a man of a cruel temper, did upon the 14th of November last past, assault the said Robert Castell, and carry him to Richard Corbett's, a spunging-house, and at the time of this imprisonment, one Joseph White was sick of the small pox, and Mr. Castell never had them; that Mr. Castell several times desired he might not be there, for that he was afraid if he should catch it, it would be his death. That from the 16th of November to the 12th of December following, Bambridge forced him to continue there; and that Castell (after his request made to Bambridge to be removed from that place, and notice had been given to Bambridge, that the person was sick of the small pox) fell sick of the small pox, and languished under it in the same house until December 12, and then died: therefore the indictment concludes, that the said Thomas Bambridge did feloniously and maliciously murder the said Robert Castell, against the peace of our sovereign lord the king, his crown and dignity. To this indictment the defendant pleaded Not Guilty; but if the fact is proved, I don't doubt but you will find him Guilty.

Serj. *Cheshire.* My lord, and you gentlemen of the jury, Thomas Bambridge stands indicted for the murder of Mr. Robert Castell, a prisoner then in his custody. Gentlemen, prisoners must be treated with humanity and tenderness, unless unruly, and then the gaoler has an authority to restrain them; but those that behave well, he has no such authority over. This person came to the Fleet the 28th of June, as will be shewn by the books of the warden, and Bam-

* See the articles immediately preceding and following.

bridge had been a deputy warden some time before. I wish he had not learned to treat people with severity. On the 30th of September he came to be warden in right of himself, and Mr. Castell had performed every thing that was necessary; for the liberty of the rules had given security, and to continue that liberty of the rules, found additional security, security to his satisfaction, approved of by the clerk of the enquiries, yet on the 14th of November, he was forced into Corbett's; and I must submit it to you, my lord, if it is not contrary to law, as he lodged in the rules, at one Mr. Underwood's, to carry him to a spunging-house, houses where they make a property of all prisoners. It is the duty, gentlemen, of a gaoler, that has prisoners in his custody, when he thinks they cannot be continued safely in the rules, to put them into prison, and not into spunging-houses, where large reckonings are run up upon them. Their method is, gentlemen, to make the security uneasy, and then to tell the prisoners that they shall be carried into spunging-houses, till they can work them up to a temper to pay such sums of money that they want to get from the unhappy prisoners. Gentlemen, Mr. Castell was given to understand, that a man was ill of the small pox in the same house, and Mr. Castell had never had them, and said, "He should die if he had, let me not be carried into this house." This did not take effect, Bambridge insisted upon his renewing his security, and when he was carried there, Savage went from him to Bambridge, and told him that Mr. Castell never had the small pox, and that one White was ill of them, and begged that he might be carried back into his lodgings, or into the gaol. One would have thought Bambridge should have had some consideration of him, but he had no answer to his satisfaction; he continued there very melancholy till the 4th of December, and then the distemper took him; he sickened with the same, the danger increased, and he died on the 12th, so that it was apparently the occasion of his death. It was Bambridge's duty, when he was informed the distemper was in the house, to have removed him. This is the state of the evidence, and as we shall be able to prove the facts, I doubt not but you will find the defendant Guilty.

Attorney General. My lord, and you gentlemen of the jury, Thomas Bambridge stands indicted for the life of an unhappy man, who died under his custody. As the law has armed gaolers with a sufficient authority, for the safe custody of their prisoners, and for the securing their properties, so the law has taken care that they shall not put any prisoner into hard duress, and if the man dies, the life of the prisoner lies to the gaoler, and whether the person dies being so confined, or whether it was the distemper occasioned by means and by reason of his illegal duress, I submit it to your lordship's direction, to be murder; for where actual force should be committed, and the offender does an unlawful act, by which death ensues, I must submit it whether, being mixed with actual force, it is not murder. This is a particular case of this prisoner, for he had given security for the enjoyment of the indulgence of the liberty of the rules, during the time he was in those lodgings; but for what reason does not appear, that Bambridge ordered Corbett to take him out, and not to bring him into prison, but carry him into Corbett's house, that will appear to be an illegal act of imprisonment; for by the statute 22nd Charles 2, it is provided, no gaoler, or other officer, having prisoners in his custody, shall carry them to any public victualling-house; therefore Bambridge ordering Mr. Castell to be carried to a victualling-house, and not into the prison, is an illegal act, and the consequence of that, I apprehend to be an illegal confinement: at the time when carried there, White being sick of the small pox, it will appear to you, gentlemen, that Bambridge was acquainted that the small pox was in the house, (it was a contagious distemper) and that Mr. Castell was afraid of catching it. Frequent messages were sent to desire he might be removed, and it will appear that Mr. Castell did personally apply to Bambridge himself at Corbett's; after this, the small pox being mentioned to be in the house when Bambridge was in company with Mr. Castell, he said he never had had them, and if he catched the contagion, it would kill him, and desired to be removed; but Bambridge refused to let him go, and continued the unlawful duress upon Castell; he did catch the distemper, and of that distemper, so taken into Corbett's, under this duress, died. If this matter is proved, it is a point of law, if it is not murder; as to the fact, it must appear by evidence, and if my brief be true, it will be fully made out to you. If the gaoler does so treat a prisoner to put him in hazard of his life, and by such duress he dies, I submit it whether the gaoler is not guilty of murder.

Sol. Gen. We will call the witnesses to prove the facts.

Richard Longborne sworn, Who produced a copy of Bambridge's Patent.

Sol. Gen. Where had you it from?

Longborne. From the Rolls.

Sol. Gen. Is it a true copy?

Longborne. It is a true copy.

Sol. Gen. Deliver it to the clerk to be read, [which he accordingly did, and it appeared to be dated the 30th of September, in the second year of his present majesty.]

Thomas Cotton sworn.

Sol. Gen. Mr. Cotton, what officer are you belonging to the Fleet prison?

Cotton. I am Clerk of the Papers.

Sol. Gen. Produce the commitment books of the said office, and see when Mr. Castell was committed prisoner.

Cotton. He was committed the 15th of July 1728, upon mesne process.

Sol. Gen. When was he charged in execution?

Cotton. The 9th of November following, for 180*l.* at the suit of William Waring.

Bambridge. I do not hear Mr. Cotton, and therefore desire he may raise his voice [Upon which the Court admitted Mr. Bambridge to come to the inner bar;] I must observe, my lord, the writ was brought in 1726, and entered in 1728.

Richard Corbett sworn.

Sol. Gen. Mr. Corbett, what house do you keep?—*Corbett.* A public-house.

Sol. Gen. How long have you lived there?

Corbett. Eleven years.

Sol. Gen. Did you know Mr. Castell was in your house?—*Corbett.* Yes.

Sol. Gen. Who brought Mr. Castell to your house?

Corbett. Myself, his security sent for me to the Rainbow coffee-house.

Sol. Gen. Where was he before he was carried to your house?

Corbett. At his own lodgings.

Sol. Gen. Where was that?

Corbett. At Mr. Underwood's in the rules of the Fleet.

Sol. Gen. Now go on.

Corbett. My lord, the security sent for me to the Rainbow coffee-house to take up Mr. Castell; but having some respect for Mr. Castell, I sent to him to let him know that his security intended to surrender him, and afterwards at five or six o'clock in the evening, the security sent for me again to the King's-arms tavern (where Mr. Castell was) to surrender him, and I told them I would not take Mr. Castell into custody without I was paid: and they gave me half a guinea, and then asked me, why I did not lock him up? Said I, he is my prisoner now, not yours, and I left him there, and went to the judge's chambers; whilst I was gone, a servant was sent to my house to have a fire made and a bed got ready for Mr. Castell.

Sol. Gen. How came he to go to your house?

Corbett. It was at his own request.

Sol. Gen. How long did he continue there?

Corbett. Till he died, which was on the 12th of December following.

Sol. Gen. Was one White there?

Corbett. Yes.

Sol. Gen. How long?

Corbett. A considerable time. White had been well about 14 days before Mr. Castell came.

Sol. Gen. Was Bambridge there?

Corbett. He was there several times.

Sol. Gen. Did Mr. Castell ever desire you to go to Mr. Bambridge?

Corbett. He did desire me to go to Bambridge, and said he was afraid, he had never had the small-pox, for if he had, it was when he was very young; and I went to Bambridge to tell him that Mr. Castell desired to go to his lodgings.

Sol. Gen. When was this?

Corbett. Nine or ten days after the security had surrendered him.

Sol. Gen. What did Mr. Castell tell you to say to Mr. Bambridge?

Corbett. He told me to tell Mr. Bambridge he was afraid of the small-pox, and to solicit him to let him go to his lodgings; and I went accordingly to Mr. Bambridge, at the King's-arms, on Ludgate-hill, and did solicit him to let Mr. Castell go to his lodgings, and Bambridge made answer to me, that he could not let a man go, that was charged in three executions, without security.

Sol. Gen. What was the reason you told Bambridge that Mr. Castell never had the small-pox, and desired to go to his lodging at Ludgate-hill?

Corbett. I told Bambridge that one White had the small-pox.

Sol. Gen. What room was it Mr. Castell died in?

Corbett. I have kept a club in the room where Mr. Castell died.

Att. Gen. When did you first acquaint Mr. Bambridge with Mr. Castell's being at your house?

Corbett. The 15th of November, the next day.

Att. Gen. What said you to Bambridge?

Corbett. I told him Mr. Castell's security had surrendered him; and Bambridge asked, Where is he? I said, At my house; to which Bambridge answered, That was well.

Bambridge. Be pleased to ask, my lord, if Corbett had any directions from me to take Mr. Castell into custody.

Mr. Just. *Page.* Corbett, answer that question.—*Corbett.* I had not.

Bambridge. When was I admitted into my office?—*Corbett.* On the 15th of December.

Bambridge. I desire Mr. Corbett to be asked, if he was not in Court when I qualified myself for the place, and desire he may give an account of it.—*Corbett.* I was in Court.

Mr. Just. *Page.* I cannot admit him to give an account of what was done in Court, for that must appear by the records thereof.

Bambridge. My lord, I desire Mr. Corbett may acquaint you what part of the house Mr. Castell lay in, and what part White.

Corbett. White lay in the old house, in the garret, and Mr. Castell in a house newly taken in, on the first floor.

Mr. Just. *Page.* Had Mr. Castell and White any communication together?

Corbett. I never suffered White to come down for eight weeks.

Mr. Just. *Page.* How high was the house where he lay?—*Corbett.* Three stories.

Mr. Baron *Carter.* How long was it before White went out of his chamber after Mr. Castell was there?

Corbett. Not till six weeks after Mr. Castell was dead.

John Savage sworn.

Sol. Gen. Mr. Savage, do you know Mr.

Castell being any time a prisoner in the Fleet?

Savage. I was daily with him.

Sol. Gen. Do you know any thing of his being sent to Corbett's?

Savage. I was several times in company with him, and he seemed apprehensive of his bail surrendering him.

Sol. Gen. Did you go to him to Corbett's?

Savage. I went to Mr. Castell the day after he was carried there, and he complained that he was afraid he should not get day rules to go out with, though it was term time, to transact his business.

Sol. Gen. Had he the small-pox at that time?—*Savage.* No.

Sol. Gen. How soon did you go to Mr. Castell again?

Savage. I went to him again in a day or two, and he expressed a great concern for fear of the small-pox, and said if he caught that distemper, it would be very fatal to him; and I went to Mr. Bambridge, and told him of it, and Bambridge said he would not let him go to his lodgings.

Sol. Gen. Were you with Bambridge at any other time?

Savage. I was at the coffee house with him.

Sol. Gen. What request did you make then?

Savage. I don't remember any.

Sol. Gen. How many times did you go to Bambridge?

Savage. Four times I went to him, and the second time I mentioned Mr. Castell's fear of having the small-pox.

Sol. Gen. Did you see Mr. Castell after he had the small-pox?

Savage. I did not see him, in regard to some of my own family who had not had them.

Att. Gen. Mr. Castell was carried to Mr. Corbett's the very day he was surrendered, pray what was it he desired at that time?

Savage. He said it was a great misfortune not to have the benefit of day rules to negociate his business with his friends.

Att. Gen. When did you first go to Mr. Castell?

Savage. The next day after he was carried there, and it was mentioned that Mr. Castell was fearful of having the small-pox.

Att. Gen. Was not that the first day that he was carried there?

Savage. I am not sure it was the first day.

Att. Gen. How did you hear it?

Savage. I had it from Mr. Castell the next day after, or the day after that.

Att. Gen. When you went first to Mr. Bambridge from Mr. Castell, what did you desire?

Savage. I did desire that he might have the benefit of the day rules, and Mr. Bambridge said he could not, being charged in execution to the amount of 900*l.*

Att. Gen. When did you go to Bambridge?

Savage. I believe I went in a day or two after Mr. Castell was carried in, and then mentioned Mr. Castell's fears of having the small-pox.

Att. Gen. Did you say any thing of the small-pox being in the house?

Savage. I knew nothing of them.

Att. Gen. How came you to talk of the small-pox to Bambridge?

Savage. I heard it from Mr. Castell, that the small-pox was there.

Att. Gen. What was the reason of Mr. Castell's fear, and message to Bambridge?

Savage. Mr. Castell told me the small-pox was there at Corbett's.

Att. Gen. What did you tell Bambridge?

Savage. I told Bambridge that Mr. Castell was fearful of having the small-pox, and that he desired to be carried to his own lodgings.

Mary Corbett sworn.

Serj. *Cheshire.* Mary Corbett, you are wife of Mr. Corbett?—Mrs. *Corbett.* Yes.

Serj. *Cheshire.* When was Mr. Castell brought to your house?

Mrs. *Corbett.* The 14th of November, at ten o'clock at night, and a drawer came from the tavern, and brought a message to have a fire made, and a bed prepared for Mr. Castell.

Serj. *Cheshire.* Where was the message brought from?

Mrs. *Corbett.* The message was from the King's-arms tavern.

Serj. *Cheshire.* Did Mr. Castell come?

Mrs. *Corbett.* Yes.

Serj. *Cheshire.* Was White there?

Mrs. *Corbett.* Yes.

Serj. *Cheshire.* How long had White had the small-pox?

Mrs. *Corbett.* I believe he had had the small-pox ten days.

Serj. *Cheshire.* Was there any mark of the small-pox remaining?

Mrs. *Corbett.* He kept the scars on.

Serj. *Cheshire.* How long was he sick?

Mrs. *Corbett.* Ten days.

Serj. *Cheshire.* Did he sit up?

Mrs. *Corbett.* He got up every day.

Serj. *Cheshire.* Pray, if they are a good sort, do they not turn in nine days?

Mrs. *Corbett.* Yes.

Serj. *Cheshire.* So that the day after the small-pox had turned, Mr. Castell came into your house: how long had Mr. Castell been in your house before he had the small-pox?

Mrs. *Corbett.* Mr. Castell had not the small-pox till about eight days after he came to my house: I was by chance speaking of the small-pox, and saying a person in the house had them, and Mr. Castell said he was very sorry for it, because he had never had them.

Serj. *Cheshire.* Did he then desire any thing of you or your husband, as to speaking to Mr. Bambridge?

Mrs. *Corbett.* Mr. Bambridge was in the room at the same time.

Serj. *Cheshire.* What did Mr. Castell say?

Mrs. *Corbett.* He desired that he might go home to his lodgings with a keeper, and Bambridge said in answer, he never knew any thing of that kind done.

Serj. *Cheshire.* Did you give any instance?

Mrs. *Corbett.* I told him that it happened when Mr. Conway, a Master in Chancery, was committed to the Fleet prison, and there was no conveniency in the prison, nor at my house, and then Mr. Gybbon sent a keeper with him to his lodging.

Serj. *Cheshire.* What did Bambridge say then?—Mrs. *Corbett.* He said no more.

Serj. *Cheshire.* During the time Mr. Castell was at your house, were there any securities given?

Mrs. *Corbett.* Yes, I believe there were, for Mr. Castell said his securities were come, and staid only for Codnor's coming with bonds, and Codnor told me there was security given.

Serj. *Cheshire.* Do you know nothing but what Codnor said?

Mrs. *Corbett.* I saw two men there, whose names I do not know, in order to give security.

Serj. *Cheshire.* Do you know that they gave security?

Mrs. *Corbett.* I saw Codnor, the deputy clerk of the papers, go up stairs with some papers, which Mr. Castell said was his bonds.

Serj. *Cheshire.* Did you hear Bambridge say, or own, that Codnor had taken security?

Mrs. *Corbett.* No.

Serj. *Cheshire.* How long was this after Castell came to your house?

Mrs. *Corbett.* About ten days.

Serj. *Cheshire.* Do you remember the time how long after he sickened and died?

Mrs. *Corbett.* He sickened on the 4th day of December, and died on the 12th.

Serj. *Cheshire.* What did he die of?

Mrs. *Corbett.* Of the small-pox.

Att. Gen. What was the request of Mr. Castell, when he had the conversation with Mr. Bambridge at your house?

Mrs. *Corbett.* His request to Mr. Bambridge was, to be moved to his own lodgings with a keeper.

Att. Gen. Did he agree or refuse?

Mrs. *Corbett.* His answer was, he never knew any thing of that kind done.

Att. Gen. When was Mr. Castell first brought into your house?

Mrs. *Corbett.* On the 14th of November, about ten o'clock at night.

Mr. *Lee.* Were you in company at the tavern?—Mrs. *Corbett.* No.

Mr. *Lee.* How long after your husband was gone there, did you receive the message about Mr. Castell's coming?

Mrs. *Corbett.* An hour and an half.

Mr. *Lee.* Who brought him to your house?

Mrs. *Corbett.* He came in custody, but I did not see him.

Mr. *Lee.* How long was it after that Mr. Bambridge came to your house?

Mrs. *Corbett.* In about a week.

Mr. *Lee.* Did you hear Bambridge say any thing when he was at that time at your house?

Mrs. *Corbett.* He did not say any thing to me.

Mr. *Lee.* Are you sure of it?

Mrs. *Corbett.* Yes.

Mr. *Lee.* White lay ill of the small-pox, then, was it in the same stair-case?

Mrs. *Corbett.* They went up the same stair-case, but Mr. Castell lay in the new house one pair of stairs, and White in the old house three pair of stairs.

Mr. *Lee.* How long was it after Mr. Castell had been at your house, that you mentioned White's having the small-pox?

Mrs. *Corbett.* About a week after he had been there, I said to Mr. Castell (Mr. Bambridge being by) that there was one in the house had the small-pox; to which Mr. Castell replied, I am sorry to hear it, for I never had them.

Mr. *Lee.* How long had White been ill before you happened to speak of his illness to Castell?

Mrs. *Corbett.* To the best of my remembrance eight days.

Bambridge (shewing a paper to Mrs. Corbett) Mrs. Corbett, pray look on that paper.

Mrs. *Corbett.* I have, and remember the coroner's coming to my house, but did not know who he was.

Mr. *Just. Page.* If you intend to produce any evidence in respect to the inquest, she is not a proper person; for that you must produce the coroner himself.

Bambridge. My lord, I shall submit, and desire Mrs. Corbett may repeat what she said in relation to Mr. Conway.

Mr. *Just. Page.* Mrs. Corbett, pray repeat that.

Mrs. *Corbett.* My lord, Mr. Conway was at a friend's house on Ludgate-hill, and the reason was, the gaol was very full, and there was no room at my house, and Mr. Gybbon sent a keeper with him to his lodging, but that in two nights and two days, when there was room, he came there.

Mr. *Just. Page.* Do you know of your own knowledge, what house he was at?

Mrs. *Corbett.* No, I do not, but that he was kept in the rules of the prison, with a keeper, till he was brought to my house.

Bambridge. My lord, I desire she may acquaint you what sort of intimacy there was between Mr. Castell and myself?

Mrs. *Corbett.* Mr. Bambridge used to be at a club at my house, where some persons met, and among them Mr. Castell, and I always thought him and Mr. Bambridge to be friendly together.

Bambridge. When Mr. Castell spoke about enquiring after new securities, what answer did I make?

Mrs. *Corbett.* That you would take the security as it came.

Bambridge. When I was speaking to a gentleman, who told me Mr. Castell was sick of the small-pox, what did I say?

Mrs. *Corbett.* You said, that you were very sorry to hear it, and that Mr. Castell should settle with you, and himself too, about the securities.

Bambridge. When Mr. Castell applied about securities, what did I say?

Mrs. Corbett. You said it should be done.

Bambridge. Was it not esteemed a favour, or part of friendship?—*Mrs. Corbett.* It was.

Bambridge. Were you by when Mr. Castell desired to go to his lodgings on Ludgate-hill?

Mrs. Corbett. I was.

Bambridge. What was the reason of Mr. Castell's desiring to go?

Mrs. Corbett. I believe he was afraid of the small-pox.

Richard Corbett again.

Mr. Just. Page. Mr. Corbett, you said that White was recovered of the small-pox fourteen days before Mr. Castell was brought to your house; are you certain of that?

Corbett. I heard so, my lord, I never went up to see him, and the nurse is here, and can inform your lordship better.

Mr. Just. Page. You may go, you know nothing of it.

Hannah Stretch sworn.

Sol. Gen. Mrs. Stretch, were you sent for to Mr. Castell when he was ill?

Mrs. Stretch. Yes.

Sol. Gen. When did you leave White?

Mrs. Stretch. Some time in November last.

Sol. Gen. Were you nurse to Mr. Castell?

Mrs. Stretch. I was.

Sol. Gen. Do you know how Mr. Castell got the small-pox?

Mrs. Stretch. I do not.

Sol. Gen. How long did you stay with White?

Mrs. Stretch. Full three weeks, and in that time White had not been out of his room. I went from White on the Thursday, and was sent for to Mr. Castell on the Tuesday following.

Sol. Gen. What condition was White in when you left him?

Mrs. Stretch. When I left him he was out of all danger, he had taken three doses of physic.

Thomas Dawson sworn.

Sol. Gen. Mr. Dawson, do you remember Mr. Castell's being brought into Corbett's?

Dawson. I never saw Mr. Castell till after he was dead.

John Neel sworn.

Sol. Gen. Mr. Neel, did you know Mr. Castell?

Neel. I was a prisoner at Mr. Corbett's when he came there.

Sol. Gen. Was one White ill of the small-pox then?

Neel. I never saw Mr. White, but was informed he had the small-pox above stairs; I was then in the house.

Sol. Gen. Do you know how long White had them?

Neel. He was never suffered to come down in two months after.

James Codnor sworn.

Sol. Gen. Mr. Codnor, were you concerned in the prison of the Fleet as a clerk?

Codnor. I did act there as deputy clerk of the papers, by the approbation of Mr. Bambridge.

Sol. Gen. Did you know of any securities given by Mr. Castell?

Codnor. Some time in November last, in Michaelmas term, I received orders from Mr. Bambridge to attend Mr. Castell as often as his security should come to him to complete his bonds, who had then three securities, and I received three Habeas Corpus very soon one after the other, and Mr. Castell could not get the bonds signed so soon till execution came against him, and then the security was objected to, because a greater charge came against him.

Serj. Cheshire. What were those bonds that had been given?

Mr. Just. Page, and *Mr. Bar. Carter.* We cannot admit you to ask any questions as to the bonds, unless you had applied to Mr. Bambridge for them, and he had refused to deliver them.

Then the Prisoner was directed to proceed in his Defence.

Bambridge. I have a great many witnesses to prove my regard for Mr. Castell, if occasion; but shall submit the rest to the evidence given for the crown.

Mr. Just. Page. You may go on if you think fit.

Bambridge. No, my lord, I will submit the whole.

Mr. Just. Page. Gentlemen of the jury, Mr. Bambridge stands indicted for the murder of one Mr. Castell. If this has not been proved, gentlemen, you are not to find the man guilty. That the evidence for the crown is not sufficient to find him guilty, for so far from being guilty, Mr. Castell desired to come there, and the warden, if he is apprehensive that a man will run away, then it is the duty of a warden to carry him to a place of safe custody. It is said, indeed, that when Mr. Bambridge came to Corbett's in about eight days after Mr. Castell was carried there, Mr. Bambridge was by, and Mr. Castell expressed his fear of having the small-pox, and desired to be removed to his lodging, but then he never asked to go into the custody of the gaol. Mrs. Corbet indeed said, that one of the masters in Chancery, Mr. Conway, was allowed to be at his lodging two days before he was carried to the gaol, but the reason was, there was no room in the gaol. Gentlemen, the gaoler must keep his prisoners as well as he can, for they must not be put like hogs together. Gentlemen, here was execution upon execution, which came to the sum of 900*l.* therefore it was requisite to have him in a place of safety. Another witness says, that the deputy clerk of the papers was ordered by Mr. Bambridge at all times to attend Mr. Cas-

tell about his securities, and so far from the prisoner's having a malicious intent, that there was no quarrel, no ill nature, no difference, and they met frequently at Corbett's at a club, and there was no quarrel, but always a friendship between them. And when Bambridge heard that he had the small-pox, he declared that he was sorry that Mr. Castell had them, and that he had trifled with himself and him about the securities. It must appear, gentlemen, to you, that Mr. Castell was murdered maliciously, to find the prisoner guilty; if it appears otherwise, you must acquit him.

Cl. of Arr. How say you, is Thomas Bambridge guilty of the murder whereof he stands indicted, or not guilty?

Foreman of the Jury. Not Guilty.

Upon this acquittal, Mary, the widow of Mr. Robert Castell, brought an appeal against the said Thomas Bambridge and Richard Corbett, for the murder of her husband. We shall here give the Trial on the Appeal, which though it is not in the order of time, yet as it relates to the same fact, is proper to follow the Trial of Bambridge for the murder.

What follows first, is a short account of the Proceedings previous to the Trial on the Appeal, taken from Strange's Reports, vol. 2, p. 854.

Hillary Term, 3 Geo. 2.

CASTELL, *Vid. ver.* BAMBRIDGE, *et* CORBETT.

"The defendant Bambridge, having been prosecuted on the Report of the Committee of the House of Commons, for the murder of the plaintiff's husband, who was a prisoner in the Fleet, under the custody of Bambridge the warden, and having on the trial been honourably acquitted, upon the prosecutor's own evidence, was followed with an appeal, to which Corbett, who on the cross examination appeared to be a material witness for Bambridge, was now also made an appellee; and the writ of appeal running 'quia Maria Castell vidua fecit nos secur' 'de clamore suo prosequendo per Thom' Wag-'staffe et Poston Stracey,' contrary to the usual form, which is, *si* the appellant *fecerit nos* (i. e. the king) *secur'*, application was made to the lord chancellor King, to supersede this writ, upon affidavit that the appellees were both in custody upon it, but that no security had been given, and the writ reciting it as an act done before the emanation of it, the sheriff had not taken any, as he would have done if it had been put by way of condition, *si fecerit*. And it was argued by me that the statute of Westminster 2, c. 12, giving the appellee a remedy against the appellant, her pledges, and abettors, it was not a matter of form, but security should be entered into by persons of ability; to which it was answered by Mr. Attorney General, that it was sufficient if there were pledges at any time before judgment. Sir T. Jones, 154. 9 Coke, Dr. Hussey's Case. Croke Jac. 413.

"To this it was replied, that at that rate the appellee would never have any remedy against the pledges; for if he was convicted, he would be entitled to none, and if he was acquitted, the appellant would never pray judgment, and it would be an artifice to elude the law.

"Notwithstanding all which the chancellor would do nothing in it, but said, if the *quia fecerit* [so in Strange] *vos* was wrong, we might have advantage of it, and so refused to make any order.

"Upon the first day of Michaelmas term last the writ being returned, and the appellees both brought by Habeas Corpus and turned over to the King's-bench, it was there moved to have the proceeding set aside, upon the same affidavit of there being no pledges; and the Court here were of opinion it was a very good objection, and a foundation to supersede the writ; but then they said, it was not in their power, who were to take the writ as they found it, and not to hear affidavits, to contradict the suggestion of the writ; and therefore the having security, being recited as an act done, they must take it so, and could not relieve.

"Upon this the appeal was arraigned, setting forth that the appellant's husband was a prisoner in the Fleet, under the custody of Bambridge the warden, who made an assault upon him, and contrary to his will carried him to the house of Corbett, a victualling-house within the Fleet, and there imprisoned him, where one White then lay ill of the small-pox, which Castell had never had; that the appellees had notice of this, and were desired to suffer him to remove to another place in the prison, which they refused, and afterwards Castell fell ill of the distemper, and died in Corbett's house; whereby the Court concludes, the appellees were guilty of murder.

"Without staying for a copy of the declaration, the appellees *instanter* plead Not Guilty, and their plea was rehearsed in French, and issue joined.

"Then it was moved, that the appellees might be bailed; and, upon debate, the Court were of opinion to bail Bambridge, and not Corbett; and the reason they gave was, that Bambridge had been acquitted, which was a strong presumption of innocence; and the judge before whom he was tried, had certified that he was very well satisfied with the verdict, and they said they would bail him in all cases after an acquittal; and that was the reason they denied to bail in Slaughterford's Case, because Holt, C. J. had sent out the jury again, to consider whether they would stand to their verdict of acquittal; and when they insisted upon it, he himself ordered the appeal.

"But as to Corbett, there was no foundation to bail, for they denied that it was of course to bail in an appeal; so Bambridge was bailed by two persons, *corpus pro corpore*, who justified in 1,000*l.* each. And it was agreed, that in an appeal by writ, on the civil side, two bail only are required; but had it come on the crown side by Certiorari, there must have been four.

"Then it was moved to fix a time for the trial, the appellees offering to take short notice; but it being by Original, there was a necessity to have fifteen days between the *Teste* and the return of the *Distringas*, and they could not be tried on the *Venire*, because being in London, there could be no trial at bar, (the citizens not being to be brought out of the city) and as it must be tried at Nisi Prius, there must be a Distringas.

"Towards the latter end of the term it was moved, that the appellees might be discharged, there being a discontinuance, for that no Venire had been taken out; and in appeals, which are a recent prosecution, every delay is a discontinuance: and Cro. Jac. 283, Yelv. 204, were cited. But upon consideration the Court held, that it was not necessary to take out the writ and make it returnable the soonest it might be, though it must bear *Teste* the day the issue is joined; and then the appellant took out a *Venire*, *Teste* 23d October, and returnable the 25th of November, which the Court looked upon as an affected delay, and therefore admitted the other appellee, Corbett, to bail. They said it appeared he might have been tried the sitting after the term, and then upon his acquittal, he must have been *instanter* discharged by the judge of Nisi Prius, according to the statute 14 H. 6, c. 1.

"Both being thus out upon bail, appeared on the several continuance days, according to their recognizance, and the appellant also appeared; and in the beginning of this term the appellees moved for a rule on Mr. Tanner, the officer who keeps the records at the Old Bailey, to attend the trial with the record of Bambridge's acquittal; he not being allowed a copy of it. But the Court refused to make any rule, and said, if it was brought it could be no evidence."

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481. The Trial of Thomas Bambridge, esq. and Richard Corbett, at Guildhall, London, on an Appeal for the Murder of Mr. Robert Castell, before the Right Hon. the Lord Chief-Justice Raymond: 4 George II. A. D. 1730.*

Mr. *Filmer*. MAY it please your lordship, and you gentlemen of the jury, I am of counsel for the appellants. This is an appeal of murder, brought by Mary Castell, against the defendants Thomas Bambridge and Richard Corbett, for the death of her late husband. The declaration sets forth, that upon the 14th of November, in the 2d year of his present majesty, the said Thomas Bambridge was warden of the prison of the Fleet, and having the custody of the prisoners, did make an assault, and with force and arms, and malice aforethought, did carry and convey him to a victualling-house, being the defendant Corbett's mansion-house, and did detain him there till the 12th of December, against his will, and without his consent; and that one Joseph White was then sick of the small-pox, and that Robert Castell had never had the small-pox. That on the 16th of November, Robert Castell requested they would not detain him, and gave the defendants notice that White was sick of the small-pox, and that he Castell had never had the small-pox, and that he was afraid of his death from this distemper; notwithstanding which, the defendants imprisoned and detained him from the 16th of November to the 12th of December, and forced him to remain all that time in the said house: and further sets forth, that on the 4th of December he began to grow sick, and languished to the 12th of the same December, and on the 12th died; so that the defendants, with malice aforethought, killed Robert Castell aforesaid, the husband of the said Mary Castell. To this declaration the defendants have pleaded Not Guilty, but if we prove the facts you will find them Guilty.

Mr. *Reeves* [afterwards lord chief justice of the Common Pleas.] May it please your lordship, and you gentlemen of the jury, I am of counsel for the widow. This is an appeal of murder, brought by her against the two defendants, Thomas Bambridge and Richard Corbett. Bambridge, gentlemen, is laid to be warden of the Fleet, and Corbett a person that kept a spunging-house, where prisoners were sometimes kept. It was for his advantage to have prisoners brought to his house, in order to get money of them. Mr. Castell, gentlemen, was so unfortunate to become a prisoner under the controul of Bambridge, and Bambridge was head warden. He came in a prisoner before Bambridge was warden, in June 1728, and at that time Mr. Huggins was warden; and after being a little time in prison, security was given to Mr. Huggins for Mr. Castell's having the liberty of the rules. The first action was at the suit of one Waring, for 186*l.* though there was only 86*l.* due, and so sworn: another cause was for 15*l.* at the suit of another plaintiff, so that the whole charge against him then was 86*l.* due to Waring, and 15*l.* due to the other plaintiff; so that security was given upon

* See the preceding and following articles; also vol. 13, p. 1199, and Mr. Horne's Speech in his Trial for a libel, A. D. 1777, in this Collection. See, too, East's Pleas of the Crown, chap. 5, § 92; and Barrington's Observations on Magna Charta, chap. 34.

his coming in; there was a bond entered into by two sufficient persons in the penal sum of 200*l.* only. After, further charges came against him in the time of Bambridge. We shall shew you the time when Bambridge became warden, which was on the 30th of September, 1728, in the 2d year of his present majesty, then it was he was appointed warden in his own right, though some time before he came in his own right; on the 30th of September, he was sworn in, though on the 28th he was warden, and acted in his own right. Gentlemen, a little while after Bambridge came to be warden, a sum of money 125*l.* Castell received; after this money was paid to Castell, Bambridge knowing of it, contrived how to get some of this money, and Corbett was to go shares. It was this view of getting something from Castell, that was the cause of the demand for farther security; and it was given: but some other charges coming in, he gave a bond for 800*l.* there was one of 200*l.* given before, and now it came to be 800*l.* then there was a third security demanded, and given for 1,000*l.* so that then the three bonds as security to the warden, were 200*l.* 800*l.* and 1,000*l.* these together made up the sum of 2,000*l.* for security to be a true prisoner to the warden, and at that time there was not 400*l.* due. One would have thought that when the warden had 2,000*l.* security for 400*l.* this would have been sufficient; but that was not the business intended, there was something farther to be done; for notwithstanding this ample security, Castell was to be taken up, as they pretended, till he gave farther security to the warden, the defendant Bambridge. Gentlemen, the time of his being taken up was the 14th of November; the 28th of September Bambridge became warden, Mr. Castell had then the liberty of the rules, and lodged at one Mr. Underwood's in the said liberty. Corbett he took him up (it becomes them to shew by what authority,) and was for carrying him away; Castell expostulated with Corbett, and asked him by whose authority he did it? Corbett said he did it by the direction of the warden. Gentlemen, when he was taken up, he was carried away from his lodging, contrary to his will, to the King's-arms tavern, and from thence in the evening to Corbett's house; what authority he had, becomes them to shew you. We say that prisoners are not to be confined in spunging-houses without the consent of those prisoners; the proper place of confinement is the gaol; if there was reason for confining him, he ought to be put into the walls of the prison, then he would have been in a legal confinement; but during the time he was at Corbett's, he was under an improper and illegal confinement. The very day, gentlemen, he was taken up, he employed a friend of his own to go to the defendant Bambridge, who went at that time he was to be carried to Corbett's, and told him it was not proper to carry him there, for that there was a prisoner then sick, one Joseph White; this White languished of the small-pox in Corbett's house. Castell, gentlemen, never had them, and was under the greatest terror that ever any man could be, for fear of catching them. He sent to the defendant Bambridge, that he might not be carried to Corbett's house, and if he did require further security, he desired to have a keeper sent with him to his lodgings, which he would be at the expence of, or otherwise into the walls of the prison. Castell, gentlemen, did not only send that night, but the next morning to Bambridge's house or lodgings, and did desire him to consider the circumstances, that he never had had the small-pox, and that he was under the greatest terror of catching them, and that White was sick of them, and that he might not be carried there, but that he might be carried into the prison, or put in some other place where the small-pox was not; but both these requests were absolutely refused, and he keeps him in Corbett's house, rather than to let him go into the gaol, or some other place where the distemper was not: then he applied at Corbett's house to Bambridge himself, and desired he might not be kept any longer at Corbett's, but that he might go into the gaol; but that not being complied with, there were frequent applications to Bambridge for his removal from Corbett's, but nothing complied with; and, if my instructions are true, the reason why Bambridge did insist that he should continue at Corbett's, and not go to the gaol or any other place, was, unless he gave Bambridge a sum of money: this not being complied with, there was fresh security given, a fourth bond for 1,000*l.* more. After this was done, Castell's friends complimented him of his having his liberty again; but though he gave this security, yet more difficulties arose; they will have a fifth bond. Mr. Castell was delayed in this manner for some time, and a fifth bond was given in the penalty of 2,000*l.* with four persons security. Five bonds, gentlemen, were entered into for Castell's being a true prisoner to the warden.

L. C. J. *Raymond.* What were the last bonds?

Mr. Reeves. One was for 1,000*l.* the other for 2,000*l.* Gentlemen, this last bond was given in the beginning of December; he was kept in custody till the time of giving the fifth bond, which was the beginning of December; and notwithstanding the fifth bond was given, he was kept in custody three days after; at last he had some apprehension of having his liberty, and upon the 4th of December there was an order sent to his lodging, as he had before, to get them ready; but he was disappointed, having thought he had done every thing that was reasonable, but it happened unfortunately, that on the 4th of December having been confined in this house under the terror of that distemper, he fell ill, and on the 12th of December died of that distemper. We say, gentlemen, that his death was occasioned by his unlawful imprisonment, and that the hardship he suffered was the occasion of his

death. If you shall be of opinion on the circumstances, that this apprehension of him served only to get money from him, it will be duress. There is one witness that heard the conversation between Castell and Bambridge at Corbett's, and the witness will tell you, that Castell did expostulate with Bambridge, that he was in danger of his life, and that he should catch the distemper and die, and desired then to be carried to the prison or any other place, and not to be in the place where his life was in so much danger; and his answer was, that he should neither go into the prison, nor to such place, without such a sum of money; it was not to get security as before. If we prove this to be the case, we prove the declaration, and you must find the defendants guilty.

Mr. Lee [afterwards Lord Chief Justice of the King's-Bench]. May it please your lordship, and you gentlemen of the jury, I am of counsel for the appellant. This poor woman has for some time staid, in hopes to see that this affair would have appeared in a true and just light at a former trial, had against one of the prisoners, in which the other prisoner who now appears here, was examined as witness. The appellant waited with great satisfaction, under a belief that the truth of the fact would have appeared at that trial, and did not commence her appeal, nor would she if she could have received satisfaction on the former trial. Gentlemen, she did not receive that, and therefore was at liberty to bring her appeal; for, by the statute of Harry 7, it is provided, that notwithstanding any prisoner is tried and acquitted, that the party appellant has a right to a full and entire examination into the fact. That act of Harry has preserved that right, notwithstanding he was before acquitted; and, as I apprehend, the affair now stands as open as if nothing had been done. This being the case, the matter, gentlemen, for your consideration will be, how far, by the witnesses, we are able to satisfy you in respect to your apprehension of the manner of her husband's coming to his death. It has been opened to you, gentlemen, that Mr. Castell was a prisoner in the Fleet, and that the defendant Bambridge was acting warden in June 1728; the defendant, Corbett, was by his office a tipstaff, and as such was under the direction of the warden. When prisoners are out upon the rules, the tipstaff is the proper officer for taking them into the Fleet, and that to be under the warden's direction, and Corbett was such a tipstaff. This Castell being committed in June 1728, (he was a gentleman that lived in good figure) did procure security in July, and a bond was given in the penalty of 200*l.* and another 800*l.* and a third 1,000*l.* Gentlemen, he was out of gaol upon this security, and the warden was satisfied as to his being abroad, but on the 14th of November he was taken up. On the 3rd of October before this, gentlemen, he received a sum of 12*l.*; on the 22nd of October, according to my instructions, this came to the knowledge of the defendant Bambridge: then came these demands of fresh security; it was very likely the means to insist upon having money in hand or fresh security; notwithstanding this, upon the 14th of November, Corbett came to his lodging in which he then was, a place within the rules, and took him from thence, and carried him to the King's-arms tavern; there he was continued till the evening: that during his continuance there, he sent for a person who will appear here as witness, who went to the defendant Bambridge at the desire of Castell, and he desired him to acquaint Bambridge, that he found there was an intention of carrying him to Corbett's, and that the small-pox was there; and he never had them, and was afraid of catching them, and begged of Bambridge that he would not let him be carried there: the witness accordingly went to Bambridge, and told him of the request of Castell, but before he came back Mr. Castell was carried to the house of Corbett, and when he found him there——

Mr. Fazakerley. He found him at the tavern when he came back.

Mr. Lee. The difference, gentlemen, is this, that this person at the request of Castell went to Bambridge, and upon his return (the fact is that he found Corbett and Castell at the King's-arms tavern) said, that upon his application to Bambridge he could get no answer, no directions that Castell should not be carried there. Castell, his fear continued upon him, and the same witness went next day to Bambridge, and petitioned for the same thing, but could get no satisfaction from Bambridge. We have accounts of several other applications, but without answer to the purpose, and particularly one from Castell himself. When Bambridge came to Corbett's house, it was that Castell complained to him himself of the hardship of being confined there, and desired Bambridge to let him go to his lodgings with a keeper, or into the walls of the gaol, which he chose much rather, from the fear he had of catching the small-pox: the answer then given by Bambridge to Castell was, that he should neither go into the gaol (though there was room enough), or go to that other place. Gentlemen, it must be under the fear and apprehension Castell had of catching the small-pox, that he made this request. How a man could appear with so much inhumanity I can't conceive, for Bambridge himself said, upon a time when he was at the tavern with Castell, that he never saw a man so much shocked at the small-pox; notwithstanding which, when Castell complained to him, and desired to be removed from Corbett's, this was Bambridge's answer to him then, That he should not go into the prison or any where else, unless he had a sum of money for going.

Gentlemen, the whole of his charge at this time was under 400*l.* He was committed in June 1728; on the first of December security was found for no less than 5,200*l.* the first bond was for 200*l.* the next 800*l.* the third

1,000*l.* a fourth 1,000*l.* and the fifth 2,000*l.* Notwithstanding these bonds were given on the 1st day of December, this man was still continued a prisoner, and I must submit it to your lordship, whether he was not continued in such a manner as to make it duress. By the statute of 28 of Cha. 2, no man is to be carried to a spunging-house without his own request. He was kept, gentlemen, in this place even after the fifth bond was given three days, and on the 4th, which was the 4th of December, he took the distemper. This gentleman was so much affected with the hardship of his case, that he often complained of this usage, and of Bambridge in particular; and in his last words, when he lay upon his death-bed, when it can hardly be imagined, that any thing could come from a man but truth, then his constant declarations were, that his death was owing to Bambridge.

This, gentlemen, is the nature of the case, and we will beg leave to call our witnesses, and if they come up to proof, it must be thought the widow has done very right; and though Corbett, when he appeared as a witness, did not give satisfaction, (I would not say it, if it was not in my brief) yet probably the witnesses now called will give you satisfaction why Corbett did not give satisfaction.

Robert Reading sworn, who produced a copy of the patent creating Thomas Bambridge warden of the Fleet.

Mr. *Reeves.* Did you examine that?

Reading. Yes.

Mr. *Reeves.* Is it a true copy?

Reading. Yes.

[Then the Clerk read so much of the copy of the patent as to prove Mr. Bambridge warden of the Fleet.]

John Noel (deputy to the clerk of the papers) was sworn, and produced the commitment-books of the Fleet prison.

Mr. *Reeves.* Do you know that Bambridge acted as warden of the Fleet prison?

Noel. I always apprehended he did act.

Mr. *Fazakerley.* Do you know of the commitment of Mr. Castell?

Noel. Yes, it is in that book (which he had before produced.)

[Then the Clerk turned to, and read the entry in the book.]

Clerk. Decimo octavo die Junii, 1728.

Noel. There are several other entries.

Clerk, (reading again.) 180*l.* sworn to be 86*l.*

L. C. J. The writ was made for 180*l.* penalty. Read on.

Clerk. William Thomas.

L. C. J. It is necessary for me to take notice of all the commitments.

Mr. *Strange.* To see the sums before the 14th of November.

Mr. *Fazakerley.* First is 86*l.*

Mr. *Kettleby.* It is sworn to 86*l.* and upwards, for that is sufficient to hold to bail.

L. C. J. How much is that on the 9th of July?—*Clerk.* The 9th of July is 20*l.*

Mr. *Strange.* How much that debt is, don't appear.

L. C. J. Don't go on so fast.

Clerk. ——Die——212*l.*—— George Colvert.

L. C. J. That is another.

Clerk. Another 20*l.* the 13th of October. ——Waring 180*l.*

Mr. *Fazakerley.* That is the same.

Serj. *Darnell.* The first appears to be on bond.

Clerk. There is 180*l.* principal; 3*l.* 10*s.* costs.

Mr. *Fazakerley.* That is the same.

Clerk. 23rd of November,——execution at the suit of Thomas ——— 19*l.*

Mr. *Strange.* He is charged in execution likewise on Colvert's.

Mr. *Reeves.* That is after being taken up.

Mr. *Fazakerley.* Do you know Corbett's house?—*Noel.* Yes.

Mr. *Fazakerley.* What kind of a house is it? Were the prisoners kept there by Bambridge's order?

Noel. I was there prisoner from the 23rd of October for two months, and never saw any thing exacting but very humane.

Mr. *Fazakerley.* Is it not a public victualling-house?

Noel. They have victuals and drink.

Serj. *Darnell.* This is very material. I will ask you a question or two; you were at Corbett's two months?—*Noel.* Yes.

Serj. *Darnell.* I ask you whether you found any exaction or oppression?

Noel. I never found any to any body, but they visited Mr. Castell with a deal of respect and humanity.

Serj. *Darnell.* When were you carried there?

Noel. The 23rd of October, 1728.

L. C. J. How long did you remain there?

Noel. I stayed there till the 19th of December.

L. C. J. Was this one of the houses that always remained to the warden as part of the gaol?

Noel. My lord, I have heard so.

L. C. J. Were you at Corbett's house all the time Mr. Castell was there?—*Noel.* Yes.

L. C. J. Do you know the time of his taking his illness?

Noel. He was taken ill on the 4th of December, and died on the 12th.

L. C. J. Do you remember Joseph White?

Noel. Yes.

L. C. J. Were they in the same house?

Noel. No, my lord; White lay up three pair of stairs in one house, and Mr. Castell one pair of stairs in the other.

L. C. J. I ask you if White was ever suffered to come down stairs?

Noel. I have heard express orders, that White should never come down, and nobody go up to him, for fear any body should catch it.

L. C. J. I ask you, according to the best of your observation, whether he ever came out of his room?

Noel. I believe he never did, except one time; and then he came to speak to me.

L. C. J. Was Castell there then?

Noel. No, my lord; I believe he never was nearer to him than my room.

Mr. *Strange.* I desire he may describe the situation of Corbett's house.

Noel. There are two houses laid into one.

Mr. *Strange.* Where did White lie?

Noel. White lay three pair of stairs in one house, and Mr. Castell one pair of stairs in the other.

Mr. *Strange.* When did Mr. Castell first come to Corbett's?

Noel. Castell first came into Corbett's the 14th of November.

Mr. *Fazakerley.* My lord, if they ask questions to a particular point, I hope they will not examine him to different facts.

L. C. J. I cannot interrupt them; you will have an opportunity to reply: they are entitled to it. Where did Castell lie?

Noel. Mr. Castell lay in one house, up one pair of stairs, and White in the other, up three pair of stairs.

L. C. J. When did Mr. Castell come to Corbett's?

Noel. The 14th day of November.

Mr. *Strange.* How long was White well before Castell came there?

Noel. He never had been down, but I believe he might have come down.

Mr. *Strange.* Did White continue up stairs all the time Mr. Castell was there?

Noel. Yes.

Mr. *Strange.* What was the reason of his being kept there? There might be other people that had not had them. Did you ever see White come down during that time?

Noel. White came down two or three great stairs.

Mr. *Strange.* Who took care of Mr. Castell?

Noel. Corbett and his spouse.

Mr. *Strange.* During the time he was ill, did he complain?

Noel. He never complained for any thing, but said he was very uneasy at having the small pox.

Mr. *Strange.* Who took care of him?

Noel. All the family took care of him.

Mr. *Strange.* Did you ever see Bambridge in company with Mr. Castell at Corbett's?

Noel. I never saw Mr. Bambridge in company with Mr. Castell, but Mr. Corbett I have.

Mr. *Strange.* Was there a club there?

Noel. Yes.

Mr. *Strange.* Did you see Bambridge and Castell together at that club?—*Noel.* No.

Mr. *Strange.* Where did Castell lie?

Noel. Castell lay in a room by himself; he had a room fitted up on purpose.

Mr. *Kettleby.* Do you know whether when Mr. Castell's wife was sent to, she did come to him, or not?

Noel. I have heard Corbett say, that his widow was sent to, but did not come.

L. C. J. That is no evidence.

Mr. *Kettleby.* Do you suppose you should have seen her if she had come?

Noel. I should have seen the woman.

Mr. *Kettleby.* What sort of a room was Mr. Castell in?

Noel. A very convenient room, very near as big as this Court.

Serj. *Eyre.* How came Mr. Castell first to be brought to Corbett's?

Noel. The body of Castell was surrendered, his security told me so.

L. C. J. That is not evidence.

Mr. *Lee.* Were you frequently with White?

Noel. No; only that time.

Mr. *Lee.* Was Mr. Castell taken ill before or after that time?

Noel. I cannot tell whether he was sick before or after.

Mr. *Lee.* Did you use to be with Mr. Castell?—*Noel.* Sometimes.

Mr. *Lee.* Were you with Castell the same day you saw White?

Noel. I cannot recollect whether I saw Castell the same day or not.

Mr. *Lee.* Was there one or two stair-cases?

Noel. There were two houses laid into one, but one stair-case.

Mr. *Lee.* Was not the passage near Castell's room?

Noel. The passage comes by the head of the stair-case?

Mr. *Lee.* Must not all those that go to the necessary-house go by Castell's room?

Noel. Yes.

Captain *Sinclair* sworn.

Mr. *Fazakerley.* Do you know Corbett's house?

Sinclair. Upon the 14th of December, 1727—

Mr. *Fazakerley.* Sir, do you know this house of Corbett's?

Sinclair Yes.

Mr. *Fazakerley.* Were you there in September, October, November, or December, 1728?

Sinclair. I was not brought in then, I was fifty-two days at Corbett's house.

Mr. *Fazakerley.* How were you used then?

Sinclair. I must submit it to the Court, whether, as I have a prosecution against Bambridge, what I may say may not prejudice myself; whether any thing I say now may not be prejudicial to me.

L. C. J. It is impossible for me to tell you. If you say any thing that they can make use of, without doubt they will.

Bambridge. I desire, my lord, the people may be kept from the witnesses behind.

L. C. J. If you hear any body prompt the witnesses, they shall be removed.

Mr. *Filmer.* We desire to know what sort of a house Corbett's is.

Sinclair. I was carried to Mr. Corbett's house contrary to my inclinations; when I was

there I was put in a garret, with some of the domestics.

Serj *Darnell.* It is not proper evidence.

L. C. J. Let me know what it is; I don't know whether it is material or not.

Mr. *Lee.* My lord, the witness is come to give you an account of this house; that it is a victualling-house.

Sinclair. It is a victualling-house and spunging-house, and they take exorbitant sums of money. I was there from the 14th of December, 1727, till the 3rd of February following.

L. C. J. I think you say it was a public victualling-house and spunging-house?

Sinclair. Yes, my lord.

Mr. *Reeves.* I desire you will inform my lord and the jury, whether it is continued the same sort of house since?

Sinclair. There was one Blackwell there.

L. C. J. When was that?

Sinclair. In the month of January, 1727.

L. C. J. That is not evidence. Do you know nothing of this house since 1727?

Sinclair. Since I have been discharged I have not been in the house; but when I was there, I was obliged to pay one shilling a night for a bed.

L. C J. That was a very wrong thing, but that was in 1727?—*Sinclair.* Yes.

Serj. *Eyre.* Let me ask you one question. You call it a victualling-house and a spunging-house; what is a spunging house?

Sinclair. Those that take exorbitant fees.

Serj *Eyre.* Did you pay any thing above the fees.

L. C. J. This is no evidence in point of time: You all know evidence, and should keep to it.

——— *Wilson* sworn.

Mr. *Reeves.* Do you know Corbett's house?

Wilson. Yes.

Mr. *Reeves.* What sort of a house is it?

Wilson. It is a public-house.

Mr. *Reeves.* what do they sell there?

Wilson. Beer, ale, cyder, wine, punch and victuals.

Mr. *Reeves.* Was the house used for that purpose when Mr. Castell was there?

Wilson. Yes.

Mr. *Reeves.* You know Castell was there?

Wilson. Yes.

Mr. *Reeves.* Was it then made use of for this purpose?—*Wilson.* Yes.

Mr. *Reeves.* Where had Mr. Castell victuals and drink?—*Wilson.* In that house.

Mr. *Reeves.* Do you know the situation of the room where Mr. Castell lay?

Wilson. Very well.

Mr. *Reeves.* Do you know the room where White was in?—*Wilson.* No.

Mr. *Fazakerley.* How much did he (Mr. Castell) pay a night for his bed?

Wilson. Mr. Castell told me——

Mr. *Strange.* That is not evidence. Had he a room up one pair of stairs?

Wilson. The latter part of his time.

Mr. *Strange.* Were you with him often?

Wilson. Yes, till he had the small-pox.

Mr. *Strange.* Did his wife come near him during the time he was ill?—*Wilson.* No.

L. C. J. If you are examining the witnesses, I cannot hear.

Then Mr. Strange asked the witness some question, which for the noise in the Court was not heard.

L. C. J. If you ask any question, you must propose it to the Court.

Mr. *Strange.* Were you servant to Mr. Castell?—*Wilson.* No.

Mr. *Strange.* Were you his companion?

Wilson. Yes; and drank several bottles of wine with him; and I have heard Mr. Castell say, that Bambridge and Corbett were all rogues alike.

Mr. *Collett* sworn.

Mr. *Filmer.* Did you know Mr. Castell?

Collett. Yes.

Mr. *Filmer.* Did you know of any money he received?—*Collett.* Yes, 125*l.*

Mr. *Filmer.* When?

Collett. The 3d of October, 1728.

Mr. *Filmer.* Did you know of Bambridge being privy to it?

Collett. I believe he was; Mr. Castell told me so.

Mr. *Kettleby.* My lord, that is no evidence.

Mr. *Filmer.* Do you know of your own knowledge that he knew of it?—*Collett.* No.

Mr. *Lee.* Where was this 125*l.* paid to Mr. Castell?—*Collett.* It was paid at Woodward's.

Mr. *Lee.* Where was Woodward's?

Collett. I drew a draft.

Mr. *Lee.* Where was Woodward's?

Collett. In Exchange-alley; I thought all the world knew that.

Mr. *Lee.* So Woodward paid it?

Collett. I don't know.

L. C. J. I thought you had actually paid the money to Mr. Castell?

Collett. I gave a draft on Woodward.

Mr. *Lee.* Was that allowed on account, do you know?—*Collett.* Yes.

Mr. *Strange.* You don't know what hands it was paid into at Woodward's?—*Collett.* No.

Mr. *Strange.* What reason have you to believe Bambridge knew of it?

Collett. Because I had some difficulty in paying the money; there was Mr. Brent, Mr. alderman Preston, Mr. Kirley, and myself, and we were under some difficulty, and Castell desired that one of us would go up to Bambridge; upon which Mr. Brent went up, and desired to know if he might pay the money with safety; then Brent came down, and gave us satisfaction, and I paid the money.

Mr. *Strange.* The force of their argument is, that as soon as Bambridge knew that he had received this money, then he pressed him to give fresh security. If he did not know that he had money, that argument will not hold. How was the note drawn?

Collett. To Robert Castell, or bearer.

Mr. *Fazakerley*. Whom was the note payable to?

Collett. It was payable to Mr. Robert Castell or bearer, on demand.

Mr. *Fazakerley*. And this was allowed in account to you by Woodward?—*Collett*. Yes.

Mr. *Strange*. You don't know that it came to Castell's hands?

Collett. No, any porter might go and receive it.

Mr. *Lee*. To whom was the note delivered?

Collett. To Mr. Castell.

L. C. J. I went away with it at first as if Castell had received it.

Mr. *Lee*. Brent was the man that went up to Bambridge.

Mr. *Strange*. Prove something or other.

Bambridge. My lord, I never had one shilling of him.

Mr. *Brent* sworn.

Mr. *Fazakerley*. Were you present when Mr. Collett drew a bill upon Woodward, payable to Mr. Castell?—*Brent* Yes.

Mr. *Fazakerley*. Do you know of any body that went to Bambridge, and what was said?

Brent. Sir, I was jealous of Mr. Castell's circumstances, and I asked Mr. Bambridge if there was any judgment or execution against Mr. Castell? And Bambridge told me he was in upon mesne process.

Mr. *Fazakerley*. Did you at any time tell him the occasion of asking that question?

Brent. It is very possible I might give him some hints, but I cannot be positive.

Mr. *Fazakerley*. I desire you will recollect; it was very natural for you to speak to Bambridge, did you mention any thing of that money?—*Brent*. I cannot say.

Mr. *Fazakerley*. Did Bambridge speak to you concerning it?

Brent. I cannot remember that he did.

Mr. *Fazakerley*. Did you give him any reasons for asking the question?

Brent. It is possible I might tell him some reasons.

Mr. *Fazakerley*. I desire you'll acquaint my lord, whether Bambridge appeared to be assisting to Mr. Castell in that affair, or have you reason to believe him so?

Brent. I cannot say, unless to satisfy me, I asked Mr. Castell several questions, and Castell said, If I would ask Bambridge he would satisfy me.

Mr. *Lee*. When you went up to Bambridge, when you went to enquire after Castell's circumstances, what did you say to Bambridge?

Brent. I have answered that question, I cannot be positive, to be particular I cannot.

Mr. *Lee*. Where was Mr. Castell then?

Brent. I do believe Mr. Castell was with the other company.

Mr. *Lee*. Where was Bambridge, was he with the other company?

Brent. I believe he was not, I don't remember he was in the other company.

L. C. J. Was he in the same room?

Brent. I don't believe he was.

L. C. J. Did you go out of that room into another room to Bambridge?

Brent. I don't believe either Mr. Collett or Preston went out of the room, but I went myself.

Mr. *Strange*. Did you not go up stairs?

Brent. I can't say whether it was in the same stair-case, or not; I did ask Bambridge, and he did satisfy me.

Mr. *Strange*. Did you ask Bambridge if it was safe to pay Mr. Castell any money?

Brent. I can't be certain, it was the whole I said, probably I might tell him I was negociating the concern.

Mr. *Fazakerley*. It will follow most naturally, that the further bonds were demanded on purpose to extort money. Now we shall shew, that security was given from time to time, and in order to that we had given notice to Bambridge to produce the bonds.

Mr. *Strange*. You know the other day in the Court of Chancery it was over-ruled.

Mr. *Reeves*. Here are bonds given as a security to a private person; we demand the bonds, and the proof lies upon them to shew they have delivered them over.

Mr. *Lee*. We ought to be let into parole-evidence, to shew that we gave notice to produce them.

Serj. *Darnell*. I think you are too early.

Mr. *Bendon* sworn.

Mr. *Lee*. Did you give Bambridge any notice to deliver the bonds?

Bendon. Yes, I have a copy of it in my hand.

Mr. *Lee*. What did Bambridge say to you?

Bendon. Bambridge told me he had but one in his custody.

Mr. *Strange*. Were not the words, that he had only one executed?—*Bendon*. No.

Mr. *Strange*. Tell us the very words.

Bendon. When I gave Bambridge that very paper (which he had then delivered to the counsel)—

L. C. J. That paper—it must be produced.

Mr. *Lee*. We desire to produce this paper.

Bendon. Bambridge said, to prevent any disputes in Court, I have but one bond.

Mr. *Strange*. Who was by?

Bendon. Several.

Mr. *Strange*. Did you know any of them?

Bendon. There was one Beatniff, that was one of his security.

Mr. *Strange*. How many were there in all?

Bendon. Five or six.

Then the Paper was given into the hands of the Clerk.

L. C. J. Read.

Clerk. "I do hereby give notice, to produce on the trial of this cause, several bonds entered into by the appellant's husband, or his several securities, taken by you as warden of the Fleet, or by the Clerk of the Securities, and particularly two bonds, dated about November or December, 1728."

Mr. *Lee.* Now we will call Peter Ellam. Somebody acted in the room of Hopkins, who was Clerk of the Securities, and took a bond wherein Peter Ellam was one of the securities.

Mr. *Peter Ellam* sworn.

Mr. *Reeves.* Do you know what security was given by Mr. Castell to the warden of the Fleet?—*Ellam.* I do.

Mr. *Reeves.* Were you one?—*Ellam.* Yes.

Mr. *Reeves.* Give an account of the several securities you knew given, the times when, and the sums.

Ellam. Security was given five times, one in July.

Mr. *Reeves.* When was the first?

Ellam. In July, 1728.

Mr. *Fazakerley.* How much was the sum?

Ellam. I think 100*l.*

Mr. *Fazakerley.* How much was the penalty of the bond?—*Ellam.* I think it was 200*l.*

Mr. *Reeves.* Whom was that given to?

Ellam. It was given to Hopkins.

Mr. *Reeves.* Who was warden?

Ellam. Mr. Huggins.

Mr. *Reeves.* Who was deputy-warden?

Ellam. I do not know, I believe Bambridge.

Mr. *Reeves.* Was there any other security besides yourself? Whom was the bond given by?

Ellam. By Mr. Chambers and myself.

Mr. *Reeves.* Pray, mind what I ask you. The next bond was given, how soon?

Ellam. I believe in about four or five days.

Mr. *Reeves.* How much was that for?

Ellam. Eight hundred pounds.

Mr. *Reeves.* Who were put in that?

Ellam. Mr. Curll, Mr. Chambers, and myself.

Mr. *Reeves.* There was a third bond, do you know any thing of that? Who was that given by?

Ellam. It was given by Curll, myself, and I believe Mr. Bell.

Mr. *Reeves.* Pray recollect yourself, do not be under any mistake.

Ellam. Mr. Curll and myself I am positive of.

Mr. *Fazakerley.* Can you be positive of a third bond? were there three?

Ellam. I believe there were, and I signed with him.

Mr. *Fazakerley.* How much was the third for?—*Ellam.* The third was for 1,000*l.*

Mr. *Fazakerley.* The third, when was that?

Ellam. I can't remember the particular time.

Mr. *Fazakerley.* How long before Mr. Castell died?—*Ellam.* A great while.

Mr. *Fazakerley.* Was it before or after making the 4th bond that he was taken ill?

Ellam. I believe it was after.

Mr. *Fazakerley.* How long after?

Ellam. I believe about the beginning of the term.

Mr. *Fazakerley.* Then that must be in October.—Was there any more?—*Ellam.* Yes.

Mr. *Fazakerley.* How much was that for?

Ellam. I think the fourth was for 1,000*l.*

Mr. *Fazakerley.* Don't you know that it was for 1,000*l.*?—*Ellam.* I believe it was.

Mr. *Fazakerley.* Who entered into that bond?

Ellam. There was Mr. Curll, Mr. Bell, and myself.

Mr. *Fazakerley.* When was that given?

Ellam. That was given the latter end of November.

Mr. *Fazakerley.* You say that was for 1,000*l.*?

Ellam. Yes.

Mr. *Fazakerley.* You seemed to say something of a fifth bond being given, how much was that for?—*Ellam.* Two thousand pounds.

Mr. *Fazakerley.* How do you know?

Ellam. I was present at reading it, and I took it to be 2,000*l.*

Mr. *Fazakerley.* When was that given?

Ellam. On the first of December.

Mr. *Fazakerley.* Do you believe it was the 5th or 1st of December?

Ellam. I believe it was on a Monday.

Mr. *Fazakerley.* Who were bound?

Ellam. There was Mr. Curll, my brother, and myself.

Mr. *Fazakerley.* What is your brother's name?—*Ellam.* John Ellam.

Mr. *Fazakerley.* What was the reason of all these bonds being given so quick? When was the last bond given?

Ellam. One was given between the 24th and 25th of November, on a Saturday night, then Mr. Castell was going to his lodgings, and in two or three days we went to see him, but could not find him, and they said he was at Corbett's, and we went to him there.

L. C. J. When was this? Name the time.

Ellam. It was about the latter end of November, between the 26th and the last.

L. C. J. Go on.

Ellam. I said, Mr. Castell, what do you do here? You love a gaol better than I do; what do you do here; what is the reason of it? Mr. Castell said, I do not know, it is what Bambridge pleases. I said, Mr. Castell, surely your luck is worse than any body's.

Mr. *Strange.* Was Bambridge by?

Ellam. No.

Mr. *Strange.* Then you may hold your tongue.

Mr. *Fazakerley.* What were the bonds given for?—*Ellam.* His liberty.

Mr. *Fazakerley.* Had he his liberty before the last bond was given?—*Ellam.* No.

Mr. *Fazakerley.* I ask you whether he had his liberty upon the last bond's being given?

Ellam. No, he never was out after.

Mr. *Fazakerley.* Do you know when he first took his sickness?

Ellam. He first took his sickness on a Monday morning, the 1st of December.

Mr. *Fazakerley.* Were you a creditor to Mr. Castell?—*Ellam.* He owed me near 200*l.*

Mr. *Fazakerley.* Then you were his security and creditor at the same time?

Ellam. I knew him to be as industrious a man as any one living, and that there was no

probability of getting any thing in a gaol, so thought it was better to run the hazard.

Serj. *Darnell.* Did you never apply to have him locked up?—*Ellam.* No.

Serj. *Darnell.* Do you know of any one else?

Ellam. No, I never was present.

Serj. *Darnell.* Do you know of the design of his security to put him into prison?

Ellam. Not that I know of, it was never mine.

Serj. *Darnell.* Did Bambridge never entreat you to continue security for him?

Ellam. All that I know relating to that matter is, that Chambers withdrew his security.

Serj. *Darnell.* What did Bambridge do to Chambers to have him stand as one of his security?

Ellam. Chambers withdrew his security.

Bambridge. I don't look upon that to be a proper answer.

L. C. J. You must answer the question.

Ellam. Mr. Chappell was coming to me to tell me that Mr. Chambers would deliver him up, for that if he went out of the rules, his counsel advised him that the security was liable, and I went along with Chambers to Bambridge, and Chambers told Bambridge that he would be security no longer; upon this Mr. Castell was very uneasy, and Chambers upon cooler thoughts determined not to give up his security.

Serj. *Darnell.* I ask you whether Mr. Bambridge did not desire Mr. Bell to continue his security?

Ellam. Mr. Bambridge talked very civilly at that time.

Serj. *Darnell.* I ask you whether Mr. Bambridge appeared to have a kindness for him?

Ellam. Bambridge told Mr. Castell, that if his security delivered him up, he must go to Corbett's.

Serj. *Darnell.* What did you do when Chambers said he would not be security?

Ellam. When Chambers told me he would not be security any longer, it lay upon myself, and I went down to the tavern then, and told them I was resolved to stand.

Serj. *Darnell.* I ask you whether Mr. Bambridge persuaded you to stand, or said that he should be put into the gaol?

Ellam. It did appear to me that Bambridge was civil to him.

Serj. *Darnell.* When was this?

Ellam. This was before the 4th or 5th bonds were given.

Mr. *Strange.* This was after the bonds for 800*l.* and 1,000*l.* Tell us whether Mr. Castell did not desire that a bed might be got there?

Ellam. I did not know of his going there.

Mr. *Strange.* Pray did not you desire Corbett to take him in custody?—*Ellam.* No.

Mr. *Strange.* Were you by at any other time?

Ellam. No.

L. C. J. Fix the time; hark you, Sir, do you remember the time when Chambers would not continue security, I ask you if you can remember when it was?

Ellam. I believe it was in November.

Serj. *Eyre.* You say you cannot be positive as to the day of the month.

Ellam. I tell you fairly, that by the almanack it was on Monday; if Mr. Castell died that day se'nnight, it was Monday se'nnight before that.

Serj. *Eyre.* How long after you executed the bond, how many days was it before he died?

Ellam. It must be Wednesday or Thursday.

Serj. *Eyre.* You say Monday the bond was executed?

Ellam. Yes, it must be the first Monday, if he died on the 13th.

Serj. *Eyre.* Whom were the bonds given before? Or to whom? Was Mr. Bambridge present?

Ellam. I never saw Bambridge present when they were given.

Serj. *Eyre.* Do you know whether you were excepted to, or remained there till better security was given?—*Ellam.* I don't know.

Serj. *Eyre.* Who was there?

Ellam. Codnor was there, who acted as clerk.

Serj. *Eyre.* Were you all present when the fourth bond was given?

Ellam. To the best of my remembrance, we were all present when the fourth bond was given.

Serj. *Eyre.* What say you as to the fifth?

Ellam. As to the fifth, I believe that all the persons were not then present.

Serj. *Eyre.* You can't tell that either of you was excepted to?

Ellam. I know no other than as Bambridge told me.

Mr. *Wynn.* You said you were uneasy when Chambers said he would not stand; what did you do then?

Ellam. I did nothing then, but went home, and next morning resolved to stand.

Mr. *Wynn.* Did you say any thing to Mr. Corbett or Bambridge?

Ellam. No; when I went to Mr. Bambridge's room, I went with a design to surrender him; and when I came out, seeing Mr. Castell in so great an agony, I resolved then not to do it.

Mr. *Wynn.* What did Mr. Bambridge say?

Ellam. He said, he believed that Mr. Castell always behaved himself within bounds, and believed that we had no reason to complain; and believed he would not make an escape.

Mr. *Wynn.* Did he encourage you to surrender him?

Ellam. All that he said at this time seemed to encourage us to stand as security.

Mr. *Wynn.* When Chambers would not stand, did you take any counter-security from any one?

Ellam. There was a note drawn, but I never had it; Mr. Curll had the custody of it.

Mr. *Wynn.* What was the amount?

Ellam I believe 100*l.*

Mr. *Wynn.* I ask you, whether you had not a bill of sale from Mr. Castell at that time?

Ellam. No.

Mr. *Wynn.* How long before?

Ellam. I can't tell the date; I have it by me.

Mr. *Wynn.* Had you not that bill of sale before you executed that first security?

Ellam. No.

Mr. *Wynn.* Was it between the first and second?—*Ellam.* No.

Mr. *Wynn.* The second and third?

Ellam. Very likely it might.

Mr. *Wynn.* What month do you believe it was in?—*Ellam.* November.

Mr. *Strange.* Do you say the bill of sale was in November?

Ellam. I can't say particularly.

Mr. *Strange.* Might it not be before November?—*Ellam.* I don't believe it was.

Mr. *Strange.* Can you take upon you to say whether before or not?—*Ellam.* I cannot.

Mr. *Strange.* I desire you to see, whether that is your name; look only on the name.

Ellam. I take it to be my name.

Mr. *Lee.* Give it to the officer.

Mr. *Strange.* Then you are not able to say exactly the day when Bambridge gave you encouragement not to deliver him up; Was it before the fourth bond was given?

Ellam. Yes.

Mr. *Strange.* There was Curll; was he a man of substance?

Ellam. Yes; he has been a housekeeper these forty years.

Mr. *Strange.* Is his reputation to be a man of circumstance?—*Ellam.* Yes.

Mr. *Strange.* There were Bell and others?

Ellam. Yes.

Mr. *Strange.* Were they men of good circumstances?—*Ellam.* Yes.

Mr. *Strange.* There was your brother?

Ellam. Yes.

Mr. *Strange.* Were they housekepers?

Ellam. Yes.

Mr. *Strange.* Were they able to answer the sums they stood bound for?

Ellam. The world thinks so.

Mr. *Strange.* What will you say you are worth over and above your debts?

Ellam. 1,000*l.*

Mr. *Strange.* When your debts are paid?

Ellam. The last time my books were cast up, I was worth 1,000*l.*

Mr. *Strange.* Did you say you were not worth 200*l.* when in company with Bambridge?—*Ellam.* No.

Mr. *Lee.* It is a question enough to put any man out of countenance.

L. C. J. No man should be obliged to discover his own affairs.

John Ellam sworn.

Mr. *Lee.* You were security for Mr. Castell to Mr. Bambridge, warden of the Fleet?

J. Ellam. Yes.

Mr. *Lee.* When was it?

J. Ellam. In November last.

Mr. *Lee.* Who was security with you?

J. Ellam. My brother Peter Ellam and Mr. Curll.

Mr. *Lee.* What was the penalty of the bond?

J. Ellam. Two thousand pounds.

Mr. *Strange.* He only says what Mr. Castell said.

L. C. J. He said it of his own knowledge.

Mr. *Lee.* When was the bond executed?

J. Ellam. I believe in November.

Mr. *Lee.* You can't tell positively?

J. Ellam. No.

Mr. *Lee.* Might it not be the beginning of December?

J. Ellam. I can't exactly tell.

Mr. *Lee.* Whom was the bond executed by?

J. Ellam. Myself and two others; I signed first, and the other two at Gravesend.

Mr. *Lee.* Were you with Bambridge to tell him about it?—*J. Ellam.* Yes.

Mr. *Lee.* How came you to be his security?

J. Ellam. Mr. Castell sent to me to know if I would be security in the room of Mr. Chambers; I said it was a thing I did not care for, but for him I would: this was in the morning. Mr. Castell said, You will be security? I said, Yes. And he said, I don't know whether Bambridge will accept of it; I beg you'll come at night. I told him I would: I think Bambridge would not then accept of it. One Mr. Shortes was there at night, and Mr. Castell desired he would go to Mr. Bambridge to desire the bonds to be executed for him.

Mr. *Lee.* When was Mr. Castell taken ill?

J. Ellam. Mr. Castell was very ill in November and December.

L. C. J. Where was this?

J. Ellam. At Corbett's.

Mr. *Lee.* Did you go to Bambridge?

J. Ellam. Yes.

Mr. *Lee.* What did you say?

J. Ellam. I asked him, whether he thought my security sufficient in the room of Mr. Chambers? And Mr. Bambridge said he would accept of it.

Mr. *Lee.* Did you execute before your brother?

J. Ellam. I believe I did before Mr. Curll; and Mr. Bell executed, I believe, after.

Mr. *Lee.* What was the sum?

J. Ellam. Two thousand pounds.

Mr. *Lee.* Was it two thousand? How do you know? Was it in Latin or English?

J. Ellam. The attorney read it; and Mr. Castell told me so.

Mr. *Lee.* Was there any person in the bond before you signed?

J. Ellam. There was only Mr. Curll, my brother, and myself.

Mr. *Lee.* I ask you whether there was any more besides you, your brother, and Mr. Curll?

J. Ellam. No.

Mr. *Lee.* How many names were there in the bond?

J. Ellam. None but mine, my brother, and Curll.

Mr. *Lee.* How many obligors? Do you know what I mean by obligors?

J. Ellam. Yes.

Mr. *Lee.* Then I ask you, How many persons names there were besides these?

J. Ellam. There was mine, my brother's, and Curll's.

L. C. J. That he said before.

Mr. *Lee.* When you were sent to Mr. Bambridge, Mr. Castell seemed very impatient to have the bonds executed; did he complain of any extraordinary usage?—*J. Ellam.* Yes.

Mr. *Lee.* What did he complain of?

J. Ellam. I asked him, what made him uneasy? He said, they would not let him out. Then I asked him, what was the reason? He made answer, I suppose they want more money of me.

Mr. *Lee.* They! Name them. Can you name any body?

J. Ellam. I asked him again, Have you given any money? He said, Yes, I have. I said, Pray how much have you given? He made answer, About ten pounds.

Serj. *Darnell.* What he said is not evidence.

Mr. *Fazakerley.* What he said upon his death bed, I apprehend, is evidence*, which is what we shall examine him next to.

L. C. J. That is according to the nature of the question; what is declared as an actual fact, is.

Mr. *Fazakerley.* Had you any discourse with Mr. Castell, when he lay on his death-bed, what was the occasion of his death?

L. C. J. [Speaking to the witness.] Don't be in a hurry, take time, speak out.

J. Ellam. He asked me, what I thought the distemper might be? I said, I cannot tell. The doctor went down with me; what he said to the doctor was, I am very ill.

Mr. *Strange.* This was before he was very ill?

Mr. *Fazakerley.* When he lay in his extremity?

L. C. J. Was he near his death?

Mr. *Fazakerley.* Did he say any thing what was the occasion of his death, when in extremity?

J. Ellam. He said upon his dying bed, that Mr. Bambridge, in not letting him go, was the occasion of his death.

Mr. *Fazakerley.* Did he know the distemper he died of?—*J. Ellam.* No.

Mr. *Fazakerley.* How long after the small-pox came out?—*J. Ellam.* A day or two.

Mr. *Fazakerley.* How long did he live after?

J. Ellam. About——

Serj. *Darnell.* Had he an apprehension of dying before the distemper came out?

J. Ellam. He said, if they did not let him out it would be too late, for it would be his death.

Serj. *Darnell.* This was before the distemper came out?—*J. Ellam.* Yes.

Serj. *Darnell.* Did he know of this distemper being there? Was he apprehensive of this distemper?

* See Leach's Hawkins's Pleas of the Crown, book 2, chap. 46, § 26; and the Case of Reason and Tranter, vol. 16, p. 1.

J. Ellam. He said, if it was in any village of any county, he would go another way.

L. C. J. Did he know it was in the house there?—*J. Ellam.* Yes.

L. C. J. When was this?

Mr. *Fazakerley.* The bonds will shew; must not they produce them?

L. C. J. They must produce them, or give some reason why they don't.

Mr. *Strange.* The two first were given in Mr. Huggins's time, I don't know any thing of the other three. Bambridge was sworn the 15th of November, so that three were given in Mr. Huggins's time, and two only in his.—I am afraid it is a civil action.

Mr. *Lee.* The action is in a criminal cause.

L. C. J. What do you think this is? The mixt action is no part of the appeal; it is certainly a criminal cause.

Mr. *Reeves.* We give it up, if we don't give sufficient evidence after.

L. C. J. Can you go no further to fix it on him?

Mr. *Reeves.* We can prove that Codnor acted as Clerk of the Securities, in behalf of Hopkins.

L. C. J. What was Hopkins?

Mr. *Reeves.* Hopkins was Clerk of the Papers, and not being well, employed one Codnor, who proves that Peter Ellam entered into several bonds.

L. C. J. You say he was not sworn in till the 15th of November, the patent bears date the 30th of October; let John Ellam be called again, he was the last witness.

Mr. *Reeves.* If your lordship pleases, we will call Peter Ellam, for he executed all the bonds.

Mr. *Peter Ellam* called.

Mr. *Reeves.* When you executed these bonds, who was present, and assisted in behalf of the warden?

Ellam. Hopkins was to the two first, Codnor to the three last.

Mr. *Reeves.* Whom did Codnor act for?

Ellam. I always understood he acted for Hopkins.

Mr. *Reeves.* Who did you think was the clerk?

Ellam. I thought Hopkins.

Mr. *Reeves.* What was the reason he was not there?

Ellam. It was reported he was sick.

Mr. *Reeves.* Who was the bond delivered to?

Ellam. To Codnor.

L. C. J. Who was allowed to be the master?

Ellam. Bambridge.

Mr. *Fazakerley.* Was it so in the three last?

Ellam. I think so.

Mr. *Fazakerley.* Was Codnor there when the last bond was given?

Ellam. Yes.

Serj. *Darnell.* What bonds do you speak to?

Ellam. The third and fourth, and I think the last.

Serj. *Darnell.* How many were bound in the last?

Ellam. Myself, Mr. Curll, John Ellam, and Mr. Bell.

Serj. *Darnell.* What is become of the bonds?

Ellam. I don't know.

Serj. *Darnell.* Should you know it if you should see it again?

Ellam. I believe I should.

L. C. J. Had you any discourse with Mr. Bambridge about the third and fourth bonds?

Ellam. No, not with him about any of these bonds.

Mr. *Fazakerley.* When Chambers declined standing as a security, how many bonds were given after?

Ellam. I think it was before the third was given up.

Then Peter Ellam withdrew, but was called back; and standing up again was farther examined.

Mr. *Fazakerley.* Recollect the time you had the discourse with Mr. Bambridge; How many bonds did you give after the time you had the discourse with Mr. Bambridge?

Ellam. I think it was three; when he came to the third bond I gave security, Mr. Chambers having given up.

L. C. J. It don't appear whom the bonds were accepted by, or whom delivered to.

Mr. *Harbin* sworn.

Mr. *Filmer.* Who acted as Clerk of the Securities to the Warden of the Fleet when Hopkins was ill?

Harbin. I don't know of my own knowledge, but as Hopkins told me.

Mr. *Edwards* sworn.

Mr. *Reeves.* Do you know Hopkins?

Edwards. Yes.

Mr. *Reeves.* What was his office?

Edwards. Clerk of the Inquiries, as I believe.

Mr. *Reeves.* Who was Clerk of the Securities?—*Edwards.* Hopkins, I believe.

Mr. *Reeves.* Do you know Codnor?

Edwards. Yes.

Mr. *Reeves.* Do you know that he acted for Hopkins?

Edwards. I was not privy to such things.

Daniel Hopkins sworn.

Mr. *Reeves.* I think you were employed by Mr. Bambridge to take securities for the liberty of the rules?—*Hopkins.* Yes.

Mr. *Reeves.* In November and December 1728, did you employ any one else?

Hopkins. In November I was taken ill, about the 20th; and in my illness Codnor, who acted in the office, I believe officiated in my office.

Mr. *Reeves.* Who did he deliver them to? To you?—*Hopkins.* No.

Mr. *Reeves.* Who then?

Hopkins. I believe to Mr. Bambridge.

Mr. *Reeves.* Did he account for any bonds to you?

Hopkins. No; but he gave me a memorandum, that bonds were taken for Mr. Landman and Mr. Castell.

Mr. *Reeves.* Do you believe Mr. Bambridge appointed him?

Hopkins. Yes; nobody else could.

Mr. *Reeves.* You believe he accounted to Mr. Bambridge?—*Hopkins.* Yes.

Mr. *Strange.* You are Clerk of the Inquiries?

Hopkins. Yes.

Mr. *Strange.* Don't you go to enquire after the securities?

Hopkins. Yes; and I have taken bonds.

Mr. *Strange.* Don't the Clerk of the Papers take bonds?—*Hopkins.* Not in my time.

Mr. *Strange.* Is it not the Clerk of the Papers business?—*Hopkins.* No.

Mr. *Strange.* What is your business?

Hopkins. Our business is, to inquire into the circumstances of the sureties before we take them.

Serj. *Eyre.* Is it not usual to take bonds *de bene esse*?—*Hopkins.* Yes.

Serj. *Eyre.* Suppose you enquire into these persons' circumstances, if you find them not sufficient do you take them?—*Hopkins.* No.

Serj. *Darnell.* If any body gets a day-rule and escapes, who takes them up?

Hopkins. The tipstaff.

Serj. *Darnell.* If the security won't stand any longer, but will surrender the party, the tipstaff carries them to prison?

Hopkins. Yes, if they desire it; and to their own houses, if they desire it.

Serj. *Darnell.* Was it usual to take up a man without the security going along with him to surrender him?—*Hopkins.* Sometimes.

Serj. *Darnell.* Could he do it in the case of Mr. Castell?

Hopkins. I don't know he could.

Serj. *Darnell.* I desire he may acquaint you, whether he had any directions from Mr. Bambridge to enquire after this Mr. Bell for Mr. Castell?

Hopkins. There was a bond taken in the month of July for 200*l.* penalty, and another of 800*l.* and I enquired after the security by the direction of Mr. Bambridge, and Mr. Bambridge excepted to the security first proposed for that bond, and Mr. Castell was at liberty to get other.

Serj. *Darnell.* Did you report them as sufficient?—*Hopkins.* Yes.

Serj. *Darnell.* Was Bambridge satisfied?

Hopkins. Yes, in July.

Mr. *Strange.* I ask you whether you ever observed any averseness to these gentlemen, as to the first bond?—*Hopkins.* Never myself.

Mr. *Strange.* Had you any directions as to the third bond?

Hopkins. I had directions to enquire after one Lilly.

Mr. *Strange.* Did you enquire after Mr. Curll?—*Hopkins.* Not then.

Mr. *Strange.* After the two first, did you inquire after the security?—*Hopkins.* No.

Mr. *Strange.* Did you ever enquire after Curll?—*Hopkins.* Yes.

Mr. *Strange.* Did you report him sufficient?

Hopkins. Yes.

Mr. *Strange.* How many bonds was herin?

Hopkins. He was in the two first, and the last bond.

Mr. *Strange.* Have you these two bonds?

Hopkins. No, I delivered them in to the table at the committee of the House of Commons, and have not had them since.

Mr. *Strange.* Do you know Mr. Corbett's?

Hopkins. Yes.

Mr. *Strange.* Do you know what prisoners pay there?—*Hopkins.* Yes.

Mr. *Strange.* What is the price of a dinner?

Hopkins. One shilling, and I think it worth it.

Mr. *Strange.* While Mr. Castell was there, how was he used?

Serj. *Darnell.* (the witness not answering directly) Did you ever hear Mr. Castell complain of any ill usage?

Hopkins. No: there are some persons behind interrupt me in giving my evidence, and say I deserve to be hanged.

Serj. *Darnell.* Do you know the house where White was?—*Hopkins.* Yes.

Serj. *Darnell.* Do you know the house where Castell was?—*Hopkins.* No.

Mr. *Fazakerley.* The witness swore that Bambridge said he had one bond.

L. C. J. Bendon did say so, for he had applied to Bambridge, and Bambridge said, to prevent disputes, he had but one.

Serj. *Darnell.* Two were delivered to Mr. Huggins, the other two before the committee; they charged Mr. Bambridge with having bonds, and Bambridge said, to prevent disputes, there was but one. If Hopkins could not act, and he had appointed any one, that was the same thing; as to one bond, that Bambridge confessed to have. There was an act made last session of parliament, under the severest penalty, that Bambridge should deliver up all his books and papers. If he should produce the other bond, and it appears that he did not deliver up all bonds, he would be liable to the said penalty.

L. C. J. You are only to deliver the bonds in evidence; you must consider, here are three bonds taken by Codnor; if one of these bonds came to your possession, that don't imply the rest being in your hands; as to the single bond, it is to be left to the jury, for if Codnor is the person he put in the office, and has delivered up one bond, won't it be implied that he has the other?

Serj. *Darnell.* There has been an application to another court for the books of the office; and it was the opinion of the Court that the books could not be delivered up.

L. C. J. That excuse will not do here; if you shew they are taken from you we cannot expect impossibilities.

Serj. *Darnell.* I do confess they are not delivered up.

L. C. J. They say the bonds were given for such sums; you must produce the bonds, to shew if that is true or not.

Serj. *Darnell.* We are desirous to lay all before you we can; these bonds were only taken *de bene esse*, only till the security was enquired after, according to the method of the thing; these are not absolute, and that was the reason why these people were enquired after.

L. C. J. Then the question is, Whether they should not go on?

Mr. *Underwood* sworn.

Mr. *Reeves.* Where do you live?

Underwood. Upon Ludgate-hill.

Mr. *Reeves.* In the rules of the Fleet?

Underwood. Yes.

Mr. *Reeves.* Did Mr. Castell lodge at your house?—*Underwood.* Yes.

Mr. *Reeves.* When did he live there?

Underwood. Last July was twelve months.

Mr. *Reeves.* How long did he continue there?

Underwood. I believe till the middle of November.

Mr. *Reeves.* Do you know what happened to him then?

Underwood. Corbett came to my house that morning to fetch him away, but he was not at home; and when he came in, I told Mr. Castell he had been there; and Mr. Castell desired me, if he came again, not to tell him he was at home, and he went to lock himself up; then Corbett came up.

Mr. *Reeves.* Did he express any concern?

Underwood. Yes; he spoke to me, and said, If Corbett came again he would lock himself up.

Mr. *Strange.* Did you hear any thing of his security being uneasy?—*Underwood.* No.

Mr. *Strange.* Did you never hear Mr. Castell say the security was uneasy?

Underwood. No.

Mr. *Strange.* Did Corbett use him uncivilly?

Underwood. No.

Mr. *Strange.* What did Corbett say?

Underwood. He spoke to me, and asked where he was, and then went up.

Then *Daniel Hopkins* was again called.

Mr. *Reeves.* Were you in Mr. Underwood's house?—*Hopkins.* Yes.

Mr. *Reeves.* You heard the discourse that passed?

Hopkins. Yes, I was in Williams's room on the stair-head; I lived up two pair of stairs, and Mr. Castell three pair of stairs; Williams, Castell, and I were standing together, Corbett came down stairs; there was Mr. Castell with us; he said, Mr. Castell, you must go with me, your security has surrendered you; Mr. Castell desired he might not go; Corbett said he must, he had the warden's orders, and must obey them.

Mr. *Reeves.* Who was warden?

Hopkins. Mr. Bambridge.

Mr. *Reeves.* Did not Castell desire him to let him stay?

Hopkins. Yes; Corbett said, he wished he could; and said several other civil expressions.

Mr. *Strange.* Do you know the time when Mr. Bambridge was sworn?

Hopkins. I believe it was the 15th of November.

Mr. *Strange.* How do you know?

Hopkins. The 16th I took bonds in his name.

Mr. *Kettleby.* How long was it after Mr. Castell was taken from Underwood's before Bambridge was admitted warden? When was he admitted warden?

Hopkins. About the 15th of November.

Mr. *Kettleby.* What day was Mr. Castell fetched in?

Hopkins. About the 14th of November.

Catharine Mackartney sworn.

Mr. *Reeves.* Were you present when Mr. Corbett came to take Mr. Castell?

Mrs. *Mackartney.* No.

Mr. *Reeves.* What orders had you from your mistress about Mr. Castell?

Mr. *Kettleby.* I must beg leave to oppose that question.

Mr. *Reeves.* Were you with Mr. Castell when he was ill?

Mrs. *Mackartney.* I went several times to know how he did; when I went the first day, he kept his bed, which was the second day of the small-pox coming out.

Mr. *Reeves.* I desire she may acquaint you, whether she heard him say who was the cause of his catching the small pox.

Mr. *Strange.* How long before he died?

Mr. *Fazakerley.* Did you see him before he died?

Mrs. *Mackartney.* Every day before he died.

Mr. *Fazakerley.* How long before he died, did you hear him say who was the cause of his death?

Mrs. *Mackartney.* I heard him say several times, that if he died, he laid his death to Mr. Bambridge, for he was the occasion of his death.

Mr. *Fazakerley.* Tell the last time you heard him speak it. How long before he died?

Mrs. *Mackartney.* Three days.

Mr. *Fazakerley.* Was he in a dangerous condition at that time?—Mrs. *Mackartney.* Yes.

Mr. *Fazakerley.* You say you went several times by the direction of your mistress; did your mistress supply him with any thing?

Mrs. *Mackartney.* The first day I went to him, he desired me to give his service to my mistress, for he wanted several things.

Mr. *Fazakerley.* What did he say?

Mrs. *Mackartney.* He said he wanted to make some tea, and he could not get things there to make it.

Mr. *Fazakerley.* What were the things?

Mrs. *Mackartney.* A spoon, tea-pot, cup and saucer, a knife, fork, plate, and napkin.

Mr. *Fazakerley.* When did he make that declaration, that Bambridge was the occasion of his death?

Mrs. *Mackartney.* I heard him make that declaration three days before he died. The last time I was with him, he held up his hand, as much as to say, Don't come to speak.

Mr. *Fazakerley.* Who provided him with necessaries?—Mrs. *Mackartney.* I cannot tell.

Mr. *Fazakerley.* Did your mistress send them?—Mrs. *Mackartney.* No.

——— *Savage* sworn.

Mr. *Lee.* Did you at any time see Mr. Castell after he was in custody with Corbett?

Savage. Frequently.

Mr. *Lee.* When did you first see him?

Savage. The day he was taken in custody.

Mr. *Lee.* Where did you first see him?

Savage. I can't say whether at his own lodgings, or at the King's-Arms tavern.

Mr. *Lee.* Did Mr. Castell make any request to you?

Savage. Mr. Castell desired I would go to Mr. Bambridge, for that he understood he was going to close confinement, and that he apprehended the small pox was there; and said, that it was very fatal to his family, and if he catched it, he should die; and said, it would be a loss to him in his affairs.

Mr. *Lee.* When was this?

Savage. This was the first day he was taken in custody, before he went to Corbett's. I told Mr. Bambridge this, and told him the apprehension Mr. Castell was under of catching the small pox, and desired he might be indulged to go to his own lodging, and that he would be at the expence of having a keeper there. Accordingly I went to Mr. Bambridge, but he gave me no express answer.

Mr. *Lee.* Did you acquaint Mr. Bambridge with what Mr. Castell said?—*Savage.* Yes.

Mr. *Lee.* What did he do after?

Savage. I went upon the same message to Bambridge, three, four, or five times, I believe four or five, and never had any answer till the last time; then Mr. Bambridge said, he was charged with a pretty deal of money, and he must take care of his office.

Mr. *Lee.* Did you mention any thing of the small pox to Bambridge?—*Savage.* Yes.

Mr. *Lee.* Did he say any thing as to that?

Savage. No.

Mr. *Fazakerley.* Do you remember any conversation at the King's-Arms tavern?

Savage. Yes, that was some time after.

Mr. *Fazakerley.* How long?

Savage. A little before he was taken ill of the small pox.

Mr. *Fazakerley.* How long before?

Savage. About a week or four days. I was in company with some other gentlemen, and Bambridge came in, and said he had been with Mr. Castell, and that an unlucky accident had happened; and that Mrs. Corbett had mentioned the danger the man was in that was ill of the small pox, and Bambridge told us, that Mr. Castell seemed to be much affected, and it gave him vast uneasiness.

L. C. J. Was this before Mr. Castell was taken ill?

Savage. I was at supper in the King's-Arms tavern, in a room behind the bar; then Bambridge came in and told us, that he had been at Corbett's house, and Corbett's wife had unfortunately mentioned the person's having the small pox; and that Mr. Castell seemed to turn pale; and it gave him pain to see Mr. Castell so much shocked.

Mr. *Reeves.* You say that you told Bambridge, the first time of going to him, of the small pox being there, and you returned immediately to Mr. Castell?—*Savage.* Yes.

Mr. *Reeves.* Was that the first day of his being in custody?

Savage. Yes, I take it to be so.

Mr. *Reeves.* You say you went the next day again?—*Savage.* I believe it was.

Mr. *Reeves.* Did you go by order of Mr. Castell?

Savage. At the request of Mr. Castell.

Mr. *Reeves.* What did Mr. Castell desire you to say the next day to Mr. Bambridge?

Savage. The very same thing.

Mr. *Reeves.* Was there any thing mentioned as to the place Mr. Castell desired to be carried to?

Savage. It was to his own lodging.

Mr. *Reeves.* Was there any other place mentioned?—*Savage.* No.

Mr. *Reeves.* Were there any endeavours used by Bambridge to take him out of that place?

Savage. No, I do not know it.

Mr. *Filmer.* How many times did you go?

Savage. Two, three, or four times.

Mr. *Kettleby.* I think he said, it would be an inconvenience, and that he cared not to go to Corbett's?—*Savage.* Yes.

Mr. *Strange.* I ask you, whether you said it was the first day, or not, before he went to Corbett's?—*Savage.* No.

Mr. *Strange.* Did you see him there?

Savage. Yes.

Mr. *Strange.* How was his usage?

Savage. I did not hear him complain.

Mr. *Strange.* Did you go with any other request, than that he might go back to his lodging?—*Savage.* That was the request by me.

Mr. *Reeves.* What was the answer the last time you went to Bambridge; whether he did not say he was in execution?

Savage. I cannot take upon me to say.

L. C. J. I think what you said, was, that it had been signified by Corbett, that Mr. Castell was to be locked up there, and it had been signified to him that the small pox was there?

Savage. Yes.

L. C. J. What place was it at?

Savage. I can't be certain whether at the King's-Arms, or his lodgings.

Mr. *Lee.* Do you know the day he fell ill?

Savage. I can't tell.

Mr. *Lee.* Was he well before he went into Corbett's?—*Savage.* Yes, he was.

Mr. *Lee.* When he went into Corbett's, the 14th of November, was he well then?

Savage. Yes.

L. C. J. Did he not talk that it was fatal to his family?

Savage. Yes, and said if he caught it, it would kill him.

L. C. J. Did you acquaint Bambridge of that?

Savage. I did tell him it would be fatal.

L. C. J. Was the message the same as the first?—*Savage.* I went on the same message.

Mr. *Lee.* How many times did you go?

Savage. Four or five times.

Mr. *Lee.* How long before Bambridge came in into the King's-Arms tavern, before that discourse happened?

Savage. I believe the same day.

Bambridge. I desire a question may be asked the witness, whether he came in relation to some suits of Mr. Castell?

Mr. *Lee.* We must oppose that.

L. C. J. It is between party and party, his counsel must ask questions.

Savage. I did understand there was a negociation carried on by Bambridge for Mr. Castell, between him and the printer; and Mr. Bambridge did tell me, that he had made an end of it for 40*l.* or 50*l.* but I know nothing of it.

Mr. *Strange.* Did not you come about one Curll?—*Savage.* I know nothing of it.

Mr. *Strange.* Did you come to Bambridge as to Mr. Curll's being security?

Savage. I believe I did, and said he was a proper man for security, being a man of substance.

——— *Shortis* sworn.

Mr. *Lee.* Did you go to Mr. Castell when at Corbett's?

Shortis. I went to Mr. Castell at Corbett's, the morning after he was in custody.

Mr. *Lee.* What passed?

Shortis. Mr. Castell said, he had been very ill used by his creditors, and believed they had been in combination, and had combined with Mr. Bambridge.

Mr. *Strange.* Were you frequently with Mr. Castell while he was at Corbett's house?

Shortis. Yes.

Mr. *Strange.* During the time you were there, what manner was he used in?

Shortis. Mr. Bambridge behaved towards him very gentleman-like, so did Mr. Corbett.

Mr. *Strange.* Did you ever hear him complain?—*Shortis.* No.

Mr. *Strange.* When did you last see him?

Shortis. A day or two before he died.

Mr. *Strange.* Did he complain of Mr. Corbett's ill usage then?

Shortis. I believe he had every thing he wanted from Corbett's.

Mr. *Wynn.* Did he complain of any hardship in being carried to Mr. Corbett's house?

Shortis. Yes.

Mr. *Wynn.* Who did he complain of, his creditors, or Mr. Bambridge?

L. C. J. That is not evidence.

John Surrige sworn.

Mr. *Lee.* Did you go at any time from Mr. Castell to Mr. Bambridge?

Surrige. I went two or three times.

Mr. *Lee.* When did you see him?

Surrige. I went in the month of November.

Mr. *Lee.* What time?

Surrige. About fourteen days in the time of the term.

Mr. *Lee.* That was about the middle of November; it was before he was taken ill.—Did you see him at Corbett's?—*Surrige.* Yes.

Mr. *Lee.* When you went to Mr. Bambridge, what did you go with?

Surrige. Two letters.

Mr. *Lee.* Did you go by word of mouth?

Surrige. No.

Mr. *Lee.* Had you any answer to these letters? Did you deliver them to Mr. Bambridge? Did he give any answer?

Surrige. He said, he would wait upon Mr. Castell.

Mr. *Reeves.* Had you any discourse, concerning his confinement, with Mr. Bambridge?

Surrige. No.

Thomas Goodman sworn.

Mr. *Reeves.* Were you at any time at Mr. Corbett's, when Mr. Bambridge and Mr. Castell were together?

Goodman. I was confined a prisoner there.

Mr. *Reeves.* Did you remember any conversation between them two?

Goodman. I was a prisoner there, and Mr. Bambridge came into Corbett's, and sent for Mr. Castell down stairs; and Castell said to Mr. Bambridge, he had sent to him two or three times, and never could have the happiness to see him; Bambridge said he was very sorry for that; and Mr. Castell desired of Mr. Bambridge either to go into the house, or the rules, for the distemper raged there.

Mr. *Reeves.* What do you mean by the house? To go into the gaol? Tell the discourse that happened; what did Mr. Castell say?

Goodman. Mr. Castell said, the distemper raged in the house, and the distemper would be the death of him; and Bambridge made answer, that he should neither go into the house, nor into the rules, unless he gave him such a sum of money.

Mr. *Reeves.* Where were you when you heard this discourse?

Goodman. I was at the bar, asking for some bread and cheese.

Mr. *Lee.* When Mr. Bambridge said he should not go into the house, or into the rules, what did Mr. Castell say?

Goodman. That he had given security several times, and fresh bail, and that he would not give any more.

Mr. *Reeves.* Did Mr. Bambridge deny that?

Goodman. No, I did not hear it.

Mr. *Reeves.* Where did Bambridge order him to be put?

Goodman. He then ordered Corbett to put him into the tap-room, and then he went up.

Mr. *Reeves.* How long did he stay there?

Goodman. About four minutes.

L. C. J. What time of the year was this?

Goodman. About the month of November.

Mr. *Reeves.* Did Castell complain of any illness?

Goodman. The next morning he came down, and said to Mr. Corbett he was very ill, and desired a fire to be made in his room, and I believe he never came down again.

Mr. *Reeves.* How often did Mr. Castell repeat this to Mr. Bambridge?

Goodman. He desired two or three times to go into the gaol, or to the other place; and Bambridge said he should not go to either, without a sum of money.

Mr. *Reeves.* What sum was it?

Goodman. I did not hear the sum.

Mr. *Reeves.* Where was this?

Goodman. At the bar; I was standing at the bar asking for bread and cheese.

Serj. *Darnell.* How long were you there?

Goodman. Four or five minutes.

Serj. *Darnell.* How long were you a prisoner?

Goodman. Four or five months.

Serj. *Darnell.* Did you see them together?

Goodman. No, it was impossible for me to see them, the door was shut.

Serj. *Darnell.* Did you never give any testimony before?—*Goodman.* No.

Serj. *Darnell.* When were you discharged?

Goodman. By the act of parliament.

Mr. *Kettleby.* How came it you were not examined before?

Goodman. I don't know.

Mr. *Kettleby.* Did you make any declaration of this matter to any body?

Goodman. I gave this account to several, particularly to Mr. Houghton.

Mr. *Kettleby.* Did you hear of this trial?

Goodman. I heard something of it.

Mr. *Kettleby.* Are you subpœnaed?

Goodman. I am not subpœnaed.

Mr. *Kettleby.* Where have you been since you was discharged.

Goodman. In my business.

Mr. *Kettleby.* What business?

Goodman. A printer.

Bambridge. My lord, there is a person, Mr. Botwright, stands behind the evidence to prompt them, I desire he may be removed from that place.

L. C. J. Let him go to the other side.

——— *Sutton* sworn.

Mr. *Lee.* Did you know Mr. Castell?

Mrs. *Sutton.* Yes.

Mr. *Lee.* Did you know he had the small-pox?

Mrs. *Sutton.* Yes; Mr. Corbett sent for me, and desired me to look after one White, but I could not, and Mr. Castell was standing there, and said he was afraid of the small-pox, and said that he was afraid that I had them, observing something like a pimple upon my face.

Mr. *Lee.* Was there any thing upon your face?

Mrs. *Sutton.* No, nothing but what is now.

Mr. *Reeves.* Was that after he was in custody at Corbett's?

Mrs. *Sutton.* He was not a prisoner then there.

Mr. *Reeves.* Were you in the house when Mr. Castell was ill?

Mrs. *Sutton.* I sat up the night he died.

Mr. *Reeves.* Can you tell the day of the month?—Mrs. *Sutton.* I cannot tell.

Mr. *Reeves.* Do you know the month?

Mrs. *Sutton.* I can't tell, it was before Christmas.

Mr. *Fazakerley.* What distemper did he die of?—Mrs. *Sutton.* The small-pox.

——— *Westbrook* sworn.

Mr. *Fazakerley.* What do you know of Mr. Castell's fear of having the small-pox?

Westbrook. I have been Mr. Castell's neighbour twenty years, and often heard him say, that he was very much afraid of the small-pox.

——— *Kilbury* sworn.

Mr. *Fazakerley.* Do you know that about the 14th of November, and so for a month, from that time till December last, there were empty rooms in the prison?

Kilbury. Yes, there was, one of the most commodious rooms in the prison.

Mr. *Fazakerley.* Where was it?

Kilbury. Up one pair of stairs, No. 16, wainscoted.

Mr. *Fazakerley.* Was there any other room?

Kilbury. Yes, one where they kept the lumber in.

Mr. *Fazakerley.* Were there other houses where there were rooms as convenient?

Kilbury. I don't know of any.

L. C. J. What time were the rooms empty?

Kilbury. From the latter end of October, till the 4th or 5th of December.

——— *Booth* sworn.

Mr. *Fazakerley.* You hear the question, whether from the middle of November till the latter part of December, any rooms convenient were empty?

Booth. There were the same two rooms as Kilbury mentioned.

Mr. *Fazakerley.* How long were they empty?

Booth. They were empty about a month; from the latter end of October till the 4th of December.

Mr. *Fazakerley.* Do you know any thing of a house that there was room in?

Booth. I don't know any thing of that.

——— *Cleaver* sworn.

Mr. *Fazakerley.* Do you know that about the middle of November, 1728, and so till some time in December, there was any convenient house, as convenient as Corbett's, to put prisoners in?

Cleaver. There was one room. I was first at Corbett's, and from Corbett's ordered to Brown's: it was the latter-end of November, or beginning of December.

Mr. *Fazakerley.* Was there room there?

Cleaver. Yes, there were seven beds made there, and but four or five prisoners in the house.

Mr. *Fazakerley.* Was the small-pox at Corbett's?—*Cleaver.* Yes.

Mr. *Fazakerley.* Was that house made use of as Corbett's?—*Cleaver.* Yes.

Mr. *Strange.* Was it fitted up?

Cleaver. Yes, so fitted up as to have prisoners in it.

Mr. *Strange.* Were not the workmen at work?—*Cleaver.* No.

Mr. *Fazakerley.* We shall call no more witnesses.

Serj. *Darnell.* I am counsel for the defendants. The gentlemen on the other side say, that this is an appeal that is brought, with a good deal of commendation of the widow; that she was following the murder of her husband; and that she traced it with a full conviction, that though one had been acquitted for it, yet she should now convict both, therefore she waited for this opportunity of laying it before the Court.

I shall not take notice what passed upon that occasion, but observe to you, gentlemen, what is alleged in the appeal: the appeal has charged, that these two defendants did with force and arms make an assault, and did feloniously take and imprison Robert Castell, without his consent and against his will, in the house of Richard Corbett; that there they did imprison him; and that in that house there was one Joseph White then ill of the small-pox, a distemper the said Castell was greatly afraid of; and he believed he should die if he had them.

That being there confined, he caught the small-pox and died.

I cannot but say, it is something new, and an uncommon accusation of murder; but so far I'll go, that if people do wickedly, they should answer for it.

There is first a great deal to be considered. As to the first point, whether he was legally taken and imprisoned? I think there is no evidence as to that but Hopkins. He told you he was present, and saw Corbett come to Underwood's, and told him his bail had surrendered him, and told him he must carry him away to prison, and told him he was sorry for it.

This is the unlawfully and feloniously carrying him there.

He told you he had the warden's authority; as he was his agent and tipstaff, he was put to take him; he must take him, and did it by the authority of the warden, as he was his officer; this was the general authority: this is the single evidence of the first taking the man. I submit it to your lordship's direction, that there is nothing unlawful in this.

The next is, that he was carried to the house where White was sick of the small-pox. What is the evidence as to that? Every body that speaks as to that, said, the small-pox was over ten days; if it was over ten days, when is he said to be sick? When is the small-pox to end? What is the consequence of his coming there? That he dreaded the distemper, caught it and died. That the catching it was from the 14th of November, till the 4th of December, which was near three weeks; this comes out to be a month after the man had the small-pox. It was lawful when he was carried there.

As it is unreasonable to suppose the time of catching the small-pox, are not you to judge? It is so general a distemper, there is hardly one in a hundred in this town, that has not caught it. Is it because he had the small-pox there, that they had a felonious intent? Were there all these circumstances to make it appear? This is the circumstance that must be left to you, the general credit that Mr. Bambridge received from almost all the witnesses, that he treated him civilly, and that even Mr. Bambridge did business for him, till it come to Goodman, and Goodman gives an odd account to you, if you can believe it. He says, he stood at the bar (which in a public-house is very noisy); and says, that he heard a talk through the door which was shut, and he took it to be Mr. Castell's voice; and he said he desired to have the liberty of the rules, for the distemper raged in the house.

For a man to hear this at the bar, when the door was shut, and that this should be a secret so long, is very extraordinary.

I must observe to you, gentlemen, that Goodman was a prisoner; and if this evidence had been thought material, the vigilance and industry used to find him out (and very commendable it was), it was impossible to think it should be undiscovered, where so vigilant an enquiry was made.

This is the only thing that shews any iniquity in Bambridge. Here is a man that wants to go into the liberty of the rules; is a gaoler to let him? If a gaoler desires money, I do not know that it is illegal; it was after his bonds were given up; it would have turned upon his own head if he had gone away; he must have been answerable.

He charges him with so monstrous an improbability (it is impossible to think he said it), that we must submit it, whether any credit can be given to such evidence.

I chuse to mention Mr. Bambridge; but I am more particularly concerned for Mr. Corbett.

They have called several witnesses, and they say Mr. Corbett used him very well. And this is alleged to be evidence, that where witnesses are wanting, the man's declaration upon his death-bed is evidence; because that it may be done without the privity of any one else; and that a man at that time would have regard to himself in what he said. What was this declaration? If I die, I lay my death to Bambridge; but he is not certain that the man did lay the misfortune of being brought into prison to Bambridge; but if he did die by catching it from White, or being confined in a close air, if I die the prison is the occasion of my death, and consequently the keeper. Is there any consequence can be drawn, that there was a felonious intent? There is nothing at all from Corbett.

But as they have taken up a good deal of time in shewing that it was a crime carrying him to Corbett's, though I apprehend it is not material, we shall make it plain that it was no crime at all.

I must take notice as to this, that it was insinuated from circumstances. They have endeavoured to shew Mr. Castell received 195*l.* and alleged, that this money was to be got from him; this money was the means of his being used ill. When they came to prove this, they only shewed that a note was drawn upon Woodward. If he had any money, might he not have paid it to his creditors?

The next thing I shall take notice of is, as to the bonds. Probably the bonds that had been given to Mr. Huggins were delivered to Mr. Bambridge. Mr. Bambridge said he had but one; and if it was taken in the manner even said by their witnesses, it did not appear in any manner oppressive; for Chambers said he would surrender him.

When Peter Ellam was examined, he was asked, whether Bambridge said, that he would not have them surrender him? He made answer, that he said something to that effect; and it was said, that these bonds were given *de bene esse*; therefore the warden was to have a reasonable time to enquire into the securities; so it may be likewise taken by the circumstance, that he desired to have a keeper with him, and he would pay for it. What hazard does the gaoler run, if two or three persons come to him to ask the liberties of the rules, and he gives it them, and the men escape? Is not he to answer for them? If that was the case, a keeper, which is thought to be a beneficial office, would be soon ruined by acts of good-nature.

As to the case, it stands thus: Mr. Castell was first committed the 18th of June, 1728, and it is customary to bring prisoners first to this house. Hopkins says, it is common for prisoners to desire to be there, for they have better convenience to transact what business is to be done, than to trouble their friends to go into the gaol. Hopkins says, that it was customary; and from this house he did give security and went to his lodgings, and continued there till his security would not stand.

When this man was brought in, he happened to be an intimate acquaintance with one Mr. Vanderbank, who spoke himself, and got several others to speak to Mr. Bambridge in his behalf. He will give you an account of the very creditors coming to surrender him; and it is nothing but a man's creditors can come; and these people will shew with what favour Mr. Bambridge treated him, and that he desired Mr. Bambridge to assist him in his affairs.

Gentlemen, he was removed from Corbett's to his lodgings, and continued there till his security surrendered him; and we shall shew you, that Mr. Castell sent to Mr. Corbett's, that this room might be made convenient and fit for him; which strikes out the first part of the appeal; and if we prove he desired to be there, that strikes out the whole; therefore there will be an end of the whole. The man is carried to the house, but the communication between them was up two pair of stairs: for the witnes-

see say, White lay up three pair of stairs in one house, and Castell lay up one pair of stairs in another. Was there any more danger lying here than in the next house? The witnesses say, White never came down, and nobody insisted that Castell went up; he must have been a madman if he did. When we shew you that he came there at his own desire, and had the bed and bedding at his own desire, we must say that this distemper was the visitation of God, and came to him as to other people.

We shall call a good many of the people who were his security, to prove, that as soon as they were enquired after, they were admitted to stand.

Gentlemen, after the last bond was given, he might have gone about his business if he would; and that bond was given *de bene esse*; and therefore in the power of the warden to let them in or not. We will call our witnesses, and shew you how long White had been well before Mr. Castell came there; that he had taken three times physic; but for fear of any accident, because there were other prisoners in the house, they did not let him come down. This, gentlemen, we shall be able to prove by several witnesses; which if we do, you will find the prisoners Not Guilty.

Serj. *Eyre.* My lord, and you gentlemen of the jury, I am of counsel of the same side. I shall not go over the whole case; but only observe to you, that the gentlemen on the other side were conscious that they had no positive proof, therefore they have artfully gone about to prove circumstances.

They say that Mr. Castell had 125*l.* paid him; and having this money, Mr. Bambridge knew of it, and consequently was making use of endeavours to extort the money from him.

They are far short, in that they called some people, who only proved that a note was drawn upon Mr. Woodward, payable to him or bearer; but it did not appear that Bambridge had any part of it.

There is another evidence, one Goodman, who said that Mr. Bambridge had a view to get some of the money; one would have thought, that he should have mentioned a particular sum. That seems to be exceedingly unnatural, for the answer Castell gives is, that security was given, and he would give no more.

Consider, gentlemen, when this happened; in November, when all the securities had been completed.

It is very extraordinary, that this witness should never be called on before, and very particular that he should hear so well. He was at the bar, they in the room, and the door shut; and, gentlemen, I am instructed to say, that it is impossible to hear what any person says behind the bar, that stands on the outside of the bar.

It is usual to take securities before their circumstances are enquired into. What then is the case? They stand if their circumstances are good, if not they don't.

How then stands this? If these bonds were executed on the 2nd, this man fell sick on the 3d, and this one bond was only delivered over to the principal, as a bond *de bene esse*.

What I should apprehend was necessary for them to produce, were the facts in the declaration, that he was forcibly taken away out of his lodgings, and carried to Corbett's house: they admit them as prisoners; and so far from force, that some of the sureties, on the 14th of November, said, that they would stand no longer, and desired Mr. Castell to be taken care of.

They say it was very wrong to carry him to a spunging-house; a victualling-house it is, but it don't appear to be a spunging-house; every gentleman is used according to his circumstances; they pay one shilling for their dinner, which is very reasonable, and Hopkins said well deserves it. We say it is exceedingly lawful to put prisoners there; it is lawful and as lawful as his own lodgings, and any place in the liberty of the rules is lawful. This is not all; he went first to the tavern, and his servant bespoke a room, and had the very room he bespoke; and we apprehend, Corbett had a lawful authority to carry him there.

There is another fact they have alleged, I must beg leave to take notice of; that White was sick at this very time, and in this very house.

These two charges are necessary to be proved; but how have they proved them? It appears that these were two distinct houses, two distinct stair-cases; and, in my judgment, I apprehend, appear to be two houses, not one.

As to White's being sick at that time, it appears he was not sick, and we shall shew he had taken three purges.

It is not only necessary for them to prove that this man was sick at the time Castell came there, and that he was unlawfully carried there, but it is necessary to prove that this sickness was infectious; but Castell, on the contrary, did not come there till he was well.

Does it not appear that White lay up three pair of stairs, and was enjoined not to come out of his room, and that he continued there, as Noel said, all the time? Where was Castell? In one pair of stairs in the new house. How can you imagine any infection to come from the garret down to Mr. Castell in the one pair of stairs room? Therefore, it was impossible to imagine that distemper was so taken.

Here is a man visited with the small-pox, and says, "Pray let me not go to gaol, but let me go to my own lodgings;" the bail surrender him, because he was not safe at the place where he lodged; therefore, it was very ridiculous for him to ask to go to his lodging, which was unreasonable.

As to the persons that were his securities, I don't think they were his friends in fact; for these men, who before were drinking at the bar of this house, designed it should be so.

I must beg leave to make one observation: suppose there were some of the prisoners had the small-pox, and a prisoner comes to the gaoler, and says, Here is the small-pox in a garret, I desire to go into the liberty; I don't see how it can be granted, for it is impossible for that or any other gaoler, if a contagious distemper comes into it, and the well prisoners desire to go out, he should give them the liberty: if criminals should be let out, it is very plain, in that case, the gaoler must answer for them; so I apprehend it would be in civil cases: therefore I must conclude with saying, that my clients have done nothing at all but what is humane and right.

Mr. *Kettleby.* My lord, I am counsel of the same side; and we will call our witnesses.

—— *Chappel* sworn.

Mr. *Kettleby.* Were you present on the 14th of November, or at any other time, when Mr. Castell's security came to Mr. Bambridge?

Chappel. Mr. Chambers came and said, he was determined to stand security for Mr. Castell no longer; and Peter Ellam and Curll the same.

Mr. *Kettleby.* What did they say to Bambridge?

Chappel. That they gave him power to take him up.

Mr. *Kettleby.* Where was this?

Chappel. At Bell Savage yard.

Mr. *Kettleby.* What did Bambridge say in answer?

Chappel. He believed they were secure, and could not imagine the reason of their withdrawing their security.

Mr. *Kettleby.* What did they say to that?

Chappel. Chambers seemed willing, but Curll would not.

Mr. *Kettleby.* What resolution was taken upon that?

Chappel. He persuaded Ellam to consent, and nothing more was done then; and we left Castell and Bambridge together.

Mr. *Kettleby.* What time was this?

Chappel. I don't know the day.

Mr. *Kettleby.* What month was it in?

Chappel. In November.

Mr. *Kettleby.* The beginning, middle, or latter end?

Chappel. I cannot tell; by a line sent to Mr. ———, the attorney, it will appear.

Mr. *Kettleby.* How long before he was carried to Corbett's house?

Chappel. Three weeks or a month.

Mr. *Kettleby.* Do you know any discourse that happened between them a little before he went to Corbett's house?

Chappel. Mr. Chambers came to Mr. Bambridge, and told him, he would be security no longer.

Mr *Kettleby.* How near the time he was carried to Corbett's?

Chappel. The next morning.

Mr. *Kettleby.* Give an account what passed the day before he went to Corbett's.

Chappel. Chambers was twice with Mr. Bambridge; and the first time Mr. Bambridge desired Mr. Castell might not be surrendered; Mr. Chambers waited two or three days, and then came to Mr. Bambridge again, to let him know he would surrender him, and said he would be his security no longer; and Mr. Bambridge said, if he would deliver him up, he must go to the tipstaff's; then Chambers went to one Corbett, and Corbett said, he must have a fee; then Chambers gave him his fee, and Chambers said, he was at the King's Arms. About an hour after I saw Corbett, Chambers and Castell together.

Mr. *Kettleby.* What did you see done?

Chappel. That is all I know.

Mr. *Kettleby.* Did not you go to the King's Arms tavern?—*Chappel.* No.

Mr. *Kettleby.* Did you hear the security say, they would complain to the judges about it?

Chappel. Mr. —— an attorney, was there.

Mr. *Kettleby.* What did the attorney say?

Chappel. I don't know.

Mr. *Kettleby.* Did they direct him to take him up? Whom did Chambers speak to?

Chappel. To Mr. Bambridge.

Mr. *Kettleby.* To do what?

Chappel. To take Mr. Castell in custody, for he would be security no longer; and desired that he would take him in custody.

Mr. *Strange.* What did Mr. Bambridge tell him was necessary to be done?

Chappel. Bambridge said he must employ a tipstaff.

Mr. *Strange.* What did Mr. Chambers do to Corbett?

Chappel. He sent to Corbett to the coffee-house, and Corbett said, he must have a fee.

Mr. *Strange.* When was this?

Chappel. Over night.

Mr. *Strange.* Did Chambers threaten him?

Chappel. No.

Mr. *Strange.* What did he say?

Chappel. He said something about giving a fee and Corbett went to the King's Arms, and said, he could not find him.

Mr. *Reeves* First of all Ellam seemed uneasy, but afterwards was not; Did Peter Ellam concern himself afterwards?

Chappel. Yes, he sent a letter to Mr. Scott.

Mr. *Reeves.* I ask you, whether Ellam did not consent to continue before he was taken up?—*Chappel.* Yes.

Mr. *Reeves.* Did Curll, before Mr. Castell was taken up?

Chappel. I don't know of that.

Mr. *Reeves.* You don't know of any others?

Chappel. No.

Mr. *Lee.* How come you to be so much concerned?

Chappel. I was to secure Ellam and myself. I was so much concerned, that he and I were bound for three-fourths of 1,000*l.*

Mr. *Lee.* Who went with you to Bambridge the first time?

Chappel. I went along the first time to Bambridge with Peter Ellam and Curll.

Mr. *Lee.* With what intent did you go?

Chappel. I went with Peter Ellam and Curll with an intent to deliver Mr. Castell up, for I had given security to Ellam to indemnify him a half part.

Mr. *Lee.* To indemnify him! Did Ellam decline then?

Chappel. He seemed inclinable to continue.

Mr. *Lee.* Were you present when Bambridge said he must go to the tipstaff's?

Chappel. Yes.

Mr. *Lee.* Was he acquainted with Corbett?

Chappel. I don't know.

Mr. *Lee.* Was there any body mentioned at the time when you were with Bambridge?

Chappel. I can't charge my memory with any name.

Mr. *Lee.* At this time when you talked about the tipstaff, was Ellam and Curll there?

Chappel. No.

Mr. *Fazakerley.* Pray what bond was that you talked of, that you were security in?

Chappel. I don't hear.

Mr. *Fazakerley.* Was there any talk then with Bambridge how much the bond was for?

Chappel. No.

Mr. *Fazakerley.* What was the bond for?

Chappel. I think 1,000*l.*

Mr. *Strange.* You say, upon Bambridge's interposition, that Ellam was induced to stand?

Chappel. Yes.

Mr. *Strange.* Was Curll the same?

Chappel. Yes.

Mr. *Strange.* When was that?

Chappel. That was the first time.

Mr. *Strange.* When was the last time?

L. C. J. I don't find that you fixed these times.

—— *Chambers* sworn.

Mr. *Strange.* You were security for Mr. Castell?—*Chambers.* Yes.

Mr. *Strange.* Give an account what you did in relation to that?

Chambers. I begged of Mr. Chappel, he having business every day in town, to apply to Mr. Bambridge, to let him know that I would be security no longer; but having long had an intimacy with Mr. Bambridge, Bambridge desired me to continue security eight days longer; and told me, that White at the King's Arms tavern had given a note. I said I was determined to deliver him up. Mr. Bambridge said, I was very safe, and desired I would continue; he had been the instrument of my being security, and he would not deceive me; if he thought there was any danger, he would advise me by letter. I came to Mr. Castell from time to time; he told me, he had other securities ready, and it would be no inconvenience to him. I came to tell him two or three times I would not stand, and found he had nobody ready; and then went to Mr. Bambridge, and found him at the lodge about seven or eight o'clock at night, and told him I was come determined to deliver Mr. Castell up; upon which he said, If you will deliver him up you must. I asked him which way to proceed? He said, I must get a tipstaff. I asked him, where there was a tipstaff? He said, there was one Corbett. I asked him, what I must give him? He said six-and-eight-pence. I went accordingly to Corbett, and told him Mr. Castell was at the King's Arms tavern, and I would give him half a guinea to secure him. Mr. Corbett went to the King's Arms, came back, and said he could not find him; then I said, I would be in town; and I lay at the Bell-Savage inn; then I came the next morning, and sent to Corbett's, who came in his gown and slippers; and Corbett said, he wished he had not got notice of our intention; and said he would go to his lodgings; and said, he believed there he should find him: then Corbett came, and said he was at his house; and I gave Corbett half a guinea; and I went to Mr. Castell at Corbett's, and he said, he thanked me for my civility; and said, he believed it was not an act of my own; and I said it was. As you are going abroad, do not think I use you ill. He said, No, I don't believe it was your own act. I said, Don't deceive yourself, it is.

Mr. *Strange.* Did Mr. Bambridge persuade you at first to be security?—*Chambers.* Yes.

Mr. *Strange.* Mr. Castell made no manner of objection to his being at Corbett's, but thanked you?—*Chambers.* Yes.

Mr. *Strange.* About what time was this?

Chambers. About the middle of November.

Mr. *Strange.* Was this after he was surrendered?—*Chambers.* Yes.

Mr. *Strange.* Did he complain of being at Corbett's house then?—*Chambers.* No.

Mr. *Strange.* Were you at the King's Arms the day he was taken?—*Chambers.* No.

Mr. *Strange.* Were you with Mr. Bambridge?

Chambers. I sent up to him, and that I was come by the securities' appointment; and he sent word again, he had nothing to do with him, till the security had surrendered him.

Mr. *Strange.* Did Mr. Bambridge at any time expostulate with you, why you surrendered him?

Chambers. I told Mr. Bambridge, I heard he had an invitation to go abroad with lord Londonderry.

Mr. *Strange.* What did Mr. Bambridge say, to lead you to that answer, to say that Mr. Castell was going abroad?

Chambers. No, I did not say he was going abroad.

Mr. *Strange.* Upon the whole, you say that Mr. Bambridge persuaded you to stand?

Chambers. Yes.

Mr. *Strange.* Did he persuade you to stand?

Chambers. Yes.

Bambridge. My lord, I desire the witness may be asked, whether he did not say that Mr. Castell was going abroad.

L. C. J. Mr. Bambridge, let your counsel ask the question.

Mr. *Strange.* What did you say?

Chambers. I said I heard a rumour; I was informed he was going abroad.

Mr. *Strange.* I desire he may be asked, if he was not told that he was going abroad with lord Londonderry.

L. C. J. Had any body told you he was going abroad with lord Londonderry?

Chambers. No, I did not surrender him upon that account.

Mr. *Strange.* What was the real reason of your surrendering him?

Chambers. I was informed that he had made two mortgages of his estate, one to my son-in-law.

Mr. *Strange.* You said you were informed he was going abroad?—*Chambers.* Yes.

Mr. *Strange.* Did any body, an enemy to him, persuade you to surrender him?

Chambers. No.

Mr. *Strange.* Did not you know of that mortgage to your son-in-law before then?

Chambers. No.

Joseph Vains sworn.

Serj. *Darnell.* Give an account of what you know of the surrendering Mr. Castell.

Vains. Mr. Chambers came several times to my coffee-house, and asked when I saw Mr. Corbett? The first time, I said I had not seen him in two or three days; and then he came again, and the third time Corbett came by, and my servant said, There is Mr. Corbett; and he asked Mr. Corbett, whether he knew where Mr. Castell was? Corbett said No. Then Chambers desired him to find him.

Serj. *Darnell.* What did Mr. Chambers say to Mr. Corbett? Repeat it again.

Vains. He said, When did you see Mr. Castell? Mr. Corbett said, he had not seen him two days. What do you want with him? Chambers replied, I want to speak with him, Corbett asked, What is your business? Chambers made answer, I will be security no longer, and will surrender him, for I hear he is going abroad with the lord Londonderry. Then Corbett went away to look for Mr. Castell, but I know no more of it, but heard he was carried to Corbett's.

Serj. *Darnell.* Did not Mr. Chambers threaten Corbett?

Vains. He said I must lose the debt, and if you do not see and get him, I will move the Court against you, and make you pay the debt, for I will stand security no longer.

Serj. *Darnell.* Do you know any thing of Mr. Castell's sending to Corbett's?

Vains. No.

Thomas Woodyer sworn.

Serj. *Darnell.* Do you know any thing of Mr. Castell's going to Corbett's house, when it was, and at whose desire?

Woodyer. The night he went from the King's Arms tavern, I was drawer there. Mr. Castell ordered me to go or send to Mr. Corbett's house, to order his room to be got ready.

Serj. *Darnell.* Was that the night he was carried to Corbett's?—*Woodyer.* Yes.

Serj. *Darnell.* It is said Corbett took him against his will?—*Woodyer.* I can't say.

Serj. *Darnell.* When you received that message, was Corbett there?

Woodyer. I can't be positive.

Serj. *Darnell.* Did you go?

Woodyer. I sent one down.

Serj. *Darnell.* By whose directions?

Woodyer. By Mr. Castell's.

Serj. *Darnell.* What time?

Woodyer. About eight or nine o'clock.

Serj. *Darnell.* What day?

Woodyer. I don't know.

Serj. *Darnell.* What month?

Woodyer. I believe November.

Serj. *Eyre.* Was it the last time?

Woodyer. I believe it was; I never saw Mr. Castell after.

Serj. *Eyre.* How long did Mr. Castell stay at your house?

Woodyer. Mr. Castell was there three or four hours.

Serj. *Eyre.* When did Corbett come to take him up?

Woodyer. That same night, I believe.

Serj. *Eyre.* Did Corbett bring him to your house?—*Woodyer.* No.

Mr. *Strange.* Who was in company when he came in?—*Woodyer.* I don't know.

Mr. *Strange.* Did Corbett come in with him?

Woodyer. No.

Mr. *Strange.* Did Corbett go with him away?—*Woodyer.* Yes.

Mr. *Strange.* Did Mr. Castell shew any unwillingness to go?—*Woodyer.* I did not hear.

Mr. *Strange.* What time of the night did he first come?

Woodyer. Some time in the dusk of the evening.

Mr. *Fazakerley.* He was taken in the morning at Underwood's.

Mr. *Lee.* Were you in the house when Mr. Castell first came from Mr. Underwood's?

L. C. J. I don't take the time he was taken from Underwood's to be in the morning.

Mr. *Fazakerley.* Are you sure it was the 14th of November?—*Woodyer.* No.

Mr. *Fazakerley.* What was it he said? To get his room ready?—*Woodyer.* Yes.

Mr. *Strange.* There were sheets to be aired?

Woodyer. Yes, there were.

John Downs sworn.

Mr. *Strange.* In November the 19th, were you a servant to Mr. Corbett?—*Downs.* Yes.

Mr. *Strange.* Do you remember any message that was sent?

Downs. Yes, that a bed should be got ready for Mr. Castell.

Mr. *Strange.* Had he been at any house before upon the surrender of his bail?

Downs. No.

Mr. *Strange.* Where did he lodge before?

Downs. At Mr. Underwood's.

Mr. *Strange.* Was there a bed prepared accordingly?—*Downs.* Yes.

Mr. *Strange.* Do you know the day he came?

Downs. No.

Mr. *Strange.* You say you were in the house when he came; who came along with him?

Downs. Mr. Corbett.

Mr. *Strange.* Who shewed him the room?

Downs. I think one Holdesworth, he was chamberlain.

Mr. *Wynn.* You attended him whilst he was there?—*Downs.* Yes.

Mr. *Wynn.* All the time?—*Downs.* Yes.

Mr. *Wynn.* What condition of health was he when he came in?

Downs. He was a weakly gentleman.

Mr. *Wynn.* Was there any extraordinary care taken of him?

Downs. Yes, he was put in the room one pair of stairs.

Mr. *Wynn.* Was there a club kept there?

Downs. Yes, and Mr. Bambridge and captain Martin used to come to it.

Mr. *Wynn.* After the time he was brought in?—*Downs.* No, before.

Mr. *Wynn.* How long before?

Downs. There was a club in it two or three nights before.

Mr. *Wynn.* Did your master use to visit him?

Downs. At all leisure-times.

Serj. *Eyre.* Was Mr. ——— with him?

Downs. Yes.

Serj. *Eyre.* What room was that, that the bed was brought out of, that he lay in?

Downs. I don't know.

Serj. *Eyre.* After you received the message at nine o'clock at night, was there a bed brought down?

Downs. I can't tell.

——— *Holdesworth* sworn.

Serj. *Eyre.* What are you?

Holdesworth. I am chamberlain at Mr. Corbett's.

Serj. *Eyre.* How often was Mr. Castell brought to your house?

Holdesworth. He was brought but once while I was there.

Serj. *Eyre.* Was he brought in by violence, or his own consent?

Holdesworth. He came in with Mr. Corbett; I did not see any violence.

Serj. *Eyre.* Was there any care taken of him while he was there?

Holdesworth. He wanted for nothing while he was there, for he had every thing he asked for.

Serj. *Eyre.* When did he come in?

Holdesworth. About the middle of November. During ten days before he fell sick and complained, he kept his room altogether, and very seldom came down.

Mr. *Strange.* The bed that was prepared for him, was it usually laid in?

Holdesworth. It was a bed that had been laid upon; Mr. Hopkins had laid upon that bed.

Mr. *Kettleby.* If a man was speaking at the bar, could you hear what was said in the inner room?

Holdesworth. No, except he spoke very loud.

Mr. *Kettleby.* Was this one house where Mr. Castell lay, or two houses?

Holdesworth. There were two houses.

Mr. *Kettleby.* Was there any communication or door opened, or how did one lie up three pair of stairs in one house, and one pair of stairs in the other?

Holdesworth. One pair of stairs turned upon the left hand, to go to Mr. Castell's room, and the other turned upon the right.

Mr. *Kettleby.* What condition of health was White in when Mr. Castell came in?

Holdesworth. He had the small-pox.

Mr. *Kettleby.* How long had he had them?

Holdesworth. He was blind.

Mr. *Kettleby.* How long was it before White recovered? How long was it he kept up after he recovered?—*Holdesworth.* About a month.

Mr. *Kettleby.* Had White taken any purging physic?—*Holdesworth.* I believe not.

Serj. *Eyre.* Was there any message sent to Mr. Castell's wife to come?

Holdesworth. I can't say; nobody ever came.

Serj. *Eyre.* Who provided necessaries?

Holdesworth. Mrs. Corbett.

Serj. *Eyre.* He wanted nothing?

Holdesworth. No.

Mr. *Reeves.* Did you not go to Jonathan Ireland?

Holdesworth. I was along with him when the gentleman died.

Mr. *Reeves.* Did not you take away a bed from under White?

Holdesworth. Yes, and I carried it into Mr. Castell's room; but the bedstead being too little, I carried it up another pair of stairs, into a room.

Mr. *Reeves.* How came you to put White out of his bed? What did you put under White?

Holdesworth. I put as good a bed as that.

Mr. *Reeves.* Did not White keep his bed?

Holdesworth. Yes.

Mr. *Fazakerley.* Did not White continue in the same room?

Holdesworth. He was removed into another room.

Mr. *Fazakerley.* Where was that?

Holdesworth. In the next garret.

Mr. *Fazakerley.* What was the meaning of turning White out of one bed into another?

Holdesworth. It was for the convenience of a fire.

Mr. *Fazakerley.* Did White make any complaint that you had taken away his bed?

Holdesworth. I believe he would not have had it taken away.

Mr. *Fazakerley.* Let me ask you about the stair-case. Was there no communication to go from Mr. Castell's room up that stair-case to White's?

Holdesworth. Yes, when you go up another part of the stair-case.

L. C. J. You say that there are two houses, and that there is but one stair-case?

Mr. *Fazakerley.* When the two houses were laid into one, the first pair of stairs served both

houses. Did not Mr. Castell lay up one pair of stairs?—*Holdesworth.* Yes.

Mr. *Fazakerley.* Can you go down stairs, without going by Mr. Castell's room?

Holdesworth. No.

L. C. J. I thought the houses were laid into one, till you come to the top?

Mr. *Fazakerley.* Is not one of the stair-cases stopped up?—*Holdesworth.* Yes.

Mr. *Fazakerley.* How long was this before Mr. Castell came in?

Holdesworth. Five or six days.

Thomas Norton sworn.

Mr. *Strange.* Do you remember any message brought from the King's-Arms tavern?

Norton. Yes, it was to have a fire laid in the best room in the house, and the best bed to be made.

Mr. *Strange.* Whom did it come from?

Norton. From the King's-Arms, from Mr. Castell.

Mr. *Strange.* Was that the best room in the house that he was in?—*Norton.* Yes.

Mr. *Strange.* Do you remember his coming in?—*Norton.* Yes.

Mr. *Strange.* Did he come in of his own accord?—*Norton.* Yes.

Mr. *Strange.* Did you observe any violence used to him?—*Norton.* No.

Mr. *Strange.* Had he all the assistance necessary, while there, and while ill?

Norton. He had.

Mr. *Strange.* Who provided it?

Norton. Mrs. Corbett.

Mr. *Strange.* You know the situation of the bar?—*Norton.* Yes.

Mr. *Strange.* Supposing then a person comes down to the bar to ask for any thing, and any body was in the room behind the bar, in case the door was shut; could you hear what was said in discourse?

Norton. I think you could not.

Mr. *Strange.* Do you know one Goodman?

Norton. Yes, very well.

Mr. *Strange.* Did you ever hear him give any such account till of late?

Norton. Never in my life.

Mr. *Strange.* How long have you been there?—*Norton.* Two years.

Mr. *Strange.* How long has Goodman been there?—*Norton.* Six months.

Mr. *Fazakerley.* Is not that partition a very thin one?

Norton. Yes, it is wainscot.

Mr. *Fazakerley.* Did you ever hearken to hear what was said in that room?

Norton. No.

Mr. *Fazakerley.* I suppose you are a drawer there?—*Norton.* I am a servant.

Mr. *Fazakerley.* What are you?

Norton. I keep the key of the door; I must hear if any one can; I stand near the door.

Mr. *Fazakerley.* Is that made up to the cieling?—*Norton.* Yes.

Mr. *Filmer.* Does the bar go up to the top?

Norton. Yes.

——— *Gardiner* sworn.

Mr. *Kettleby.* Did you attend Mr. *Castell* in his illness?—*Gardiner.* No.

Mr. *Kettleby.* Can you give an account what condition he was in?

Gardiner. No, he was not sick when I saw him.

Mr. *Kettleby.* Were not you with him when he was sick?—*Gardiner.* No.

Mr. *Kettleby.* Did you go with him, when he was charged in execution?

Gardiner. Yes, I asked him how he had been used; he said, with great civility.

Mr. *Kettleby.* What house was he in?

Gardiner. At the Royal Oak.

Mr. *Kettleby.* Did you ask him in what house he was placed?

Gardiner. He said he was placed at Mr. Corbett's house, at his own request.

Mr. *Kettleby.* How did he say he was used?

Gardiner. With great civility.

Mr. *Kettleby.* How long before he died?

Gardiner. I don't know.

Mr. *Kettleby.* Was it a year?

Gardiner. I believe it was about fourteen days.

Mr. *Kettleby.* Were not you charged in execution at the same time?—*Gardiner.* Yes.

Mr. *Kettleby.* When were you charged?

Gardiner. The last day of the term.

Mr. *Fazakerley.* How came you to ask him such a question?

Gardiner. I went from Corbett's with him, and came back to Corbett's again.

Mr. *Fazakerley.* How many times were you in company with him after?

Gardiner. I never was in company with him but at that time.

Mr. *Filmer.* Do you know when he had the small pox?

Gardiner. I heard he had the small pox, and died in a fortnight.

Anne Blake sworn.

Mr. *Wynn.* You were in the house when Mr. Castell lay ill?—Mrs. *Blake.* Yes.

Mr. *Wynn.* Was he provided with all necessaries?

Mrs. *Blake.* Yes, I was present at making of hartshorn-drink, before he had the small pox.

Mr. *Wynn.* Was he attended with an apothecary?

Mrs. *Blake.* I did not see, I was sick beforehand.

Mr. *Wynn.* Pray did you know the care that was taken to prevent the disease from the other prisoners?—Mrs. *Blake.* I saw no disease after.

Mr. *Wynn.* Was the room furnished with good furniture?—Mrs. *Blake.* Yes.

Mr. *Strange.* What was the matter with him?

Mrs. *Blake.* He had a flux upon him when he came in.

Mr. *Filmer.* Had you ever the small pox?

Mrs. *Blake.* No.

Mr. *Filmer.* When he had the small pox, were not you removed?

Mrs. *Blake*. After he died, I had leave to go out.

Mr. *Strange*. Was not the house so commodious, that as you lay up two pair of stairs you thought yourself safe?—Mrs. *Blake*. Yes.

Mr. *Strange*. You did not catch them?

Mrs. *Blake*. No.

Mr. *Strange*. Did White come down before Mr. Castell died?

Mrs. *Blake*. I was kept from White, because I had not had them.

——— *Moor* sworn.

Serj. *Hawkins*. Did you attend Mr. Castell?

Moor. Yes.

Serj. *Hawkins*. You are an apothecary as well as a surgeon?—*Moor*. Yes.

Serj. *Hawkins*. In what manner did you take care of him?

Moor. I was ordered to attend Mr. Castell, and accordingly I went to him, and found him in bed, in a very convenient warm room: the small pox was not then come out, but appeared in two days after; he seemed alarmed at the distemper, but did not say he was under any great concern or alarm from the confinement.

Serj. *Hawkins*. Who was to attend him?

Moor. There was a nurse. He did not seem to want any thing; there was a good fire kept; I ordered her so to do, and he had every thing given him in good order.

Serj. *Hawkins*. Did he make any complaint of Corbett?

Moor. No, he never said any thing to me, I was an utter stranger, Mr. Waller was the apothecary employed.

——— *Smith* sworn.

Mr. *Strange*. At the time Mr. Castell was ill, Corbett came to Mr. Bambridge at your house?—*Smith*. Yes.

Mr. *Strange*. Tell what passed.

Smith. I think it was the 2nd or 3rd of December, Corbett came to Mr. Bambridge, and Bambridge was in the parlour; I was sitting there; we were not rose from table, and Mr. Corbett was telling Mr. Bambridge of the affairs of the prison, and said, Poor Mr. Castell is not well; and Bambridge asked what was the matter with him? He said, he had caught cold. Bambridge said he was very sorry for it, and said, Give my service to your wife, and desire her to take care of him.

Mr. *Strange*. What did Mr. Bambridge ask?

Smith. Mr. Bambridge asked what was the matter, and Corbett said he had caught cold. Something of the affairs of the prison requiring the direction of Mr. Bambridge, the next day Corbett came again, and Bambridge asked him how Mr. Castell did? Mr. Corbett said he had got the small pox, and said the gentlemen in the house were very uneasy at his being in the middle of the house, and he was thinking to have him removed a room higher; and Mr. Bambridge said, he would not have him removed higher in the house, to run the risk of his life; but if the gentlemen were uneasy, he would have them removed into the prison.

——— *Martin* sworn.

Mr. *Strange*. I ask you if you were not of the club with Mr. Castell, in Corbett's house?

Martin. Yes.

Mr. *Strange*. Were you present at the club the last time Mr. Castell was brought there?

Martin. I think I was there that night he was charged in execution.

Mr. *Strange*. I ask you whether Mr. Corbett and Castell were there in a friendly manner, when together?—*Martin*. Yes.

Mr. *Strange*. So they were together?

Martin. Yes.

Mr. *Strange*. Was Mr. Bambridge there?

Martin. Mr. Bambridge did not come to the club all that term.

Mr. *Strange*. There is one thing I must take notice of, that the paper Ellam owned his hand to, may be read.

Serj. *Hawkins*. Were you with Mr. Castell all the time of his late illness?

Martin. I visited him constantly.

Serj. *Hawkins*. What did he say as to his usage?

Martin. I never heard any complaint.

Serj. *Hawkins*. How often did you go to see him?

Martin. Every day at Corbett's.

Serj. *Hawkins*. Did you ever hear him complain of Bambridge?

Martin. It was the second day after the small-pox came out, I went into the room to him; I could not see him, being in bed, but he knew my voice, and he would have had me drank something. I was immediately called out of the room, and Mr. Castell would not have had me gone; I told him I must, but would return soon; and when I went down, I saw Mr. Bambridge there, and I told him Mr. Castell had the small-pox; and Mr. Bambridge said he was very sorry for it, but he had trifled with him and himself too: When I went up again to Mr. Castell, and told him that I had told Mr. Bambridge that he was very ill of the small-pox, and that Mr. Bambridge said he was very sorry for it; (I would not mention the rest) Mr. Castell said, For God's sake don't mention his name, I can't bear to hear of it.

Serj. *Hawkins*. As to the temper of Mr. Castell, was he reserved?

Martin. He was very free in conversation, but not free in telling of his circumstances.

Mr. *Strange*. I desire the paper Ellam owned his hand to may be read. [Which was accordingly produced and read, and appeared to be a bill of sale, dated the 22d of October, 1728.]

Mr. *Strange*. The witness, when I came to ask for the bill of sale, did not remember when it was executed.

L. C. J. But what use is it of?

John King sworn.

Mr. *Kettleby*. Did you know when Mr. Castell was brought to Mr. Corbett's?

King. No.

Mr. *Kettleby.* Do you know how Bambridge behaved to him after?

King. I was to declare Houston and Nus against Mr. Castell, and Bambridge appeared not only as gaoler, but as his attorney, and paid me.

Mr. *Kettleby.* How did Bambridge behave himself?

King. Very handsomely.

Mr. *Kettleby.* In what capacity did Bambridge act?

King. Mr. Bambridge was employed by Mr. Castell as his attorney.

Mr. *Kettleby.* Did not you say Bambridge lent him money?

King. He lent him a guinea to clear the score.

Mr. *Kettleby.* Did he lend him any more? and what?

King. Mr. Castell complained he had not money to pay the reckoning, and Bambridge paid it for him.

Mr. *Kettleby.* When was this?

King. It was the 21st of November, 1728.

Mr. *Kettleby.* You can be positive to the time?—*King.* Yes.

Mr. *Kettleby.* How many times were you in company before?

King. Twice; but I never was with him but once at Corbett's.

L. C. J. Then this 21st of November was at Corbett's?—*King.* Yes.

Mr. *Kettleby.* There it was he lent the money?—*King.* Yes.

Mr. *Kettleby.* Was there any disrespect towards Mr. Castell shewn by Mr. Bambridge?

King. I never saw any thing like it.

Mr. *Kettleby.* I ask you, whether Mr. Bambridge did say any thing upon his giving security?

King. Mr. Bambridge said, he should be ready to do him any service.

Mr. *Fazakerley.* Did he do any other than attornies usually do for their clients?

King. Attornies very seldom pay their clients reckonings.

Mr. *Fazakerley.* Was there not then judgment against Howson?

King. No, I have always been concerned for Howson.

William Howson sworn.

Mr. *Kettleby.* I ask you, whether you were ever in company with Mr. Castell and Bambridge, after he was surrendered at Mr. Corbett's?—*Howson.* I don't know that.

Mr. *Kettleby.* Were you ever in company with them?

Howson. Yes, Mr. Castell employed Mr. Bambridge as his attorney, to make up a matter between me and Mr. Castell.

Mr. *Kettleby.* When was this?

Howson. In November before he had the small-pox.

Mr. *Kettleby.* Did you observe any dislike between him and Bambridge?

Howson. I did not know that he was warden, he acted as his attorney.

L. C. J. This was before he came to Corbett's?—*Howson.* Yes.

L. C. J. Where was it at?

Howson. The King's-Arms.

——— *Meers* sworn.

Mr. *Kettleby.* Do you know any thing that passed between Mr. Castell and Mr. Bambridge?—*Meers.* Yes, I desired———

Mr. *Kettleby.* What month was it in?

Meers. I cannot tell.

Mr. *Kettleby.* How long before Mr. Castell died?

Meers. About ten days.

L. C. J. What were the particular marks of friendship that Bambridge shewed?

Meers. Bambridge appeared to behave with civility to him; he desired———

L. C. J. I cannot understand a word; he must explain himself.

——— *Townshend* sworn.

Mr. *Kettleby.* Do you remember the day when Mr. Bambridge was admitted warden of the Fleet?

Townshend. I do not remember the day particularly.

Then *James Codnor* was again called.

Mr. *Kettleby.* Were you at any time concerned in taking securities?

Codnor. Yes; at the time of Mr. Castell's first commitment, and being put in custody at Corbett's.

Mr. *Kettleby.* You acted in taking securities; pray look upon this bond, and see if it was taken by you?

Codnor. I believe it was all my hand-writing except the names of the persons subscribing as witnesses and parties.

Mr. *Kettleby.* Did you receive any, and what directions from Mr. Bambridge, as to Mr. Castell?

Codnor. I received directions from Mr. Bambridge to attend Mr. Castell.

Mr. *Kettleby.* Did he go to Castell?

Codnor. Never: he sent.

Mr. *Kettleby.* What was the purport of the bond?

Codnor. The purport of the bond was *de bene esse.*

Mr. *Kettleby.* Were there any other bonds, during the time you acted, given over to Bambridge; or that one only?

Codnor. I cannot recollect that; I remember I took two bonds; I believe they were only bound *de bene esse.*

Mr. *Kettleby.* Were these absolute bonds, or bonds *de bene esse?*

Codnor. As to the first bond, the parties not being found sufficient, the penalty ———

Mr. *Strange.* How much was the penalty?

Codnor. One thousand pounds. It was ordered to be cancelled, and a bond taken *de novo.*

Mr. *Strange.* Was that bond absolutely completed, or done *de bene esse?*

Codnor. There was not an enquiry reported.

Mr. *Wynn.* Was that indorsement made at the time?—*Codnor.* It is my hand-writing.

Mr. *Wynn.* What was wrote there?

Codnor. De bene esse.

Mr. *Wynn.* Was it done at that time?

Codnor. I might go into the office.

Mr. *Wynn.* Was it usual to let parties execute bonds before enquiry was made?

Codnor. Yes; it was the daily practice.

Mr. *Reeves.* You say it was the usual practice to take bonds *de bene esse*, and you say the other bonds were cancelled?

Codnor. I believe so.

Mr. *Reeves.* Did you see them cancelled?

Codnor. I did not.

Mr. *Reeves.* I ask you then, whether it was usual for you to cancel a bond that was good before another was executed?

Codnor. I would not have taken upon me then to have done it.

Mr. *Reeves.* Do you know it was done?

Codnor. I can't say I do; it was usual to take new bonds *de bene esse*: when bonds given before were cancelled, and the persons had been enquired after, and not found sufficient.

Mr. *Reeves.* What were your orders?

Codnor. My orders were to take the securities from time to time as they came.

Mr. *Reeves.* So you took them *de bene esse?*

Codnor. Yes.

Mr. *Fazakerley.* You say you have got a method to take bonds *de bene esse*: did not you take a bond *de bene non esse*, which he was in execution for?—*Codnor.* Yes.

Mr. *Fazakerley.* What, do you take double times?—*Codnor.* Yes.

Mr. *Fazakerley.* Did you say how much he was in execution for?—*Codnor.* No.

Mr. *Fazakerley.* Do you know how much?

Codnor. Yes.

Mr. *Fazakerley.* Was there any thing more?

Codnor. No.

Mr. *Fazakerley.* Then that was 500*l.*?

Codnor. Yes.

L. C. J. So your constant practice is, that the securities are first bound, and then you enquire after them?—*Codnor.* Yes.

L. C. J. You say you took these bonds by Mr. Bambridge's directions?—*Codnor.* Yes.

L. C. J. What did you do with the first bond?

Codnor. I can't charge my memory.

L. C. J. Are you sure you took but two?

Codnor. Yes.

Mr. *Strange.* It was very probable that these people might demand 1,000*l.* bond; the other bond, when given, was for 2,000*l.* What was the reason of your taking a larger security?

Codnor. I received three Habeas Corpus's, which was the reason of taking so large a security (speaking to Mr. Strange.) We always take security, though charged by the same plaintiff, for two sums.

L. C. J. Is that usual?—*Codnor.* Yes.

L. C. J. So that you take security for the declaration, and take security for the subsequent charge in execution.

Mr. *Fazakerley.* When was the last security given?—*Codnor.* About a week after the first.

Mr. *Fazakerley.* Observe; if an action is brought for 200*l.* and you take security, and a week after that judgment is had, do you take other security, and double the sum?

Codnor. Not without a Habeas Corpus is brought.

Mr. *Fazakerley.* So you don't increase the penalty, unless you distrust the value of the bail?

Codnor. No.

Mr. *Fazakerley.* Because I observe a great many judgments are given before the security is increased.

L. C. J. The last bond was executed the 1st of December, and he was taken ill the 3d.

Mr. *Strange.* My lord, we shall call no more evidence, but submit it here.

Mr. *Reeves.* My lord, I must beg leave to take notice of the objections they have made. The first is, that he went voluntarily to Corbett's; that it was his own desire. In answer to that, if our witnesses are to be credited, we have proved the whole appeal. We have proved, he was taken forcibly; I humbly apprehend that was sufficiently proved; for if Corbett took him without his consent, it was forcibly, and it was unlawful; it will warrant the declaration of appeal.

The next fact is, that he was carried to the house of Richard Corbett, where one Joseph White was then ill of the small-pox. The objection did arise, that it was laid to be the house of Richard Corbett, which was one house, and here are two; one where Joseph White lay sick, and they say, he was carried to the other. As to that, it appeared by the evidence, that before this fact happened, they were made into one house; and notwithstanding they were made into two dwelling-houses before Castell was put there, our witnesses say, they went up stairs into one and the same house; and that Mr. Castell was carried to the house of the said Richard Corbett, where Joseph White was ill of the small-pox.

The other objection is, that Joseph White was well of the small-pox ten days before Mr. Castell was brought there. My lord, we apprehend that that is contradicted by their own evidence; that the man was well, and looked upon to be recovered; for I must beg leave to observe, that upon the evidence of Holdesworth, it appeared that White was blind at that time when Castell came in; and he remained there a considerable time after Castell was brought in.

As to the points of law insisted on by the gentlemen on the other side, I must submit it to your lordship, whether this proof is not sufficient to support the appeal; that he was carried against his consent to an unlawful confinement, and at a spunging-house.

Mr. *Strange.* The point of law is, Whether he was unlawfully taken? And though he was unlawfully confined, yet it don't make an unlawful taking.

L. C. J. Though he was lawfully taken, yet he ought not to be unlawfully confined. He was carried into Corbett's on the 14th of November, and the fifth bond was given the 1st of December; which was a great while after he was taken in custody.

Mr. *Reeves.* There was a third bond given for 1,000*l.* one was in July. In order to make these bonds clear, they should be produced.

Mr. *Strange.* Codnor swears, that he took but two.

Mr. *Reeves.* It was sworn by Ellam that there were five.

Serj. *Darnell.* The confinement was a proper confinement. A tipstaff's house is a proper confinement, and the taking was not an unlawful taking.

L. C. J. Is there not a difference of being carried into the rules? If not in the rules, it is not a part of the prison; if not, every prisoner that escapes and dies, the gaoler is answerable for; and a prisoner being there, will not* be looked upon to be a prisoner at large: every part of the rules is a part of the prison, though not within the walls: if it is not in the prison, then there is an end: it was both illegal to carry him there, and confine him there. There is another consideration; they say, capitally guilty; I don't know but that is the case here; but then it is not laid so in the declaration. If a prisoner dies by duress, the gaoler is guilty, and capitally guilty.

Mr. *Lee.* We humbly apprehend, that the case must be considered, that he did with malice aforethought murder the said Robert Castell.

L. C. J. The law makes it so.

Mr. *Lee.* Therefore I apprehend, from the nature of the thing, and his behaviour, that it must be taken, that in this case they did feloniously carry this man to the house of Richard Corbett; but that must be decided by the evidence. They knew the house to be infected; therefore, whether the original taking him up was legal or illegal, is the thing to be considered; if he was only taken up to be carried into the gaol, it will have another consideration; but the prisoner's intention is to be judged by the jury. I don't know whether I should be proper in taking notice of the evidence; I should very shortly take notice of the evidence in this trial.

L. C. J. That can't be done.

Mr. *Fazakerley.* As to the single matter of taking, that will be the consequence of the other.

L. C. J. Though the act itself is lawful, the usage of the man will make it unlawful: this is a necessary case for their consideration; for where a man dies in duress, it is murder in the gaoler. It is the nature of human bodies to take infection; and if a man is put into a place where such infection is, it will be murder in the gaoler.

Mr. *Strange.* That does not appear to be done with the privity of either.

L. C. J. Is the proof against Corbett's taking of him? Human bodies may breathe forth infections vapours.

Mr. *Fazakerley.* We desire to call Noel again.

Noel standing up again.

Mr. *Fazakerley.* What has been the usage, where an action has been brought, and security given for 100*l.* and judgment given upon this action?

Noel. I don't know what it was then; but since Mr. Gambier's time, where a prisoner is charged with mesne process, we have taken the bond for the sum; but when in execution, take the bond in a double penalty.

Mr. *Fazakerley.* We desire to call Jonathan Ireland, to ask him a question or two, as to a declaration of Holdsworth.

Jonathan Ireland sworn.

Mr. *Fazakerley.* Do you know Holdsworth?

Mr. *Ireland.* Yes.

Mr. *Fazakerley.* Had you any discourse with him about a bed being brought out of White's room?

Ireland. No, I had no such discourse.

L. C. J. Gentlemen of the jury, this is an appeal of murder, brought by Mary Castell for the death of her husband. I must take notice of the whole appeal, because proofs are required of the facts as there laid. It charges, that on the 14th day of November, in the 2nd year of his present majesty, he was duly committed to the custody of the warden; that on the 14th of November, Richard Corbett took her husband, arrested him, and carried him to the house of him, the said Richard Corbett, and kept him there for the space of 21 days, against the will, and without the consent of the said Robert Castell. Then it goes on, and says, that the said Richard Corbett did unlawfully, violently, and of malice aforethought, imprison and detain the said Robert Castell in his the said Richard Corbett's house; and that, at the time of taking and imprisoning of the said Robert Castell, White was ill of the small-pox in the same house; which distemper Robert Castell never had.

Further sets forth, That while her husband was there, on the 16th of November, he requested Bambridge and Corbett, that they would not detain him in the house; and then gave notice that White was sick of the small-pox, and that Castell had not had them; and if he got that distemper, it would be the occasion of his death: that notwithstanding this distemper was there, they detained him there, and there kept him till the 12th of December.

Further sets forth, That on the 4th of December he fell ill of this distemper; and on the 12th of the same December he died of the same.

To conclude, that these two appellees did feloniously, voluntarily, and of malice aforethought, kill and murder the said Robert Castell.

To which the two defendants have pleaded Not Guilty. The question for you, gentlemen

* This word seems to be redundant.

of the jury, to consider of, is, If the appeal is proved, and not what is opened by the counsel: you must regard that no further, than it is proved by the evidence.

This appeal is grounded upon this law; that is the law has particular guards and privileges in justifying the right of gaolers in detaining of prisoners in safe custody; so on the other hand, that though they had the liberty of keeping prisoners secure and safe, yet they must treat them humanely, and put them into such places as do not prejudice their limbs and lives; for if they should be put in such places as they* do, and they die, it lies at their doors; that is murder.†

If a gaoler brought bodies that were infectious into a room, by which a prisoner should catch a distemper; or put a man into irons, by which he should die, it would be the same thing. If a gaoler will take persons that have not a distemper, and carry them to a room against their consent, after notice was given him that such a distemper was there, it is at his peril. Gentlemen, I must observe to you, that in the present case all these circumstances must be concurrent:

That he was carried there against his will; that the distemper was in the house; that he had knowledge of the distemper being there, and that the nature of it was infectious; that application was made on his behalf; that notwithstanding he was carried there, and there kept; and by that means caught that distemper, which was the occasion of his death; because distempers may arise from human bodies.—This is the foundation upon which the appeal is founded.

The first witness is only to shew, that Mr. Bambridge was warden of the Fleet; and for that end, he produced a copy of the letters patent. I shall take notice of the time, which is the 30th of September, 1728: it said, he was not admitted till after, but there is no proof to be admitted.

The next, John Noel, is to prove, that he was committed the 18th of June, 1728. I need not trouble you with all the particular sums, but that all together they come to 527*l.* When they have proved this, it was necessary to shew that he was a prisoner at large.

As to Corbett's house, he says, he was a prisoner there two months, and that he never saw any thing but what was very humane; the house was in the liberty of the rules, and so consequently part of the prison; the questions that were asked by the defendant's counsel were to shew, that he had a right to take him up, because he might have went away before; that the house belonged to the warden, and that the behaviour of Corbett to him, and his usage while he was there, were very humane.

He told you he was taken ill the 4th of December, and died the 12th; that as for the house, there were two houses laid into one; and White was not properly in the house, because one was in the first floor in one house, and the other was up three pair of stairs in the other; and that direction was given, that White was not to come down; and White never came down during the time Mr. Castell was there, before he died.

That as to Corbett's wife, when Mr. Castell was ill, she did look after him as much as if he had been her own child; and that Mr. Castell did not complain, but did say, he was very sorry he had the distemper, and that Corbett and Castell had been of a club together; that as to the room, it was a very commodious place. As to what evidence else was given by him, I shall mention but little of it now, for I am now only summing up for the appellant.

The next evidence that was called was captain Sinclair; he did not speak to the time in question, but spoke only to 1727; he was going on, but the counsel knew that was not proper, so stopped him.

The next witness was Wilson; he says, that it was a public house, and that they sell beer, ale, and wine; and that Castell had provision there, and paid for it. I desire, if I omit any thing I may be put in mind of it.

The next was captain Collet; they made use of him for another purpose, to prove that Mr. Castell had received 125*l.* therefore they insisted, that Mr. Bambridge having notice of this, he might take the occasion of insisting upon further security, in order to extort money from him.

Mr. *Lee.* There is a juryman and the prisoner talking all the time.

L. C. J. I must have no obstruction of justice; you must not disturb the Court.

The first thing to be done was to prove, that

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* This word seems to be redundant.

† "The law watches with a jealous eye over the conduct of these officers" [Gaolers and persons employed by them]; "and therefore if a prisoner under their care die, whether by disease or accident, the coroner, upon notice of such death (which notice the gaoler is obliged to give in due time,) ought to resort to the gaol, and there, upon view of the body, make inquisition into the cause of the death. And if it were owing to cruel and oppressive usage on the part of the gaoler, or any officer of his, or in the language of the law to duress of imprisonment, it will be murder in the person guilty of such duress. For though in civil suits the principal may in some instances be answerable for the fault of his deputy, yet in criminal cases each man must answer for his own acts or defaults. If a gaoler, knowing that a prisoner infected with the small-pox lodged in a certain room in the prison, confined another prisoner against his will in the same room, in consequence of which the latter, who had not had the distemper, of which the gaoler had notice, caught it and died of it; this, being done from a deliberate malignant motive, would clearly be murder in the gaoler." East's Pleas of the Crown, c. 5, § 92.

ter-security to Ellam; that was the reason he called the note from Chambers.

Chambers desired Mr. Chappel to tell Bambridge, that he then came to town in order to give him up; and Bambridge told him he was very safe, and he desired him to continue security still. The use they make of this is, that if Bambridge wanted him in custody, he would not have persuaded him to continue security. He says, that on Bambridge's saying that, he did continue some time longer; then he came to town, and was resolved he would deliver him up; he told him again, if he was resolved, he must go to a tipstaff, and give 6*s.* 8*d.* for his fee; that Chambers went that very day to Corbett's, and had Castell taken up; and Castell said to Chappel, that he was set on; and Chappel said, he was not; and Castell said, he did not believe it; and says that Mr. Castell did not complain of any ill usage.

Joseph Vains was the next; he says that Chambers came to his house (he was not there after he spoke to Corbett,) and asked him, whether he had seen Corbett? He said, he had seen him that day: he came there again, and met with Corbett, and told him he intended to surrender Mr. Castell, for that he was informed he was going abroad with lord Londonderry. He says, that he charged Corbett to look for Castell; and said, if he did not get him, he would move the Court against him, and make him pay the debt.

Woodyer, he gives an account, that Mr. Castell was at the King's Arms, and says, that Mr. Castell ordered him to get a room ready, to air the sheets, and get a fire; and he says, he sent the boy thereupon, but that he never saw Mr. Castell after; that Mr. Corbett went with him; that he went away easy, and did not make any complaint.

The next is Downs; he did not * say that he received the message from Mr. Castell to get the room ready, and that the night before he lay at Underwood's, that he attended him there till he died; and as to necessaries, he had every thing that was fit, and there was a club kept there, and Corbett used to be with them.

Then Holdesworth the chamberlain was called; who says, that Mr. Castell came in there, and wanted nothing; he seemed to complain of nothing; before he came in there the bed was aired. They asked him, whether they could hear on the outside of the bar, what was said in the room behind it? (to take off the evidence of Goodman) he says, in his opinion he could not hear, unless they spoke very loud. As to White, he says, he lay up three pair of stairs, and Castell up one pair of stairs; that two houses were laid together only at the top, and that one stair-case was stopped up five or six days before Castell came there.

That the bed White lay on was brought down into Mr. Castell's room, but the bedstead being too little, it was carried up again; this was five or six days before Mr. Castell came there.

The next witness is Norton; he tells you, that a message was brought to have a fire made in the best room, and to have the best bed got ready in the best room. He tells you, as to the bar, that you can't hear what is said in the inner-room.

They then called doctor Gardiner; when he was charged in execution, he says, he was with him at that place; talking how Mr. Bambridge and Corbett used him, he said he was used with great civility.

This was the last day of Michaelmas term, which was long after Mr. Castell was carried there, for he was carried there the 14th of November; and says, that he went back again with him.

The next was Blake; who gives an account, that she saw hartshorn-drink made; that she never had the small-pox, and staid in the house the whole time White was there, but never went out.—Mr. Moor says, he found him in a convenient room, and that he wanted nothing.

Mrs. Smith was the next; who said, that Corbett said to Bambridge, that poor Castell was ill of the small-pox, and Bambridge desired to let him have every thing that was necessary for him; and Corbett came again the next day, and said the gentlemen were uneasy, and he said he had thoughts to remove him; and Bambridge said, If they are afraid, let them go into the gaol.

The next was captain Martin; he tells you, that he never heard that he particularly complained; that the second day after the small-pox came out, he went to Bambridge, and was telling him how Mr. Castell was, and Bambridge said he was very sorry for it; then he went up to Mr. Castell, and told him what Mr. Bambridge had said, and Mr. Castell desired he would not mention his name.

Then there was a paper produced to shew what he did by a bill of sale.

Then King was called; who says, that Mr. Castell was at Corbett's, and that Bambridge used him very well, and Bambridge paid his reckoning on the 21st of November, which is about seven days after he came into Corbett's house.—One Howson, another witness, says, that Mr. Castell owed him money, and that Bambridge was employed for him, and this was about ten days before Mr. Castell died.

Then they come to shew you what became of the bonds.—Peter Ellam proves that there were five; but then it was not proved they were delivered to Bambridge.

Codnor, he was clerk, and says, he had repeated directions, from time to time, to take Mr. Castell's security as soon as they came; he says, there were but two taken; there was 1,000*l.* 1,000*l.* and 2,000*l.* but he only admitted of 1,000*l.* and 2,000*l.*

He says, that the bonds were taken *de bene esse*, in their language, which was only to be taken in order for an enquiry; one was taken up and cancelled, the other was only *de bene esse*.

* So in former edition, but wrongly as it seems.

He tells you likewise, that all the charges was 500*l.* this was taken in the penalty of 2,000*l.*

He says, that where the charge is first for 100*l.* and judgment for 100*l.* they take bonds for double.

There are other witnesses say, that the custom is otherwise lately: they say what the other said; and that the same man may have a declaration for one sum, and judgment for another.

Codnor says positively that the two last bonds were only taken *de bene esse.*

This evidence has been long, according to the different things; if any thing is omitted, you'll remind me of it.

Gentlemen, you are to consider in the first place as to Corbett, that only part of the evidence relates to him, as to the taking Mr. Castell up; but as it does not appear he had any knowledge of the small-pox being there then, I apprehend it is not sufficient to convict him: then as to Bambridge, if Bambridge had notice that he never had this distemper, that he was afraid of catching it, that he desired not to go there; if he did carry him afterwards, against his will, and Castell did catch this distemper of White, and he died of that distemper, then he is guilty. The appeal depends upon these circumstances. I take it in point of law, they must all concur; if they do not, you will not find them guilty; if they do, you will find them guilty.

Clerk. Gentlemen of the jury, answer to your names. (Which they did.)

Clerk. Who shall say for you?

Jury. The foreman.

Clerk. Are you agreed?

Omnes. Yes.

Clerk. Are the defendants, or either, and which of them, Guilty or Not Guilty?

Foreman. Not Guilty.

Upon this acquittal, Mr. Kettleby moved the Court, on the statute of 13 Edw. 1, cap. 12, which enacts, That upon a false appeal, by malice, the appellor shall suffer a year's imprisonment, and restore the parties appealed their damages, at the discretion of the justices.

But the Court would not allow the same; the Chief-Justice said,* he was only to try the issue, and that the application was proper above, or by writ of conspiracy, and all he could do was to record the verdict.

Upon 3 February following, the appellees appeared in Court, and having given a rule upon the *postea*, which they then produced, and nobody appearing to say any thing against them, they were discharged. Strange pro Appellatis.

* Strange's Reports, p. 857.

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482. The Trial of William Acton, Deputy-Keeper and Head Turnkey of the Marshalsea Prison in Southwark, for the Murder of Thomas Bliss, late a Prisoner in the said Prison; at the Assizes held at Kingston-upon Thames, for the County of Surrey, before the Hon. Mr. Baron Carter, August 1: 3 George II. A. D. 1729.*

Wednesday, July 30, 1729.

Proclamation was made for all persons concerned to attend.

Clerk of Arraigns. YOU good men that are impannelled to enquire, &c. answer to your names, and save your fines.

Clerk. William Acton, hold up your hand. (Which he did.)

Clerk. You stand indicted by the name of William Acton, of the parish of St. George the Martyr, &c. for the murder of Thomas Bliss, &c.

Clerk. How say you, William Acton, are you guilty of the murder whereof you stand indicted, or not guilty?—*Acton.* Not Guilty.

Clerk. How wilt thou be tried?

Acton. By God and my country.

Clerk. God send you a good deliverance.

On a motion, his Trial was fixed for Friday.

Friday, August 1, 1729.

Proclamation was made for information.

Clerk. Thou the prisoner at the bar, these men that thou shalt hear called and personally appear, are to pass between our sovereign lord the king and thee, upon the trial of thy life and death; therefore if thou wilt challenge them, or any of them, thy time to speak is as they come to the book to be sworn, before they are sworn.

Mr. *Strange,* (Counsel for the Prisoner.) My lord, I hope you will indulge the prisoner to come to the inner bar.

Mr. Baron *Carter.* He may come.

Mr. Baron *Carter.* Call over the pannel. (Which was done.)

Mr. Baron *Carter.* There are 27 of the jury

* See the Cases immediately preceding and following this.

in that pannel, so you may challenge who you will.

Acton. No, my lord, I shan't challenge any.

JURY.

Thomas Cole,	John Siggins,
Miles Poole,	Thomas Bandford,
Robert Parkhurst,	William Brown,
Vincent Hollis,	John Walter,
Charles Buckland,	Robert Patten,
William Goswell,	James Wellbeloved.

Clerk. Hold up your hand. (Which he did.) You of the jury, look upon the prisoner, and hearken to his charge. He stands indicted by the name of, &c. (*prout* in the indictment *mutatis mutandis.*)

Acton. I desire the indictment may be read in Latin.*

Mr. *Strange.* I desire Mr. Serjeant Baynes may be here, before it is read.

Mr. Baron *Carter.* I have staid an hour already, I can't stay any longer.

Crier, make proclamation to keep silence upon pain of imprisonment. This is a trial for life and death, and I shall commit any one that don't hold their peace.

Mr. *Harding.* William Acton stands indicted for the murder of Thomas Bliss. The indictment sets forth, That John Darby was keeper of the King's Palace-court at Westminster, and had the custody of the prisoners there.

That William Acton, during the time he was servant of the said John Darby, was employed in and about the care and custody of the prisoners there.

That the said William Acton, being a person of an inhuman and cruel disposition, did on the 21st of October, in the 13th year of the late king, cruelly, barbarously, and feloniously beat, assault, and wound the said Thomas Bliss, then being a prisoner under the custody of the said Darby; and of malice aforethought did carry the said Bliss into the strong room, and put on irons and fetters of great weight upon his legs; and the said Bliss was exposed to the damp, and wet, and cold of the said room; which is a dangerous, damp, noisome, filthy, and an unwholesome place.

The indictment further sets forth, that he put on an iron instrument, and engine of torture, upon the head of the said Thomas Bliss, called the scull-cap; and also thumb-screws upon his thumbs; and that he remained there three hours under all this torture and torment.

At the time of the imprisoning the said Thomas Bliss in the room aforesaid, he knew it to be damp, noisome, and filthy; and consequently very unwholesome.

That during the detention of the said Thomas Bliss in the said room, by duress of the imprisonment, by being assaulted, beat and wounded, the said Thomas Bliss became languid, and contracted such an indisposition, and ill habit of body, that he languished; and, by reason of this duress, died.

The indictment concludes, that he did feloniously, voluntarily, and of malice aforethought, murder the said Thomas Bliss.

Gentlemen, the prisoner has pleaded Not Guilty; and if we prove him Guilty, you will find him so.

Mr. *Marsh.* I have the honour to be counsel for the king against William Acton, the prisoner at the bar. The offence is murder; and nobody can be guilty of murder, but by being a person of a malicious and cruel nature. The law determines all differences between all subjects; and by the laws of this land, the body and person of the unfortunate debtor is liable to imprisonment till he pays the debt; and the law takes care, that gaolers and keepers of prisons should have a particular encouragement and defence against the persons that offer abuses to them in the capacity of a gaoler; and on the other hand, the law takes care, that they shall not use their prisoners inhumanely or cruelly.

The nature of all custody is to answer for the debt owing, or injuries done; and the person is to be kept safe there, till justly delivered in Court. Where a person is condemned in an action where judgment is had against him, then the gaoler is to keep the prisoner in safe custody, but not to use any inhumane treatment.

That, by the common fate and inequality of human affairs, mankind cannot be alike in point of fortune, and it must fall to the lot of many to become insolvent; and it would be very hard for these of the unfortunate, when they are reduced by the confinement and miseries of a gaol, to be made more miserable by the cruelty of the gaoler; who ought to treat his prisoners with lenity and humanity. Bliss was put in gaol, and was there kept for a small debt.

The indictment takes notice, that Darby had the custody of the gaol; and that Acton was his servant, and stood in his place; and performed the same as Darby ought to have done.

That the prisoner at the bar, by a long train and series of cruel and inhuman usage, maltreated the deceased (I would not be hard upon a man in his circumstances;) I may say what the law allows, that he being under Darby as servant, assaulted Bliss, who was a prisoner for debt under his care, and prosecuted that, by putting him into that place, where he would not have put his swine, or other beast.

A place so damp, in which were so many noxious humours, that any one that was put there must be in danger of death, not only from the noxious vapours, but from the want of a due covering at top; and from its being so remote from the sun, that it could have no influence upon it, and must for want of it grow noxious, even to infection.

To make misery more miserable, he put him there without bed or bedding.

A bed would have kept him warm, but he was denied that, which is seldom denied even to criminals and convicts; nor would he afford

* See vol. 12, p. 1292.

him the cold comfort even of straw; but he was restrained from the liberty of looking out for any thing to relieve him from the injuries of the place.

He was several times very hardly used; he was so beat with a most terrible instrument of correction, a bull's-pizzle, that his clothes were forced to be cut off his body.

There is no punishing the body without the concurrence of the mind. The prisoner sent for this poor man out of this terrible place, in sport and ridicule, to the lodge where he had company; and there had an iron instrument fixed upon his head, thumb-screws on his thumbs, that the blood started from his thumbs. He had another instrument, called a collar, put about his neck; it was very far from being easy; it there made an impression that the mark plainly appeared: he had a load of heavy irons on, worse than any yoke of servitude; after these instruments were fixed on him, he had fetters put upon his legs, of great weight. What then were the fetters put on for? To add to the affliction of the man, and to shew the cruelty of the prisoner, I have already mentioned, that he was a prisoner for debt: they should not be loaded with fetters, upon any pretence whatever.

Indeed, by an old act of parliament,* where auditors of accounts were found indebted to their principal, and are imprisoned, and refuse to account, they may be ironed: but this is an obsolete, disused law, and being in a particular case excludes all others. Lord Coke takes notice, that it is not lawful, that prisoners for debt by the common law should be put in duress.

The indictment does not say, that it was the occasion of his immediate death; but it would have been better that one of those instruments had put an end to his life, that he had expired under these cruelties: his death would have put an end to him and them together; for every body would rather choose to die immediately, than to be so punished, when death must be the consequence. But though he survived them, the effects remained; the man soon died, and that shews that it was the cause of his death. The indictment charges, that the prisoner killed and murdered him. If we prove the facts, they will justify that conclusion; and then we must submit to your lordship, if it is murder. If a gaoler brings a prisoner to his death by duress, it is murder; and the law in such case judges it to be malice prepense.

There is one thing I should have taken notice of; that in case of the death of any prisoner, the law requires the gaoler to have the coroner's inquest to sit upon the body, to enquire the cause of his death: I don't find that was done.

Mr. Ward. May it please your lordship, and you gentlemen of the jury, I am counsel of the same side. If a gaoler, or the servant of a gaoler, kills a prisoner by duress, I take that to be murder; the reason of the law is plain: by the constitution of this country, a prison is only for the safe custody of the prisoners till tried or discharged: if that is turned into cruelty, it is contrary to the law; and he must answer for it. If Bliss came to his death by Acton, if that usage was the occasion of his death, I must conclude, as in the indictment, that he is guilty of murder. To shew you, gentlemen, that Acton used him in that barbarous manner, we shall shew, that the place he kept him in was unfit for any human creature; it was not defended from the violence of the rains and seasons, which made it moist and damp, and very unwholesome. He was kept here without a bed; this might be the occasion of his death; but if he had force used upon him afterwards, there can be no reason to doubt it.

We shall shew you that he had actual force used upon him. He had a cap of iron fixed on his head, and a collar of iron on his neck, so that he could not open his jaws; even his sustenance was forced to be pulled into little pieces, for it was impossible before to get it into his mouth, which was occasioned by the weight of his collar. The man did address himself to a person, who condescended to chew it fit for him to get it into his mouth.

Besides these irons he had thumb-screws on his thumbs, and the blood gushed out of them; besides this, he was beat with a bull's pizzle and a rope, and was black all over. Not content with this, the prisoner at the bar stamped upon his belly, till the swelling was so great, that his clothes were forced to be cut off his body.

Further, to be more barbarous, he put him into fetters so strait, that they made an impression on his legs, and eat into the skin; which occasioned a wound and mortification in his legs. This was the usage of the prisoner to a poor man who was only to be kept in safe custody by him. If he did not die immediately, but languished of his wounds, and then died of them; that will be as much chargeable upon him.

If we call our evidence, and prove the case, you will find him guilty: that he feloniously, and of malice aforethought, assaulted and murdered Thomas Bliss.

Mr. Trigg. A person confined for a very small debt, to have all those engines of torture upon him, is contrary to law.

Mr. Ward. It is set forth in the indictment, that Darby was keeper of the prison; therefore it is proper to proceed to prove that first.

John Wilson sworn.

Mr. Marsh. What is your name?

Wilson. John Wilson.

Mr. Marsh. Have you been sworn?

Wilson. Yes.

Mr. Marsh. Do you know the Marshalsea prison?

Wilson. Yes, I have been a prisoner there ever since April 1726.

Mr. Marsh. Who was the keeper?

Wilson. John Darby.

* Westm. 2d. See 2 Inst. 381.

Mr. *Marsh.* Do you know the prisoner at the bar, William Acton?—*Wilson.* Yes.

Mr. *Marsh.* In the year 1726 was Mr. Acton concerned, and in what manner?

Wilson. He acted as chief turnkey, and succeeded one Burleigh.

Mr. *Marsh.* What is the nature of turnkey?

Wilson. He acted under Mr. Darby, in taking care of the prisoners.

Mr. *Marsh.* Acquaint my lord, and the jury, if you remember Thomas Bliss?

Wilson. Yes.

Mr. Baron *Carter.* I must put you in mind, you have only examined to the year 1726.

Mr. *Marsh.* How long did he (Acton) continue under Mr. Darby?

Wilson. I can't justly say how long; till Mr. Darby farmed out the gaol.

Mr. *Marsh.* How long had it been farmed out?

Wilson. I believe it had been farmed out a year, more or less.

Mr. *Marsh.* When was it farmed out?

Wilson. I believe in May 1727.

Mr. *Ward.* You say, you believe it was farmed out in 1727; who took care of the prisoners then? Who in May 1727?

Mr. Baron *Carter.* You need not go so far; take any part of the year 1727, to the death of Bliss.

Mr. *Ward.* From what do you know he was turnkey? How long was he so before 1727?

Wilson. He was so the time I was committed. I was committed in 1726.

Mr. *Ward.* You believe he did continue as such from 1726 to 1727?—*Wilson.* Yes.

Mr. *Ward.* Did Acton act?

Wilson. Acton did act. I seldom saw Darby there.

Mr. *Marsh.* Give an account what condition Bliss was in.

Wilson. When I was committed a prisoner in 1726, he was then put in the sick ward; a little before the act passed, to prevent frivolous and vexatious arrests, there was a draught made of four prisoners out of each ward, to be put into the pump-ward, and I and Bliss were among them: he then appeared to be a sad object, very lame, and I took an opportunity to ask him the cause of it, and he told me that he attempted to escape; but being seen by a woman, he was discovered in the attempt, and fell down and dislocated his ancle; and that one Rogers and Page took him, and brought him into the gaol again, who he said had beat him.

Acton. I desire, my lord, he may be asked, if he ever saw Bliss in irons?

Mr. Baron *Carter.* Answer that.

Wilson. No, my lord.

Acton. Please to ask him, my lord, if Bliss ever fell off the top of the house.

Mr. Baron *Carter.* What say you to that?

Wilson. He did.

Mr. Baron *Carter.* He said so before.

Acton. Please to ask, my lord, if he ever saw Bliss beat, or confined in the strong room.

Wilson. I never saw him beat.

Acton. Please to ask, my lord, if he saw my behaviour to the prisoners in general.

Mr. Baron *Carter.* What say you to that?

Wilson. I have seen people beat, and put in irons.

Mr. *Ward.* By whose directions?

Wilson. I believe by Acton's.

Mr. *Ward.* Have you seen Acton strike prisoners?

Wilson. I have seen him strike prisoners with his fist.

Mr. *Ward.* Did you see Bliss with an iron instrument on?—*Wilson.* No.

Mr. Baron *Carter.* What behaviour did Acton use towards his prisoners?

Wilson. He behaved very well to some, and used others ill.

Mr. *Strange.* Wilson's evidence is hearsay, being only the declaration of the deceased.

Mrs. *Anne Bliss* sworn.

Mr. *Marsh* Did you know Thomas Bliss?

Mrs. *Bliss.* Yes.

Mr. *Marsh.* Who was he?

Mrs. *Bliss.* My husband.

Mr. *Marsh.* Do you remember the time when he was put into the strong room?

Mrs. *Bliss.* He was a prisoner in the Marshalsea for a small debt.

Mr. *Marsh.* Did you use to visit him?

Mrs. *Bliss.* I went to him every night and morning.

Mr. *Marsh.* Acquaint my lord, and the jury, with every step as to the treatment of your husband.

Mrs. *Bliss.* My husband went to make his escape, and was betrayed.

Mr. *Ward.* Tell the time.

Mrs. *Bliss.* He and six or seven others went to break into a baker's, and Acton came in.

Mr. *Ward.* Name the time.

Mrs. *Bliss.* I can't be sure when it was, but one Murlimus, when he was put in, was there, and was collared.

Mr. *Marsh.* Were you by?

Mrs. *Bliss.* I saw it next morning; I went into the strong room, and Murlimus had an iron collar on, but my husband was only fettered.

Mr. *Marsh.* I confine my question only to your husband. What room was he in?

Mrs. *Bliss.* The strong room.

Mr. *Marsh.* Describe it.

Mrs. *Bliss.* It is a room floored with boards, and there is a hole big enough to put in a pot of beer, and I saw him in there through the hole.

Mr. *Marsh.* How long did he lie there?

Mrs. *Bliss.* He lay there three weeks, in the winter-time.

Mr. *Ward.* You say, there is a little hole, big enough to put in a quart pot?

Mrs. *Bliss.* Yes, there is, just on the side of the door.

Mr. Baron *Carter.* Stay a little, I can't hear one word. You say you could not go into the room, but looked through the hole?

Mrs. *Bliss.* Yes.

Mr. Baron *Carter.* Did you observe the condition of the room?

Mrs. *Bliss.* The floor was very damp, and it had rained that night, and had rained in.

Mr. Baron *Carter.* Was it covered at top?

Mrs. *Bliss.* Yes; but the rain came in through the boards.

Mr. *Foster.* Were the irons heavy he had on?—**Mrs. *Bliss.*** Yes, they were.

Mr. *Ward.* What time of the year was it?

Mrs. *Bliss.* It was much about Christmas time.

Mr. *Ward.* How long ago?

Mrs. *Bliss.* About three months after he was in gaol.

Mr. *Ward.* What time did he first go into gaol?—**Mrs. *Bliss.*** I cannot tell the month.

Mr. *Ward.* Can't you be certain as to the time?

Mrs. *Bliss.* I think it was after Christmas, not much.

Mr. *Ward.* How long since?

Mrs. *Bliss.* It was much about three years; it was much about four years since the first time he attempted to escape. He went to make an escape a second time, by a rope, about two or three months after the first attempt; and then Acton pursued after him, and took him.

Mr. *Ward.* Do you know this of your own knowledge?

Mrs. *Bliss.* When I came the next day to the prison, Nichols said, there is the bitch his wife, and Acton ordered me to be called into the lodge; and said, Damn you, madam, I will have you before justice Ladd, for bringing the rope to your husband: Damn you, I will confine you; and he put me into the place where they put the irons in, adjoining to the lodge, and kept me there an hour. Whilst I was there, he sent for my husband into the lodge, and put on the scull-cap, collar, thumb-screws, and fetters.

Mr. *Ward.* Were they all put on at the same time?—**Mrs. *Bliss.*** Yes.

Mr. *Ward.* Who put them on?

Mrs. *Bliss.* They were put on by Acton's order.

Mr. *Ward.* Did you see him order it?

Mrs. *Bliss.* I heard him order it, I did not see it.

Mr. *Ward.* Did you see them on your husband?

Mrs. *Bliss.* I did. My husband said, As you are a man, I hope you will use me as such; Acton said, If you will confess who brought you the rope; and ordered him into a place called the dungeon; and when he was put there, sent for me, and said, I will now have you before justice Ladd; but having a friend there, who interceded, I was let go out of the gaol, and came the next morning, and found my husband in the dungeon; he spoke to me through the hole.

Mr. *Ward.* Did you see him?

Mrs. *Bliss.* I did not see him, but through the hole. He said, This place, and the cruel usage I have had, will be the death of me. He was beat so, that his clothes were forced to be cut off, and his body, stomach, and belly were very much swelled.

Mr. *Ward.* Did you see him beat?

Mrs. *Bliss.* I saw the marks.

Mr. *Ward.* When did you see him in the Strong Room?

Mrs. *Bliss.* About two hours after I came in, in the morning; Acton came down the yard at the same time.

Mr. *Ward.* Had he all these irons on when Acton came down?

Mrs. *Bliss.* He had them all on.

Mr. *Ward.* When were his clothes cut off?

Mrs. *Bliss.* His clothes were cut off from his body after Nichols beat him, because he was swelled.

Mr. *Ward.* You told us that you saw your husband, what had he on?

Mrs. *Bliss.* I saw him with the scull-cap, collar, and irons on.

Mr. *Ward.* By whose order were they put on?

Mrs. *Bliss.* I heard Acton order them to be put on.

Mr. *Ward.* What was he swelled with?

Mrs. *Bliss.* He was swelled with the blows that Acton had given him, as my husband told me.

Mr. *Foster.* How long was this before his death?

Mrs. *Bliss.* His clothes were forced to be cut down; and Acton told the nurse of the sick ward to take a deal of care of him.

Mr. *Foster.* Recollect what year this was in?

Mrs. *Bliss.* It was about two years and three quarters ago.

Mr. *Richardson.* When he was in this place, (the Strong Room) did you see any blood about him?

Mrs. *Bliss.* He bled at the mouth, and he told me, that it was caused by having the iron instrument on his head: and the blood flowed from under the nails of his thumbs.

Mr. *Harding.* Did you make any complaint of this usage?

Mrs. *Bliss.* A friend of mine did.

Mr. *Harding.* How long did he continue in the Strong Room?

Mrs. *Bliss.* Above a month at one time, a week at another, and another time about three days.

Mr. *Harding.* How long before he died?

Mrs. *Bliss.* About seven or eight months before he died.

Mr. *Richardson.* Did you see your husband beat?

Mrs. *Bliss.* He was black as any thing with the marks of the bull's-pizzle Acton kept. Rogers and Nichols knocked him down with a bunch of keys, as I was told.

Mr. *Richardson.* From the time you saw him in this condition, till he died, how long was it?

Mrs. *Bliss.* About seven or eight months.

Mr. *Richardson.* When did he die?

Mrs. *Bliss.* He died on Lady-day.

Mr. *Richardson.* What condition of health was he in?

Mrs. *Bliss.* He was a pretty while in the sick ward, and then was removed into his own ward.

Mr. *Richardson.* How long after this usage was it before he died?

Mrs. *Bliss.* Seven or eight months.

Mr. *Richardson.* Was it in summer-time?

Mrs. *Bliss.* It was at the beginning of summer.

Mr. Baron *Carter.* I must be forced to tell you, not to ask the same questions over and over again.

Mr. *Richardson.* What was the occasion of his death?

Mrs. *Bliss.* I verily believe the cruel usage of Acton and Nichols; for he said to me a little before he died, I must soon leave you, and nobody is the death of me but Acton and Nichols.

Mr. Baron *Carter.* The first witness, Wilson, put it right, when he came in April 1726, to Lady-day 1727; you must keep her to that time.

Mr. *Harding.* What time did you see him in fetters?

Mrs. *Bliss.* Seven or eight months before he died.

Acton. My lord, please to ask her if I was by when the scull-cap was upon her husband's head.

Mr. Baron *Carter.* What say you to that?

Mrs. *Bliss.* I saw it on in the Strong Room.

Acton. Please to ask, my lord, if he was not well after this, and went into the country to work.

Mr. Baron *Carter.* Answer that question?

Mrs. *Bliss.* He went to Enfield to work, but was so ill he could not work; he did not do three hours work there.

Acton. I desire she may be asked, if he had not got a violent cold by working.

Mrs. *Bliss.* When he came home he said he was very bad, and I got him half a pint of wine, and put him to bed; he continued very ill for a week, keeping his bed some part of the time, and some part sat up; and then desired me to get him into the hospital, for that he could not recover it, and Acton was the occasion of his death?

Acton. Please to ask, if any body was by, when her husband told her I was the occasion of his death.

Mrs. *Bliss.* He made the declaration as I was sitting on the side of the bed.

Acton. I desire she may be asked, if he had not strained his ancle by a fall from the house, when he attempted to escape.

Mrs. *Bliss.* Yes.

Acton. Please to ask, my lord, how long it was after her husband died, before she complained to any body that I was the cause of his death.

Mrs. *Bliss.* I never complained to any body, because I had no money to go to law, nor friends, nor any body else to stand by me.

Acton. Please to ask who she lodged with when her husband died.

Mr. Baron *Carter.* Answer that.

Mrs. *Bliss.* I lodged with my sister.

Acton. Please to ask her, if she ever complained to her sister.

Mr. Baron *Carter.* What say you to that?

Mrs. *Bliss.* No, I did not.

Acton. Please to ask, if she complained to her father or mother.

Mrs. *Bliss.* I had no father, and as to my mother, I did not see her in half a year; it was above a quarter of a year after my husband's death.

Acton. I desire she may be asked again, if she did not tell her mother.

Mr. Baron *Carter.* Did not you tell your mother?

Mrs. *Bliss.* No, I had a difference with my mother, on account of her marrying a second husband.

Acton. I desire she may be asked, when was the first time of her complaining, whether it was voluntarily, or whether she was sent for, and by whom, and whereto.

Mr. Baron *Carter.* You hear the question.

Mrs. *Bliss.* One Mr. Newland, an acquaintance of my father's, knowing how my husband was used, sent for me.

Acton. I desire she may be asked, when and where.

Mrs. *Bliss.* To his own house.

Acton. Please, my lord, to ask how long ago.

Mr. Baron *Carter.* Answer that.

Mrs. *Bliss.* I believe half a year.

Acton. Please to ask her, my lord, when Mr. Newland sent for her, what he sent for her for; and whether he did not say there was money for her.

Mr. Baron *Carter.* What say you to that?

Mrs. *Bliss.* Knowing how barbarously my husband was used, he said he would have me right his death; and ordered me to go to a gentleman about it; but said nothing of money.

Acton. Please to ask, my lord, if she did not tell Hester Long she was to have money to swear her husband's death to me.

Mr. Baron *Carter.* Did you tell Hester Long so?

Mrs. *Bliss.* No; my sister came to me, and said, Mr. Newland desired to see me; and she said, she believed there was money for me. Afterwards I saw Newland, and he told me to go to the gentleman.

Acton. I desire she may be asked again, if she did not tell Hester Long, she was to have money to swear her husband's death to me.

Mrs. *Bliss.* No.

Acton. Please to ask her, if she did not tell Hester Long she was to have 50*s.* or 3*l.*

Mr. Baron *Carter.* I must take care you do not ask her questions to injure herself.

Susannah Dodd sworn.

Mr. *Marsh.* Did you see Bliss in prison?

Mrs. *Dodd.* Yes, a hundred times, and once in irons.

Mr. *Marsh.* What time did you see him in irons?

Mrs. *Dodd.* He had them on the next day after he was put in the Strong Room.

Mr. *Marsh.* What time of the year?

Mrs. *Dodd.* Between winter and summer.

Mr. *Marsh.* How long before he died?

Mrs. *Dodd.* A quarter of a year.

Mr. *Marsh.* Do you know when he died?

Mrs. *Dodd.* I was not with him.

Mr. *Marsh.* When [qu. How] do you know he died? Have you been told when he died?

Mrs. *Dodd.* I knew he was dead, because his wife came and said he was dead.

Mr. Baron *Carter.* Was it the first or second time he made his escape he was out two or three months?

Acton. My lord, he was not out then at all.

Mr. Baron *Carter.* I will call the woman again.

Mrs. *Bliss* being called.

Mr. Baron *Carter.* Was your husband twice in gaol, or once?—Mrs. *Bliss.* Only once.

Mr. *Marsh.* What gentleman did Mr. Newland send you to?

Mr. Baron *Carter.* It is not usual to ask questions after a witness has been examined, and only called again to explain a fact.

Mr. *Marsh.* It is only to clear up what she has already given in evidence.

Mrs. *Bliss.* Mr. Newland, an acquaintance of my father's, only sent for me.

Mr. *Marsh.* How long since?

Mrs. *Bliss.* Three weeks last Sunday.

Mr. Baron *Carter.* Who is Newland?

Mrs. *Bliss.* He lives in Southwark.

Mr. Baron *Carter.* What is he?

Mrs. *Bliss.* He is a baker.

Mrs. *Dodd* standing up again.

Mr. *Ward.* When did you see him last in gaol?

Mrs. *Dodd.* About three months before he died.

Mr. *Ward.* When did he die?

Mrs. *Dodd.* I can't be certain when he died.

Mr. *Ward.* What condition did you see him in?

Mrs. *Dodd.* I went to the strong room to carry him some victuals, and he had thumb-screws on his thumbs, irons on his legs, an iron cap on his head.

Mr. *Ward.* Had he fetters on his legs?

Mrs. *Dodd.* He had very large fetters on his legs, and irons cross his legs too. I spoke to him through the hole.

The said Irons being produced and viewed by the Witness.

Mr. *Ward.* Are those the same you saw upon Bliss?—Mrs. *Dodd.* They are.

The Irons called Sheers being shewn her particularly;

Mr. *Ward.* Look on them, had he any other irons on his legs than those?

Mrs. *Dodd.* He had the sheers cross his legs, and fetters on besides. The deceased asked me to give him relief, and desired me to chew his victuals, for his mouth was sore; and I pulled it to pieces, and fed him.

Mr. *Ward.* What was the occasion of his mouth being sore?

Mrs. *Dodd.* He was confined two days in this condition.

Mr. *Ward.* How do you know it?

Mrs. *Dodd.* By being sent backwards and forwards of errands.

Mr. *Ward.* Did he speak to you?

Mrs. *Dodd.* Yes, he spoke to me several times.

Mr. *Harding.* Could he chew?

Mrs. *Dodd.* I don't believe he could chew.

Mr. *Foster.* How long was he in this condition in the Strong Room?

Mrs. *Dodd.* A day or two.

Mr. *Ward.* How long ago?

Mrs. *Dodd.* Five or six months ago.

Mr. *Ward.* How long ago is it since you saw him in that condition? Recollect yourself, how long ago it might be.

Mrs. *Dodd.* I can't tell exactly.

Mr. *Ward.* How long was it after he was turned out, before it was reported he was dead?

Mrs. *Dodd.* About half a year.

Mr. *Ward.* How long was it then, before he was in that condition?

Mrs. *Dodd.* This was about a quarter of a year before.

Mr. *Ward.* What time of the year was it?

Mrs. *Dodd.* It was about Southwark fair-time.

Mr. *Ward.* Did you see him bleed at the mouth, or any where else?

Mrs. *Dodd.* There is a great hole on the side of the door, and I saw him screwed, and saw him bleeding at his thumb nails.

Being again shewn the Iron instrument called the Sheers.

Mr. *Ward.* How was it used?

Mrs. *Dodd.* It goes between the legs.

Mr. *Harding.* What sort of a place is the Strong Room?

Mrs. *Dodd.* It is a large room, and strong.

Mr. *Harding.* Describe the room. Is it damp?

Mrs. *Dodd.* It is not damp; it is dry enough.

Mr. *Harding.* Is it covered at top?

Mrs. *Dodd.* It is leaded over at top. I gave him drink through the hole by the door, while he held his head backward; he could not take it himself, because of his hands being confined.

Acton. Please to ask, my lord, if he was well in health when he came to lodge at the house where she lived.

Mrs. *Dodd.* He was only lame in his legs; he was well as to every thing else.

Acton. Please to ask her, if she did not see him the day after he came out of the Strong Room.

Mr. Baron *Carter*. Did you see him the day after he came out of the Strong Room?

Mrs. *Dodd*. No, it was two days after.

Mr. Baron *Carter*. Did you see him when his clothes were cut off?—Mrs. *Dodd*. No.

Ruth Butler sworn.

Mr. *Ward*. Did you see Bliss in the gaol?

Mrs. *Butler*. I was a prisoner in 1725.

Mr. *Ward*. How long did you continue a prisoner?

Mrs. *Butler*. I continued till I was cleared by the late act, about 14 days ago.

Mr. *Ward*. Did you see Bliss?

Mrs. *Butler*. I did.

Mr. *Ward*. How long was he in prison, while you were there? Give an account of what you knew of Bliss.

Mrs. *Butler*. He was a prisoner, I cannot say how long; but I saw him going over the house, and he fell off; and was taken on the other side, and brought in again; and was put in the Strong Room by Acton, Thomas Nichols, Rogers and Page.

Mr. *Ward*. Did you see Acton put him there?

Mrs. *Butler*. I saw Acton concerned in putting him there. He kept him there till the other prisoners were locked up, and then brought him into the sick ward, and Acton beat him with a bull's-pizzle there, and stamped upon his body several times, he (Bliss) lying upon the ground. He had hurt his leg with the fall, and thought it was broke. He continued in the sick ward that night, and the next day they carried him into the lodge, and there put irons on.

Mr. *Ward*. What irons?

Mrs. *Butler*. They put on long irons, that kept his legs to a vast extent.

Mr. *Ward*. When was this?

Mrs. *Butler*. The next morning after he fell in going over the house; in the latter end of February, or the beginning of March.

Mr. Baron *Carter*. You say it was the latter end of February or the beginning of March. Was it the first time of his escaping?

Mrs. *Butler*. Yes.

Mr. *Richardson*. Did you see him after he went out of gaol?

Mrs. *Butler*. I never saw him after he went out of gaol.

Mr. *Ward*. How long was he out of gaol before he died?

Mrs. *Butler*. I don't know.

Mr. *Ward*. Recollect the last time you saw him in gaol; when was it?

Mrs. *Butler*. I cannot say.

Mr. *Harding*. Did you see him when he left the gaol? How was he?

Mrs. *Butler*. He was very bad, very ill; I heard him often say after this usage, that the bruises and hurts Acton gave him by stamping upon him, would be the occasion of his death?

Mr. *Richardson*. Do you believe that those bruises and that ill usage was the occasion of his death?

Mrs. *Butler*. I verily believe they were the occasion of his death.

Mr. *Richardson*. What state of health was he in when he left the gaol?

Mrs. *Butler*. In a very ill state of health.

Mr. Baron *Carter*. For my satisfaction and the jury's, give an account particularly when he was beat with the bull's-pizzle.

Mrs. *Butler*. He was first beat with the bull's-pizzle; then flung upon the ground, and stamped upon.

Mr. Baron *Carter*. Whereabouts did Acton stamp upon him?

Mrs. *Butler*. Betwixt his belly and his stomach, and upon his belly.

Mr. Baron *Carter*. How many times did you observe him to stamp upon him (Bliss)?

Mrs. *Butler*. Three times.

Mr. *Richardson*. I will ask you one question.

Mr. Baron *Carter*. I can't admit you to ask any questions now; I asked them for my own, not your information.

Matthew Bacon sworn.

Mr. *Ward*. Did you see the deceased?

Bacon. Yes, several times; I saw him when he was sick, and when his legs were swelled.

Mr. *Ward*. What state of health was he in?

Bacon. He was very sickly and very lame; his legs were swelled, and he complained of the bruises that he had received from Acton.

Mr. *Ward*. Did you see him in the Strong Room?

Bacon. I was not a prisoner then; I was a prisoner from about the latter end of April to Michaelmas following, and then I was discharged. He was sick great part of that time, and said he should do well enough, if not for the bruises; and that that rogue, Acton, had done that to him which he should never recover.

Mr. *Harding*. What state of health was he in when you left the prison?

Bacon. He was sickly.

Mr. *Richardson*. Do you know the Strong Room?

Bacon. Yes; it is standing at the south-east part of the gaol; and is a terror to all those that behave themselves ill; and is not fit to put a human creature in, to remain there.

Mr. *Ward*. Did you see him after you were discharged?

Bacon. I was discharged about Michaelmas, 1726, and went to the gaol to see him between Michaelmas and Christmas; and I am positive he was never well while I saw him in gaol.

Mr. *Ward*. Did he complain of any thing?

Bacon. He complained of pains in his side, which he attributed to Acton.

Mr. *Harding*. What sort of a place is the Strong Room?

Bacon. It is a square, as big as the square between the posts in the Court; and has no light but through a little hole on the side of the door; and it is damp.

Mr. *Harding*. Is it unwholesome?

Bacon. It is undeniably to all mankind unwholesome. I have seen people dead in it.

Mr. Baron *Carter.* What is the prisoner's general character in the gaol?

Bacon. A great many give him an ill character, but I never had any abuse from him; I never deserved it.

Mary Gillis sworn.

Mr. *Ward.* Do you know Bliss?

Mrs. *Gillis.* Yes; I was a prisoner nineteen months, and remember Bliss very well.

Mr. *Ward.* Give an account of what you know in relation to Bliss.

Mrs. *Gillis.* The account I can give is this: the man was almost perished for want, and with a rope had attempted to escape, being tied round his middle; but being discovered, the rope was cut, and he fell into the yard on the other side, and received damage in one of his legs; and though he could not stand, Acton and his servants brought him into the lodge.

Mr. *Ward.* When was it?

Mrs. *Gillis.* In an evening; about the beginning of March.

Mr. *Ward.* Who were Acton's servants? Name them.

Mrs. *Gillis.* Richard Page, Nichols and Rogers. Acton was there himself; they pulled and hawled him about, and Acton beat him with a bull's-pizzle; he stood upon one leg, for he could not set the other to the ground, and cried out for mercy; and they asked him, who gave him the rope? He said Thomas Crabb. Then they put him in a hole, a little place under the stairs, and he lay there a little while; and when he came out, they ironed him on one leg.

Mr. *Ward.* Do you believe this usage was the occasion of his death?

Mrs. *Gillis.* I believe in my heart he died for want of food, as well as by being so used.

Mr. *Richardson.* Did you see his body?

Mrs. *Gillis.* I never did.

Mr. *Harding.* They wanted him to confess who brought the rope?

Mrs. *Gillis.* Yes; they did ask him who brought it.

Mr. *Harding.* What time was it?

Mrs. *Gillis.* It was candle-light; I came out of one Carey's shop.

Mr. *Ward.* What state of health was he in when he left the gaol?

Mrs. *Gillis.* I came out before him. He was sick in the sick ward when I came out.

Mr. *Ward.* What irons had he on?

Mrs. *Gillis.* I never saw him but with one iron on.

Mr. *Ward.* Did you see him beat?

Mrs. *Gillis.* Yes; I did stand by, and saw him beat; and he fell down through weakness from the hurt.

Mr. *Harding.* Did you ever hear him complain of the injuries he received?

Mrs. *Gillis.* I never went near him, nor asked him.

Mr. *Harding.* How many blows did you see him receive?—Mrs. *Gillis.* I cannot tell.

Mr. *Harding.* How long were they using him in that manner?

Mrs. *Gillis.* They were half a quarter of an hour using him in that manner.

Mr. *Harding.* Was Acton by?

Mrs. *Gillis.* He was present at the same time he was beat; but he was beat mostly by Nichols.

James Abbot sworn.

Mr. *Ward.* Did you see Bliss?

Abbot. Yes; I saw him drubbed, so that no man was so drubbed.

Mr. *Ward.* By whom?

Abbot. By Acton's servants.

Mr. *Ward.* With what?

Abbot. With a rope and a bull's-pizzle.

Mr. *Ward.* Was Acton by?

Abbot. I can't say that.

Mr. *Ward.* Who were they that beat him?

Abbot. He was beat by Page and Nichols.

Mr. *Ward.* You say they beat him with a bull's-pizzle and a rope?—*Abbot.* Yes.

Mr. *Ward.* Was Acton in the prison then?

Abbot. Yes, he was.

Mr. *Ward.* Was Acton in the yard?

Mr. *Richardson.* Did you see Bliss in the Strong Room?—*Abbot.* No.

Mr. Baron *Carter.* Will you (speaking to the prisoner) ask any questions?

Acton. My lord, please to ask the question, whether I ever used the prisoners ill during the time he was there.

Abbot. I did see him beat a great many people, but can't say who.

Matthew Brandon sworn.

Mr. *Ward.* Did you know Bliss?

Brandon. Bliss was a prisoner when I came in, in 1726; I went there on the 16th of March, 1726.

Mr. *Ward.* How long did you continue there?—*Brandon.* Six months.

Mr. *Ward.* Did you see Bliss?

Brandon. Yes.

Mr. *Ward.* What condition did you see him in?—*Brandon.* He was a cripple.

Mr. *Ward.* From what time do you count the year?

Brandon. From the 25th of March; I cannot be sure whether it was 1725 or 1726.

Mr. *Trigg.* What manner did you see his legs in?

Brandon. I saw one very much bruised by the irons that were put on. There was a mark about as big as the top of one's finger.

Mr. *Ward.* Was his leg swelled?

Brandon. It was very much swelled.

Mr. *Ward.* Did you see both his legs?

Brandon. I took it to be the left leg.

Mr. *Ward.* Was his ancle strained?

Brandon. I don't know any thing of the straining of his ancle; it was much about the ancle.

Mr. Baron *Carter.* If it was his leg that he hurt; that's an answer.

Mr. *Ward.* That remains upon them to prove. Had the skin been broke?

Brandon. The skin had been broke, and it was swelled above and below, and there was the mark of the iron.

Mr. *Harding.* What sort of mark was it?

Brandon. It was a circular mark.

Mr. *Harding.* Did he make any complaint to you?

Brandon. I gave him part of a mug of ale; and as he was relating his grievances to me, he told me he desired me to see Acton prosecuted, in case he died.

Mr. *Harding.* What did he tell you?

Brandon. He told me he was very barbarously used by Acton, and he was the occasion of his death.

Mr. *Harding.* How long was it before you left him in gaol, that he made this declaration? What time of the year were you discharged?

Brandon. I went out in August.

Acton. My lord, please to ask, how long it was after Bliss's death before he made complaint.

Mr. Baron *Carter.* What say you to that?

Brandon. I made no complaint of this but since I have been at home; I have been beyond the seas.

Acton. Please to ask, how long it was before he went out of England, after he was discharged.

Mr. Baron *Carter.* Answer that.

Brandon. I was discharged in August, and went abroad in about two months time; and it is three months since I came home again.

Mr. *Ward.* Did you ever see any irons upon Bliss?—*Brandon.* No.

Mr. *Ward.* Did you ever see him beat?

Brandon. No.

Mary Renwood sworn.

Mr. Baron *Carter.* I beg you would let us know the time better; I should be glad to be satisfied as to that.

Mr. *Ward.* Give an account of what you know of Bliss.

Mrs. *Renwood.* I never was a prisoner, but carried him victuals.

Mr. Baron *Carter.* You knew Bliss; Did you see him in irons?

Mrs. *Renwood.* Yes, my lord, once. After his fetters were taken off, I saw his legs where the irons had been on; and the irons had eat very deep into both his legs.

Mr. Baron *Carter.* Did you see the irons on?

Mrs. *Renwood.* I saw the irons on in the yard, but that was before.

Mr. Baron *Carter.* Was the soreness of his legs occasioned by the irons?

Mrs. *Renwood.* Yes.

Mr. Baron *Carter.* Upon what occasion did you go to him?

Mrs. *Renwood.* I went to carry him victuals and clothes. When I saw him in the sick ward, the small of his legs were swelled as big as the calf.

Mr. *Ward.* When was this?

Mrs. *Renwood.* I can't be certain as to the time.

Mr. *Ward.* Go on.

Mrs. *Renwood.* The skin was broke, and his legs were sore and raw in the places where the marks of the irons were.

Mr. *Richardson.* What did you carry him?

Mrs. *Renwood.* I carried him a pair of stockings, but he could not put them on.

Mr. *Ward.* Had he no stockings on?

Mrs. *Renwood.* When I went to him, he had no stockings, no shirt, only a blanket.

Mr. *Ward.* What size were the stockings?

Mrs. *Renwood.* They were my husband's stockings, but of a small size.

Mr. *Ward.* If his legs had not been swelled, might he have got them on?

Mrs. *Renwood.* I believe he might.

Mr. *Ward.* Did he make any complaint to you?

Mrs. *Renwood.* He said, he was afraid he should never be his own man again, by the ill usage he had received in the gaol.

Mr. *Ward.* Did he say who used him ill?

Mrs. *Renwood.* No; I did not ask him.

Peter Purchace sworn.

Mr. *Ward.* Did you know Bliss when in prison?

Purchace. Yes; he was a prisoner some time before I was a prisoner, in the year 1726; and he related to me the usage he had had.

Mr. *Ward.* When were you a prisoner?

Purchace. I became a prisoner the 26th of March 1726. I was discharged some time before he was.

Mr. *Ward.* When had you the discourse with him?

Purchace. In May or June.

Mr. *Ward.* How long did he continue in gaol?

Purchace. He was there 10 months during the time I was there; he told me he was ironed, and——

Mr. Baron *Carter.* You must not speak to hear-say. What he told you don't signify. Did you see his legs?

Purchace. I did; and the marks of the irons were upon them. His legs were swelled very much both of them; and one continued swelled until he went out of the gaol.

Mr. *Ward.* What was the occasion of their being swelled?

Purchace. It was occasioned by wearing the irons.

Mr. *Ward.* Were they raw?

Purchace. They were not raw; but I saw the marks of the irons upon them.

Mr. *Ward.* Did you see his thumbs?

Purchace. I did; and he told me, that he had been thumb-screwed.

Mr. *Ward.* Did you see any marks upon them?

Purchace. I saw his thumbs very black, and much bruised about the joints; and he told me, he had worn the scull-cap.

Mr. *Ward.* Did he complain of any bruises?

Purchace. He complained of his side.

Mr. *Ward.* When did he go out?

Purchase. I cannot tell the exact time; I went out a little before him.

Edmond Commins sworn.

Mr. *Ward.* Did you know Bliss?

Commins. Yes.

Mr. *Ward.* Did you see Acton do any thing to him?

Commins. No; but he told me, he believed he had got his death by Acton.

Mr. *Ward.* Did you see any irons on him?

Commins. I saw them; they were very remarkable; he declared to me that Acton put them on, and beat and abused him.

Mr. *Ward.* Did you see his legs?

Commins. I did; and his legs were like a horse's fetlock cut with a clog.

Mr. *Ward.* What time?

Commins. I cannot say.

Mr. *Ward.* How long before his death?

Commins. A considerable time; when he died I was abroad in India; I was there two years and three months. I was by when Acton put Bliss and some others in the Strong Room; and I heard him say to Bliss, I thought I had given you enough already, but I will give you more.

Mr. *Ward.* What kind of a place is the Strong Room?

Commins. I have been twice in that prison; it is very damp, and if it rains never so little, it comes through.

Mr. *Ward.* Had he any bed?

Commins. No; there is no bed allowed to be carried in.

Mr. *Ward.* Is there any place to let in the air or light?

Commins. There is a small hole, about twelve inches, on the side of the door.

Mr. *Ward.* Was it proper to put a human creature in?

Commins. No; I have seen hogs lie in a better place: the common sewer runs underneath it, and the drain from the vault.

Mr. *Ward.* Is it unwholesome?

Commins. It is very unwholesome.

Edward Murfey sworn.

Mr. *Richardson.* Did you know the deceased?

Murfey. I did; he was in prison when I came.

Mr. *Richardson.* What condition was he in? Did you see him?

Murfey. Yes; I heard him say that he had so much beating in the lodge, that he could never recover it.

Mr. *Richardson.* Did you see any irons upon him?

Murfey. I saw him in the Strong Room with handcuffs on his hands, and large fetters on his legs.

Mr. *Richardson.* Did you see his legs? What condition were they in?

Murfey. I saw them; they were black and blue; and they were raw in a circle, and the skin was off.

Mr. *Richardson.* Did he complain of any bruises?

Murfey. He complained of his side.

Acton. Did he never talk of falling off the house, and that he was hurt thereby?

Murfey. I never heard him.

Elkis Roberts sworn.

Mr. *Ward.* Did you know Bliss?

Roberts. I saw him in prison, and saw the fetters upon both his legs.

Mr. *Ward.* Did you see him after he went out?—*Roberts.* I can't say.

Mr. *Ward.* Did he make any complaint to you?

Roberts. He told me, that his legs were very bad, and desired me to go to Mr. Darby about it; which I did, but was afraid to speak in the prison, seeing people used so ill; and I spoke to him at the door, and Darby said—

Mr. Baron *Carter.* What Darby said is no evidence.

Mr. *Ward.* Upon what account did you go to him?

Roberts. I went to Darby to desire the fetters might be taken off; or otherwise, that those might be taken off, and bigger put on; for his legs were swelled so much, that they hid the irons; the iron hung almost out of sight on one side.

Mr. *Ward.* Did he shew you any other marks?—*Roberts.* No.

Mr. *Ward.* Did you see him in the Strong Room?

Roberts. I did see him in the Strong Room; and I saw several more there lying upon the ground, coming to see him after work.

Mr. *Ward.* What sort of a place is it?

Roberts. There is only one place to look in at, a hole on the side of the door. It is very dismal to look into.

Mr. *Ward.* Was it dry?

Roberts. I can't say. At the same time Bliss was there, I saw another man with an iron about his neck in the same room.

Mr. Baron *Carter.* Would you (speaking to the prisoner) have me ask any questions?

Acton. No, my lord.

Mr. *Richardson.* It was insinuated, that the man went to work. We shall produce the person where he went to work, to shew he was not able.

Wm. Cowley, master carpenter, sworn.

Mr. *Marsh.* Did you know Bliss?

Cowley. I remember his coming out of gaol; and after he came out of gaol, he came to work with me.

Mr. *Marsh.* What trade are you?

Cowley. A carpenter.

Mr. *Marsh.* Give an account what state of health Bliss was in when he came to work for you?

Cowley. I had a job of work at Southgate, and came to town generally on a Saturday night; and he came the day after, and said he was coming to work for me; I said he was too

weak, and he had better be purged and blooded before he went down. I left him in town, and when I came again from the country he came to me; I asked him, How he did then? He said, Pretty hearty. I and the rest of the men went down; and on Monday he came down after us to Southgate. I asked him, How he got down, and if he came to work? He said, I don't doubt but I shall, in grace of God. I got him some mutton, and made broth of it; and he endeavoured to work, but was very little able, and did nothing that day. The next day he came to work, and plained three boards; and then said, he could not work any longer. I asked him, What he would have? Give me, says he, a dram of Geneva, or brandy, one of which they got; and laid him down, and threw their clothes over him. I asked him, If he could eat any thing? He said, He believed he could eat some bacon; but when it came, he could not touch a bit. I said, Can you eat any thing else? He said, No, nothing. I then spoke to the woman of the house to get him sugar-sops, which she did; but it did him no good; he grew worse and worse. I asked him, If I should send to the apothecary? He said, No: he attempted to come up, but could not. On Saturday night I came to London; I asked him, If I should leave any thing? He said, No; but desired his sister might be sent for; and I think I sent for her, and my son, Thomas, sent for the apothecary. And when I came back on the Monday, he was worse, and the people were uneasy with me for bringing a sick man; so I got the man that carried my timber, to bring him to London; and he was put into the hospital; and on the 25th or 26th of March he died.

Mr. *Marsh.* Were you with him in the hospital?

Cowley. Hearing he was abused, I went to see him. He had holes in his legs when he came down to me; and his words were, Master, that rogue, Acton, and those other rogues, are the death of me; this was about a month before he died.

Mr. *Marsh.* How long was he with you in the country?—*Cowley.* About nine days.

Mr. *Marsh.* Did he complain of any thing?

Cowley. About a month before he died, he complained for a week together.

Mr. Baron *Carter.* Did the deceased complain of his side?

Cowley. He told me, that they took and held him by the legs, and his head knocked on the ground; and kept him chained in irons.

Mr. Baron *Carter.* Did he complain of his side?

Cowley. He complained of inward bruises.

William Cowley, junior, sworn.

Mr. *Marsh.* Acquaint my lord with what you know of Bliss.

W. Cowley. After he came out of prison he came to see for me at my lodgings.

Mr. *Marsh.* Don't tell all you know in your life-time.

W. Cowley. When Bliss came to see for me, I met him in Crooked-lane, and asked him, How he did? He said, As well as can be expected; for the bruises I have received from those rogues, I shall never recover.

Mr. Baron *Carter.* Did you see his legs?

W. Cowley. Yes, and they were black, blue, and yellow, about the calf. When he came to Southgate, I asked him then how he did; he said, As well as can be expected; for I have got those bruises I shall never recover.

Mr. *Marsh.* Tell how he was at Southgate?

W. Cowley. After he had done work, he went up to bed, and said, I hope I shall do well; and putting his hand to his breast, said he was very sore. After he began to work, he fainted. We had a fire made, and laid him down, and asked him if he could eat; he said if we could get him some bacon; but when it came he could not touch it. Then we got him some bread and ale, and he could but just take it down, and brought it up again, and complained of pains. He was afterwards blooded, and the blood was of all manner of colours, and mighty watery.

Mr. *Marsh.* Did you see any marks but in his legs?

W. Cowley. He said those rogues had given him bruises he should never recover.

Mr. *Marsh.* Did he name any body?

W. Cowley. Yes, he named Acton, and a little fellow he had shewn to me when at the gaol.

Mr. Baron *Carter.* When he was going away, what did he complain of?

W. Cowley. He said, I shall never overcome the blows received by these villains; and I must lay my death to Acton and those rogues.

Samuel Parker sworn.

Mr. *Marsh.* Did you know Thomas Bliss?

Parker. I knew Thomas Bliss when he came out of gaol; I saw him come down to Southgate to work, but he was fitter to go to bed. He worked with me, and lay down on the bench seven or eight times.

Mr. *Marsh.* Did he complain?

Parker. He complained of his stomach and legs, and said that his stomach was beat to a great degree, and that Acton had put on irons on his legs, which extended them a yard, and put on an iron on his head, thumb-screws on his thumbs, so that the blood gushed out at the end of his thumbs.

Mr. *Marsh.* Did you see his legs?

Parker. Yes; they were swelled so, that he was forced to wear old slippers; and they looked of many colours; and there was a hole in one of them big enough to put your thumb in.

Mr. *Marsh.* What condition was he in?

Parker. In a very weak condition, not fit to work.

Mr. *Marsh.* How long did he work?

Parker. About a quarter of an hour, and then said, Master, I can't work any more; he then laid down, and they made a fire for him.

Mr. *Marsh.* Had he any apprehension of death?

Parker. He said, that the bruises and the blows he had received were the occasion of his death, and he should never recover them, and hoped some good person or other would prosecute them for it.

Mr. Baron *Carter.* Now, you have heard the charge against you, by sixteen witnesses, you stand upon your defence.

Acton. Notwithstanding what the people have swore against me, I hope to make it appear that I am innocent.

Thomas Bliss was a prisoner in December, 1725, and he attempted to escape by a rope, to get over a house; but some people seeing him, he fell off the house on the other side, which is 24 feet high: I went round, and found him lying on the ground; I took him up by the arm, and asked him the reason why he did so; he said, he was poor, and he could not get out, without somebody would assist him: I put him into the sick ward, to be taken care of, and allowed him two-pence per day; and had a surgeon to bathe his leg, which he had hurt in the fall. He continued in custody, and continued in the sick ward only till his leg was well, and then went into the pump ward, where he was chose constable, but for some misdemeanour was turned out; it was for cheating the other prisoners of the ward. After he was discharged, he continued three weeks at one Gresham's near the Marshalsea gate, and was fuddled several days. He went into the country and came up again, and said he had catched cold, was put into the hospital, and there died of a fever. My lord, since his fall, he never had any irons on, and he lived near twelve months after. I have several witnesses ready to prove those facts, which I will call.

Samuel Bullock sworn.

Acton. Give an account of what usage Bliss had in the prison.

Bullock, (after making a long pause.) My lord, I may be a little startled, having never been before such an audience before, therefore desire a little time to recover myself.

Mr. Baron *Carter.* You must propose what questions you would have asked, to the Court.

Acton. Please to ask, my lord, if Bliss was on the top of the house, and what usage he saw when he came back.

Bullock. In March, 1725, or 1726, I went to see Mr. Acton, and there was an outcry, He was here, he was there; and Acton went into Axe and Bottle yard, and brought Bliss along with him. I saw no barbarity used, but saw some of them strike him.

Acton. Please to ask, if he saw any irons on.

Mr. Baron *Carter.* What say you to that?

Bullock. I saw no irons on. He continued with Mr. Acton till he was confined in the sick ward, and a friend and myself gave a shilling a-piece, because he complained he was destitute, and had no sustenance.

Acton. My lord, please to ask, if he did not complain of his legs and back by the fall.

Bullock. I saw him in a miserable condition.

Mr. Baron *Carter.* The question was, if he did not complain of his leg and back by the fall?

Bullock. He complained of his ankle and his side.

Acton. Please to ask, my lord, if there was any irons on, should he have seen them.

Mr. Baron *Carter.* I think that question will not be so much for your service; you may have it asked if you please.

Robert Holmes sworn.

Acton. Please to ask him, my lord, whether he remembers the escape of Bliss, and when.

Holmes. I know of Bliss's breaking out into Axe and Bottle yard, and saw Acton and Rogers bring him into the prison, supporting him upon their shoulders.

Acton. Please to ask, if he had any irons on, or abuse given him.

Holmes. He had no irons on, no abuse given.

Acton. What did he complain of?

Holmes. He only complained of his legs.

Acton. Where did he go after he was discharged?

Holmes. He went and lodged at one Gresham's, and I drank with him very often in an evening, and he and I took a walk together, and he then declared to me, that Acton had used him very well, and if it had not been for him, he must have perished before he got discharged; and when he came back to Mr. Gresham's, he told me, he was to go to work at Southgate, which he did, and stayed there nine days; and when he came back, he said he had catched an ague, and took a sweat; and two or three days after that went into St. Thomas's Hospital. I met Bliss's wife on the bridge, and she said——

Mr. *Marsh.* I apprehend what she said cannot be evidence.

Mr. Baron *Carter.* I tell you how far; she is a good witness to contradict herself.

Mr. *Marsh.* You can only call this witness to invalidate her testimony. What did she say about her husband's death?

Mr. Baron *Carter.* She has said, the blows he received from Acton were the occasion of his death; and the witness may be asked to what she said as to that. Did you see any irons upon Bliss, after the fall from the house?

Holmes. No.

Mr. Baron *Carter.* Was he in the Strong Room?

Holmes. No, he was in the sick ward.

Acton. Please to ask, my lord, how long he was in prison after he came out of the sick ward.

Mr. Baron *Carter.* What say you to that question?

Holmes. Seven or eight months.

Acton. What condition of health was he in?

Holmes. Very good,

Acton. Please to ask, if he ever complained of any thing but his lame leg.

Holmes. I never heard him complain of any thing else. He was at work several times in my room.

Mr. *Ward.* He did complain of one leg you say; did he not complain of both?

Holmes. No, he never did.

Mr. *Harding.* Did you never see him fettered after he attempted to escape?

Holmes. No, I never did.

Mr. Baron *Carter.* Before he went into the sick ward, was he in the lodge?

Holmes. I came down into the lodge with him.

Mr. Baron *Carter.* Where was he carried next?

Holmes. He was set down there.

Mr. Baron *Carter.* You did not see him in the yard?—*Holmes.* No.

Mr. Baron *Carter.* The witnesses say, that he was first brought into the lodge, and there had irons put on, and then was carried into the yard, and there it was that all the witnesses say he was beat.

Mr. *Marsh.* I did not hear that.

Mr. Baron *Carter.* It is so said.

Mr. *Marsh.* When did he fall from the house?

Holmes. About seven or eight o'clock at night.

Mr. *Marsh.* What time of the year was it?

Holmes. I can't say; I believe about March.

Mr. Baron *Carter.* Let the time be whenever it will, it must be taken after the fall off the house.

Mr. *Marsh.* When did he fall?

Holmes. As near as I can guess, in March next coming, four years ago.

Mr. *Marsh.* You were speaking of his continuing well when he came out of the sick ward; when did he come out?

Holmes. About two months after March.

Mr. *Marsh.* Were you a prisoner then?

Holmes. No, I was a prisoner before.

Mr. *Marsh.* You were discharged then, and lived in the prison?—*Holmes.* Yes.

Mr. *Marsh.* Had you not the privilege of the gate?—*Holmes.* I was no prisoner.

Mr. *Marsh.* Had you no privilege granted you?

Holmes. Yes, by Mr. Darby. I had the privilege of lodging in the prison; he gave it me gratis.

Mr. *Marsh.* When were you discharged?

Holmes. About four years since, by the Act of Insolvency.

Mrs. *Bliss*, being in Court to confront Holmes.

Acton. I desire he may give an account of the conversation he had with Mrs. Bliss.

Holmes. I met Mrs. Bliss on Saffron-hill, and she told me, she thanked God her husband was dead.

Mr. Baron *Carter.* Did she tell you what was the occasion of his death? What did she tell you he died of?

Holmes. That he died of an ague and fever in St. Thomas's hospital. I met her on Tuesday last.

Mrs. *Bliss.* My lord, I did meet him on Tuesday, but never said any such words; there was no such word spoke.

Henry Chapman sworn.

Acton. Don't you remember Bliss's attempt to escape?

Mr. Baron *Carter.* I would have you take one thing for granted, that he fell off the house; ask any thing that was the consequence of that.

Acton. Please to ask him, if he saw Bliss after he fell off the house.

Chapman. Bliss was found in the Axe and Bottle yard, and was brought in; he had hurt his leg, and as soon as he came, he was put into the sick ward; Dr. Draper was sent for to him, and used what means he thought proper.

Mr. Baron *Carter.* Tell me if you saw him when he went back to the lodge?

Mr. *Chapman.* He was carried to the sick ward directly. I saw nothing of him till he was brought into the sick ward.

Acton. My lord, Chapman was not out at all.

Mr. Baron *Carter.* Bliss must come into the lodge?—*Chapman.* Yes.

Mr. Baron *Carter.* Where does he go, through the yard to the lodge?

Chapman. I saw nothing there; but he was carried to the sick ward, and the doctor was called out of bed to him.

Acton. I desire he may be asked, whether I did not order the doctor to come to him, and let him have three-pence [two-pence, p. 485.] per day while he was sick.—*Chapman.* Yes.

Mr. Baron *Carter.* How long did he continue in the sick ward?

Chapman. I can't tell how long.

Acton. Please to ask him, if he don't remember Bliss's being constable of the pump ward, and drawing garnishes for his fellow-prisoners.

Chapman. Yes, I do remember it very well.

Acton. What condition was Bliss in when he was brought out of the sick ward?

Chapman. He was healthful, but complained of the hurt of his leg.

Acton. Did you ever see any irons on him?

Chapman. No.

Acton. Did you see him in the Strong Room?—*Chapman.* No.

Acton. Please to ask, my lord, if he did not usually see Bliss every day.

Chapman. I saw him frequently.

Acton. Did you ever hear him complain of having irons on?

Chapman. No; but he desired me to make interest to get him the charity money, to get him out of the gaol.

Acton. Please to ask, If he did not go with Bliss into the sick ward, and if I stamped upon his breast. How long did he continue in health after he came out of the sick ward?

Chapman. It was, to the best of my memory——

Mr. *Strange.* Was it a great or a little while?

Chapman. It was a considerable time; but I can't be certain.

Acton. Please to ask, whether he never saw Bliss at Mr. Gresham's?

Chapman. I drank with him there.

Acton. How was he in health there?

Chapman. He was well in health; and he said himself, he was as well as ever he was in his life.

Mr. Baron *Carter.* Who is Gresham?

Chapman. He keeps the Dolphin ale-house, at the gaol door.

Mr. Baron *Carter.* You saw him when he came from Southgate; tell me whether he was well in health then?

Chapman. He was well then; but he complained of a stitch in his side, and that he had an ailment, and that work did not agree with him.

Mr. Baron *Carter.* Was he well in health then?

Chapman. He was well in health, but wished to get into the hospital.

Mr. Baron *Carter.* Did he complain of any ill usage of Acton?

Chapman. Never in his life.

Acton. Be pleased, my lord, to ask him as to the Strong Room; whether if he was to be locked up, he would not rather choose to be locked up there, than in the wards.

Chapman. Yes.

Acton. Whether prisoners have not chose to lye there, rather than in any other room?

Chapman. I have heard several people request it.

Acton. Is there any common sewer runs under the Strong Room?—*Chapman.* No.

Mr. *Marsh.* You say, there is no common sewer under the Strong Room?

Chapman. I am sure of it.

Mr. *Marsh.* Have you no place or office in the gaol?

Chapman. I draw beer for twelve-pence a barrel, which Mr. Halsey gives me; and victuals and drink from Mr. Wilson, and since he died, from Mr. Acton.

Mr. *Marsh.* What Halsey?

Chapman. Halsey the brewer.

Mr. *Ward.* You say, you heard Bliss complain after he was at Southgate; What did he complain of?

Chapman. He did complain of his legs swelling, and other pains, and wished to be in the hospital.

Thomas Fletcher, surgeon, sworn.

Acton. Mr. Fletcher, pray tell the Court, after Bliss fell from the house, whether you looked after him in the sick ward.

Fletcher. I visited people in the sick ward, and the deceased asked me to look at his leg; I did look upon it, and saw a large tumour, and used the best means I could. I went to my own ward, and got some oils, and used them first, and then applied a plaister. I often asked him where his pain was? He said, he felt no pains but in that part. In about 14 days time I took off that plaister, and put on another, and then he was removed into another ward. I was then released, but I went to see him now and then; and in the month of February or March following, I asked him how he did? He had either a rule or stick in his hand, and pointed to his ankle, and said he should never be well as long as he lived. I afterwards met him in Westminster-hall, and he told me, that he was released by some charity money, through Mr. Acton's means.

Mr. Baron *Carter.* Who was the occasion of his being let out?

Fletcher. He always gave Acton a good word; and said, he was released by a gentleman coming there with charity-money.

Acton. I desire, my lord, he may be asked, if he (Bliss) had any irons on?

Fletcher. I never saw him with irons on.

Mr. Baron *Carter.* When he came out of that room, and was put into the sick ward, had he any irons on then?

Fletcher. He had no irons on.

Acton. Please to ask, if there was any bedding.

Fletcher. I saw some bedding, and asked who lay there. They did not tell me the particular man, but told me a gentleman.

Acton. Please to ask him, as to the Strong Room, if it was damp.

Fletcher. I do not think it was any ways damp.

Mr. *Ward.* You say there was a great swelling upon one of his legs; was it not eat into?—*Fletcher.* No.

Acton. Please to ask, if there was any contusion of the other leg?

Fletcher. There was not.

Acton. Did you ever see Bliss in irons?

Fletcher. I have seen him with fetters on.

Mr. *Trigg.* Do you remember the time of Bliss's making his escape?—*Fletcher.* Yes.

Mr. *Trigg.* Were there other people put in irons?

Acton. I desire he may be asked, whether he ever saw Bliss in irons, after his last attempt to escape?—*Fletcher.* I did not.

Mr. Baron *Carter.* What was Acton's behaviour to the prisoners, according to your observations.

Fletcher. I never saw him appear otherwise than very handsome, and very well to them.

Thomas Whitford sworn.

Acton. I desire, my lord, he may be asked, if Bliss did not attempt to escape.

Mr. Baron *Carter.* It is agreed.——Tell me how he was after his fall off the house.

Whitford. I saw him in prison.

Mr. Baron *Carter.* Tell me how he was.

Whitford. From October to February (I was discharged the same day) he was as well as ever.

Acton. Please to ask what he said in relation to me.

Whitford. He (Bliss) said, that if it had not been for Acton, he should not have got out of prison; and he himself had spoke respectfully of him, and so had his wife.

Acton. Did you go to Mrs. Bliss?

Whitford. I went to Mrs. Bliss, in the alehouse, where she lived; and she desired I would take no notice that her husband was dead; and told me, he went into the country to work, and there catched cold, and was carried into the hospital, and died of it; which was thought the occasion of his death.

Acton. What do you think of the Strong Room?—*Whitford.* It is a Strong Room, but the best room on the common side of the gaol.

Mr. Baron *Carter.* Do you say, it is the best room on the common side?

Whitford. Yes, for wholesomeness and cleanness.

Acton. Please to ask, what was my general behaviour to the rest of the prisoners.

Whitford. I never saw you strike a man.

Acton. What was my character among them?

Whitford. You had a very good character; you gave victuals to them every week.

Robert Walter sworn.

Acton. Did you ever see me misuse Bliss?

Walter. Bliss was never used ill by you.

Acton. Had he any irons on?—*Walter.* No.

Acton. Did he make any complaint? Was I there?

Mr. Baron *Carter.* I remember the question when Huggins was tried; it was asked then, if he was there or not? You know I advised Huggins against answering [qu. asking: see the Case of Huggins, *ante.*] it (speaking to Mr. Strange). What condition of health was Bliss in after his fall?

Walter. In a small process of time he walked about the gaol as well as I did, and spoke hearty.

Mr. Baron *Carter.* Did you hear Bliss say any thing of Acton?

Walter. Never any thing unhandsome.

Mr. Baron *Carter.* That is not the question. Have you heard him say any thing about Acton?

Walter. I have heard him speak in praise of him.

John Chope sworn.

Acton. Please to ask, my lord, what state of health Bliss was in.

Mr. Baron *Carter.* Did you see Bliss? What condition was he in after his fall?

Chope. He was in very good condition. About February I eat and drank with him out of the place at Gresham's, and he was in good health then, and talked of going into the country to work.

Mr. Baron *Carter.* What did he complain of?—*Chope.* Nothing.

Mr. Baron *Carter.* Did you see him when he came back from the country?

Chope. I did; and he said, the country air did not agree with him.

Mr. Baron *Carter.* Did you ever hear him complain of the ill usage of Acton?

Chope. No, his wife told me——

Mr. Baron *Carter.* I must not hear you tell any thing of her, but what may contradict what she said. Pray, what did you hear Mrs. Bliss say, in relation to her husband's death?

Chope. Nothing.

William Bolland sworn.

Mr. Baron *Carter.* What have you to say? Do you know of Bliss's breaking out?

Bolland. I saw him after it.

Mr. Baron *Carter.* What did he complain of?—*Bolland.* Only of hurting one leg.

Acton. Please, my lord, to ask, how he was in health.

Bolland. In as good as I am.

Acton. Did you eat and drink with him?

Bolland. Often, at one Gresham's.

Acton. Please to ask, if he did not fetch bread.

Mr. Baron *Carter.* What signifies that, I don't see how it affects you one way or the other. Did you see him after he was out of custody?

Bolland. Yes, I saw him at Gresham's; and I met his wife on Tuesday last, and asked her to drink some gin.

Mr. Baron *Carter.* I must not let you go on so. What did he (Bliss) say of the prisoner?

Bolland. That he was very civil and kind to him.

Mr. *Ward.* Did Mrs. Bliss tell you what her husband died of?

Bolland. She said, she believed he died of an ague and fever.

Mr. *Ward.* Did you see his legs after he fell?

Bolland. Yes, both, and one of them was swelled.

Mr. *Ward.* You are sure both were not swelled?—*Bolland.* No, only one.

Mr. Baron *Carter.* What is that he says?

Mr. *Strange.* Repeat the answer to my lord.

Bolland. I saw only one of his legs swelled.

John Westby sworn.

Acton. How was Bliss in health, after the second attempt to escape?

Westby. I saw him the night he was brought in.

Mr. Baron *Carter.* Did he complain of one or both legs?—*Westby.* One only.

Mr. Baron *Carter.* What health was he in?

Westby. He was in the sick ward, and I don't apprehend he wanted health; he was only lame.

Mr. Baron *Carter.* What did Bliss say was the occasion of his death?

Westby. His wife told me, he was at Southgate at work four or five days, and he came home on the Sunday following; and his wife said, he was very well, but the country was too cold for him; but he went back the week fol-

lowing, and she said, he worked a day, or a day and half, but the country was so cold he could not bear it. I did not see her after his death.

Mr. Baron *Carter*. What did Mrs. Bliss say?

Westby. That he had caught cold, which she took to be the cause of his illness.

Christian Fandy sworn.

Mr. Baron *Carter*. Did you see Bliss after the fall from the house?

Fandy. He lay by me four months in the Queen's ward.

Mr. Baron *Carter*. The Queen's ward?

Acton. He was removed from the sick ward to the Queen's.

Mr. Baron *Carter*. What health was he in? Did he make any complaint?

Fandy. I never heard him make any complaint, but of his ankle.

Mr. Baron *Carter*. Did he complain only of one leg?

Fandy. It must be one leg. He could not lye down at nights; and the other leg was only swelled.

Mr. Baron *Carter*. Did you see him at the Dolphin?—*Fandy*. I did several times.

Mr. Baron *Carter*. Did he complain of any thing at his coming out of the gaol?

Fandy. He desired me to lend him half a guinea, and he would go to work.

Acton. Be pleased, my lord, to ask, if he saw him in the hospital.

Mr. Baron *Carter*. What say you to that?

Fandy. Mrs. Bliss told me her husband was gone to the hospital; and I went into the hospital to him, and asked him how he came there? He said, he was at work in the country, and pulled off his waistcoat, and catched cold.

Mr. Baron *Carter*. What was the prisoner's general behaviour?

Fandy. I had been there ten months, and never saw any harm done to any prisoner in that time.

Hester Long sworn.

Acton. I desire, my lord, she may be asked, if she saw Bliss after he came out of prison.

Mr. Baron *Carter*. What say you to that?

Mrs. *Long*. I staid at the Dolphin ale-house to drink when he came out, and I wished him well of being out; he thanked me, and said it was owing to Mr. Acton; and said, God bless him, he got me out. I asked him, If he was arrested again, what he would do? he said, Acton would stand by him. Mrs. Bliss, my sister-in-law, came there, and she said, that he was as well as ever in his life; and on the Saturday se'nnight after, he came to my house, in East-Smithfield, and said to his wife, Go home to dinner, for I must go to Mr. Cowley, for I have seven shillings and six pence to take of him for wages; and afterwards I saw him in the hospital.

Mr. Baron *Carter*. What was the matter with him?

Mrs. *Long*. Mrs. Bliss desired to lodge with me; which she did, and she told me, her husband wanted to see me; and when I went to him, he said, Sister, I am going to leave the world: I said, it was only going a little before me.

Mr. Baron *Carter*. Pray tell whether he made any complaint to you of any thing?

Mrs. *Long*. No.

Mr. Baron *Carter*. What distemper did he die of in the hospital?

Mrs. *Long*. He said no more than that he catched cold at Southgate.

Acton. I desire she may be asked, what she heard Mrs. Bliss talk about any money she was to have in this prosecution, and from whom.

Mr. Baron *Carter*. Answer that question.

Mrs. *Long*. I never heard no more talk till within these four months; and then a messenger came, and said, there was money for Mrs. Bliss in Southwark; and when she went there the gentleman was not at home; and when she came back, she said, she should have thirty or forty shillings. I asked for what? She said upon account of going to swear against Mr. Acton.

Acton. Please to ask, whether somebody gave her any clothes, and who.

Mrs. *Long*. The next day after, she gave out, that she was to go to some gentleman; and I asked to whom? She said, to the committee, and she should have forty or fifty pounds; and when she came home, I said, Nanny, I hope you will not be so foolish to go to take away the life of a man for forty or fifty pounds. After that she went to service.

Acton. Did you not see Bliss and her brother together, and what was the conversation?

Mrs. *Long*. I said [qu. saw] Anne Bliss and her brother together, and he cautioned her to take care what she did; and she said she was to have forty or fifty guineas; and he said, Make it up; if you go to Acton, he will give you a couple of guineas; and she said she could not go, for her master said she should [qu. not] take 100*l*. She (Bliss) came and said, some time after, she had two guineas given her by one of the gentlemen of the committee, and that she did go and live with him in an alley by Little Moor-Fields.

Mr. Baron *Carter*. You talk faster than I can take notes of what you say; you have no occasion to talk so much. Whom did you say, she said, she went to live with?

Mrs. *Long*. One of the committee.

Mr. *Oglethorpe*. My lord, with humble submission, I desire leave to speak.

Mr. Baron *Carter*. Sir, you may.

Mr. *Oglethorpe*. Then, my lord, I desire this matter may be thoroughly sifted, and the evidences may be confronted.

Upon which Mrs. *Bliss* was called to confront *Hester Long*.

Mrs. *Bliss*. When I went to my sister Long, she said, she would have me consider, not to be ruled by Mr. Newland, and if I would, she

could go to Mr. Acton and make it up, and he would give me something: I told her, she never liked my husband, and Mr. Jennings would not forgive me, if I made up my husband's death; and she (Long) said again, her husband would not forgive me, and wondered how I could pretend to go. I told her after that, my master Jennings had lent me two guineas, and desired the gentleman, where I went to live, that he would see the money laid out; and gave the gentleman the money with his own hands, and his wife laid it out for me.

Mr. Baron *Carter*. Did you not say, that you were to have 40 or 50*l*.?

Mrs. *Bliss*. I said no such thing.

Mrs. *Long*. The person that came from Newland said, it would be a great deal in her way.

Mr. *Oglethorpe*. I desire she may be asked, who that person was, and whether he was one of the committee.

Mr. Baron *Carter*. Who was Mr. Newland?

Mrs. *Long*. A baker in Southwark.

Mr. Baron *Carter*. Mrs. Bliss, I ask you, whether you said, that Mr. Jennings told you, that you should not take 100*l*.

Mrs. *Bliss*. He said, if they were to offer me 100*l*. I should not take it, not to do justice to my husband.

Mr. Baron *Carter*. How came you to leave Jennings's service?

Mrs. *Bliss*. There were so many came flocking up and down after me, that I could not live with him. There came two gentlemen last Sunday.

Mr. *Richardson*. You say you could not live with your master, because so many people came after you. Whom did they come from?

Mrs. *Bliss*. They said they came from Acton.

Mr. Baron *Carter*. What they said is no evidence.

Mr. *Oglethorpe*. My lord, I must with all humble submission beg leave to speak. Reputation is a very valuable thing; and here is an aspersion thrown out at random against a member of a committee, which may affect the characters of several gentlemen who are not here present.

Mr. Baron *Carter*. There are many committees, and I should have taken notice if any thing had been said of any committee of the House of Commons.

Mr. *Oglethorpe*. There are many committees, as your lordship says; there is one of aldermen, there was also another, which I find is not forgot. I would have them explain what committee they mean; the charge is a very heavy one, no less than subornation of perjury, and this founded on a hearsay, so as to render it impossible for any persons to justify themselves: I therefore desire this may be strictly examined into, and insist upon knowing who this person was, and his name.

Mr. Baron *Carter*. Was there any name mentioned?

Mrs. *Long*. She said, one of the committee, and the committee's spouse was to lay out the money for clothes.

Mr. *Richardson*. I ask you, whether or no she said she was to have two guineas from Jennings, or any one else?

Mrs. *Long*. From nobody but Mr. Jennings.

Robert Cole sworn.

Mr. *Acton*. My lord, please to ask Robert Cole if I gave Bliss money?

Cole. Some time after the committee met, they had sat once or twice, I met Mrs. Bliss on London-bridge, and asked her, if she had been with the committee or Acton. She said, No; but if Acton would give her 5*l*., she would not mention any thing of her husband's death.

Mr. Baron *Carter*. How long was this before Acton was taken up?

Cole. About three weeks; I can't be certain.

Mrs. *Bliss*. I said no such thing.

Mr. *Richardson*. Are you subpœnaed?

Cole. No.

Mr. *Richardson*. How came you here, if not subpœnaed?

Cole. Hearing Mr. Acton was to be tried.

Mr. *Richardson*. How did you know he was to be tried?

Cole. I heard it by being in the Marshalsea as a prisoner.

Thomas Rogers sworn.

Acton. What usage did Bliss receive after he fell off the house at the Marshalsea?

Rogers. His ankle was swelled as big as his calf.

Acton. I desire he may be asked, how the other leg was.

Mr. Baron *Carter*. What say you to that?

Rogers. As usual.

Acton. I beg he may be asked, whether he was with Bliss when he was brought into the lodge.

Rogers. Mr. Acton and I supported him.

Mr. Baron *Carter*. This man was accused of beating Bliss; I will not press the thing upon him to affect himself.

Serj. *Baynes*. If he thinks himself innocent, he may be voluntarily a witness, though he could not be obliged to it.

Mr. Baron *Carter*. He may be a witness; but don't let me lead him into any thing that may injure himself.

Acton. I desire then he may be asked, if he saw Bliss in the sick ward?

Rogers. I did; and Mr. Acton sent for a surgeon into the sick ward to bathe his leg.

Acton. I desire he may be asked, if he was put in irons.—*Rogers*. He was not.

Acton. Were you by there all the while?

Rogers. I was.

Acton. I desire he may be asked, if he continued a prisoner after Bliss was discharged.

Rogers. I did.

Mr. *Ward*. You are asking too many questions.

Acton. I desire he may be asked, if he ever saw him after he was discharged.

Rogers. I did see him, and drank with him; and he was very merry and well.

Acton. Rogers, my lord, was in the gaol; I beg he may be asked, if the iron cap was ever made use of?

Mr. Baron *Carter.* That is a proper question. Did you ever know that it was made use of?

Rogers. I saw it there in Burleigh's time, and never saw it used from that time to the time of my discharge; it hung up.

Mr. *Ward.* I ask you, whether you never saw Bliss beat with a bull's-pizzle, or rope?

Rogers. I never saw him beat at all.

Mr. *Baugh* sworn.

Acton. I desire Mr. Baugh may be examined (he has belonged to this court many years), whether he has not seen such an instrument used in burning felons in the cheek.

Baugh. I have seen such an instrument used to burn people in the cheek.

John Grace sworn.

Acton. I desire he may be asked, whether the iron cap was not in the prison before I came.

Grace. My lord, I remember the Marshalsea prison above a year before Mr. Acton knew it; and the iron cap hung up there, and I enquired the use of it. There was an act in king William's time for burning felons in the cheek; and it was used for that purpose; and that was the county gaol, till within these five years and an half.

Acton. Please to ask if there were not irons left behind?—*Grace.* These irons were.

Mr. *Ward.* How do you know?

Grace. I was Clerk of the Papers five years.

Acton. Please to ask if there was not an inventory left.

Grace. When Burleigh left the gaol, there was an inventory.

John Boswell sworn.

Mr. Baron *Carter.* Did you see Bliss after his fall?

Boswell. I saw Bliss brought in: I was in the lodge at that time, and Acton had him to the sick ward, and had a surgeon to bleed him, and sent for ointment to anoint him.

Mr. Baron *Carter.* Where was he hurt?

Boswell. It was the small of both his legs.

Mr. Baron *Carter.* Did he complain of both legs being hurt with the fall off the house?

Boswell. He did; it was twenty-four feet high.

Mr. *Ward.* Was he dressed of both his legs?

Boswell. Yes.

Mr. *Ward.* Whether the deceased, before he went into the sick ward, had any irons or thumb-screws on him?—*Boswell.* No.

Mr. Baron *Carter.* Did you see him carried through the lodge into the sick ward?

Boswell. Yes.

Mr. Baron *Carter.* What way was he carried?—*Boswell.* Cross the yard.

Mr. Baron *Carter.* How long was he in the sick ward?—*Boswell.* Two months.

Mr. Baron *Carter.* Where was he afterwards?—*Boswell.* In the Queen's ward.

Mr. Baron *Carter.* Did he go out of the sick ward into the Queen's ward?

Boswell. He went into another ward before.

Mr. Baron *Carter.* Was it the Pump ward?

Boswell. Yes; he went into the Pump ward.

Mr. Baron *Carter.* Did any one meddle with him when he went cross the yard?

Boswell. Nobody.

Acton. Please to ask, my lord, how he was in health after he was abroad.

Boswell. He lay three weeks next door to the gaol at the Dolphin; being very intimate, I asked him how he did; he said, Very well. And he worked for me in the gaol, now and then a day, when he was able.

Mr. Baron *Carter.* How was he when he was out of the gaol?

Boswell. He said he was very well in health, but his legs were not quite come to.

Mr. Baron *Carter.* Did he complain of one or both legs?—*Boswell.* Of both.

Samuel Davenish sworn.

Mr. Baron *Carter.* Did you see Bliss after his fall from the house?—*Davenish.* Yes.

Mr. Baron *Carter.* What state of health was he in?

Davenish. In a good state of health, only lame of his foot; I never saw any thing otherwise.

Mr. Baron *Carter.* Did you see him after he was out of gaol?

Davenish. I did, and drank with him at the Marshalsea gate; he was in very good health.

Acton. Please to ask, if he ever saw any irons upon Bliss.

Mr. Baron *Carter.* You hear the question, answer it.

Davenish. No, directly or indirectly.

Mr. Baron *Carter.* Did Acton behave himself well to his prisoners?

Davenish. He never behaved himself indecently to any of the prisoners.

Mr. Baron *Carter.* Was his behaviour good or bad?

Davenish. Very good; I never saw an ill action of his in my life.

Benjamin Brown sworn.

Mr. Baron *Carter.* What do you say?

Brown. As to what?

Mr. Baron *Carter.* As to Bliss?

Brown. I saw Bliss when he fell from the house, and he complained of both legs; one was worse than the other.

Mr. Baron *Carter.* What was Acton's behaviour towards the prisoners in general?

Brown. Very good.

John Bowdler sworn.

Mr. Baron *Carter.* What do you know of Bliss?

Bowdler. I was in the same ward with him

seven months, and he was very hearty and well.

Mr. Baron *Carter*. How was he after the fall from the house?

Bowdler. He had hurt one leg by the fall.

Mr. Baron *Carter*. What was the prisoner's general behaviour?

Bowdler. I never had any thing but very good usage while I was there, which was three years and three months.

Mr. Baron *Carter*. Was the prisoner there all that time?—*Bowdler*. Yes.

Elizabeth Gosling sworn.

Mr. Baron *Carter*. How was Bliss after his fall, when he was brought into prison?

Mrs. *Gosling*. He had sprained one of his ancles, and was carried into the sick ward for three months; he lived at my house, and said, he was as hearty as ever in his life, only as to the sprain of his ancle.

Mr, Baron *Carter*. What was the general behaviour of the prisoner?

Mrs. *Gosling*. I never heard him have an ill character, or that he struck any one in his life.

Robert Gresham sworn.

Mr. Baron *Carter*. What state of health was Bliss in after he came out of prison?

Gresham. In February 1726, or 1727, he came to lodge at my house, with two more, and lodged there near three weeks.

Mr. Baron *Carter*. Pray take notice of the question that was asked. What state of health was he in?

Gresham. He looked pale, but eat his victuals well.

Mr. Baron *Carter*. Did he complain of any ill usage?

Gresham. I never heard him complain of any ill usage.

Mr. Baron *Carter*. Did you see him after he had been in the country?

Gresham. Yes; he came to my house, I was not at home when he came, but went up after; and he said the weather was too sharp for him, and he caught cold, and could not stay in the country.

Jane Lapworth sworn.

Mr. Baron *Carter*. What are you?

Mrs. *Lapworth*. Nurse of the hospital. I was there on the 11th of March; Bliss was in there a few days before.

Mr. Baron *Carter*. What condition was he in?

Mrs. *Lapworth*. He was ill of a fever, Dr. Coatsworth had the care of him, and he took medicines for a fever and flux.

Mr. Baron *Carter*. When did he die?

Mrs. *Lapworth*. I went to the hospital on the 11th, and he died on the 25th or 26th.

Mr. Baron *Carter*. Did he say what was the occasion of his death?

Mrs. *Lapworth*. I heard him say no more, than that he had been in the country, and caught an ague and an intermitting fever.

Mr. Baron *Carter*. What do you take to be the cause of his death?

Mrs. *Lapworth*. The fever was the cause of his death.

Acton. I desire she may be asked, whether after he was laid out, there were any bruises in his head or face.

Mr. Baron *Carter*. What say you to that question, woman?

Mrs. *Lapworth*. His head was shaved, and I saw no wound, bruises, or scabs in any part whatsoever.

Acton. Please to ask if his wife was there.

Mrs. *Lapworth*. No.

Acton. Did she sit up with him in his illness?

Mrs. *Lapworth*. She sat up one night.

Acton. Please to ask, if he voided blood or not.

Mr. Baron *Carter*. Answer that.—What do you hesitate at?

Mrs. *Lapworth*. Not during my time, from the 11th to the 26th of March.

Mr. *Harding*. Did you see no marks about him?—Mrs. *Lapworth*. No.

Acton. My lord, I'll rest this part of my defence here, but beg leave to call some witnesses to my character.

Mr. Baron *Carter*. Call whom you will.

Sir *John Darnell*, Serjeant at Law, and Judge of the Marshalsea Court, sworn.

Sir *John Darnell*. My lord, I did not hear any thing of this affair, till I came here to the assizes. I think, my lord, it is five years ago since I had the honour of having the patent for steward of the Palace-court; and it is three years since Acton has been in the office that he now is in; and in all the time that I have known him, both as turnkey, and when he came to be deputy, I always thought him a very humane man. I have often heard complaints of the prisoners, and have spent whole days to mediate between their keeper and them; and never found but he was very willing to have them made easy. This only I must say, that he was careful of the custody of them. In my whole observation, I neither thought him cruel nor severe.

Mr. *Ward*. Do you believe he was guilty of murdering prisoners by duress?

Mr. Baron *Carter*. I can't ask him that question.

Mr. *Marsh*. Was there no application by petition to you, as judge of the Court, from the deceased?

Sir *John Darnell*. No; I never heard that he was a prisoner.

Mr. *Marsh*. Was there no petition to you in relation to six persons being put in irons?

Sir *John Darnell*. No.

Edmond Halsey, esq. sworn.

Mr. Baron *Carter*. Sir, the prisoner calls you to his character.

Halsey. I have known the prisoner ever since he was at the Marshalsea, both before and

since he was deputy, and never heard an ill character of him, but that he was a very honest trader, and a humane man, and paid very well for what he had.

Mr. Ward. Does he keep a shop?

Halsey. He buys bread and beer.

Malthus Ryall, esq. one of his majesty's Justices of the Peace for the county of Surrey, sworn.

Ryall. I have known the prisoner better than twelve months, and I thought him improper for the post he was in from his too great compassion.

John Lade, esq. one of his majesty's Justices of Peace for the said county, sworn.

Mr. Baron *Carter.* You must speak to the general character of the prisoner.

Lade. I live in the neighbourhood, and most commonly am applied to if any abuses have been committed in the prison; and I never have heard any complaint of the ill usage of prisoners.

Mr. Baron *Carter.* What is his general character?

Lade. His general character is good.

Mr. *Haysey* sworn.

Haysey. The prisoner was four years a servant with my father, and his behaviour was very well; he was a good-natured man.

Mr. Ward. In what capacity did he serve your father?—*Haysey.* As a butcher.

John Morris sworn.

Morris. For almost fifty years last past I have visited all the prisons about London, and I believe I have discharged three hundred poor prisoners, and I never found better usage in any gaol than in this.

Acton. I desire he may give an account what sort of place the Strong Room is.

Morris. I have been of the building trade, and have taken particular notice of the Strong Room; and would choose it rather than any other on the common side. This rises ten inches from the surface, and is boarded, and covered at top with a tarpaulin; and the others go down a step.

Acton. Please to ask if any wet could come in.

Morris. I don't believe any wet could get in.

Mr. Marsh. It had not been built long when he saw it.

Mr. *Terrant*, in the Borough, sworn.

Terrant. I live in the Borough, and the prisoner has as good a character as any one in the neighbourhood.

Acton. I desire, my lord, he may be asked as to the Strong Room.

Terrant. I was curious to see the Strong Room. It is a boarded place of nine feet square.

Mr. Baron *Carter*, Did you see it?

Terrant. Yes.

Mr. Baron *Carter.* Was it dry?

Terrant. It was.

Mr. Baron *Carter.* Was there any stench?

Terrant. It is very close.

Mr. *Marsh.* When did you go to see it?

Terrant. About two months ago.

Mr. *Marsh.* Was it over the common-sewer?

Terrant. No.

Mr. *Ward.* Was it dry weather when you saw it?—*Terrant.* It was.

Mr. *Taylor*, of the Borough.

Acton. I desire he may acquaint the Court what is my character.

Taylor. In relation to his character he is a very honest man, and a man of humanity to all people.

Acton. I desire he may be asked as to the Strong Room.

Taylor. The Strong Room is dry; there is a drain runs some distance from it, but not near it.

Mr. *Whitaker*, of the Borough, sworn.

Whitaker. I have been with Acton in and out of gaol, and never saw him do any thing ill.

Acton. Please to ask him, my lord, about the Strong Room.

Mr. Baron *Carter.* Give an account of what you know of that.

Whitaker. The Strong Room is dry, there is no drain runs under it, but there is a drain about five yards from it.

Mr. *Lamb* sworn.

Lamb. I have had the happiness of knowing him these three or four years. He has had a good character, and was a man of humanity.

Mr. *Sydall*, Apothecary, sworn.

Mr. Baron *Carter.* What was the prisoner's character?

Sydall. Having had recourse to the gaol, the prisoners told me he had a very good character.

Mr. *Brown* sworn.

Mr. Baron *Carter.* What character had the prisoner?

Brown. I believe as good as any man's can be.

Mr. *Harrison* sworn.

Harrison. I have known his character these three or four years, and he is a very modest man, and of a good behaviour.

Acton. My lord, I humbly apprehend I have called a sufficient number of witnesses to my character, and will rest my defence here. I apprehend it can't be conceived, that any man can be guilty of such inhumanity as is here laid to my charge, and to live a year.

Mr. Baron *Carter.* You must not say that; for then there could have been no room for the prosecution.

Acton. By all circumstances, my lord, this

man must certainly die a natural death; and I humbly apprehend, that they must be mistaken in point of time, for that no irons were used the second time of his attempting to escape.

Mr. *Marsh.* I would not be wanting to my clients, and yet would preserve all rule and order, and must beg leave to observe——

Serj. *Baynes.* I have been concerned in several criminal prosecutions, and never knew it admitted.

Mr. *Strange.* The prisoner is not allowed counsel to speak for him in his defence; therefore the king's counsel have no right of reply. It was not allowed in Huggins's Trial.

Mr. Baron *Carter.* In Huggins's Trial Mr. Justice Page and myself would not allow it.

Mr. Baron *Carter.* Gentlemen of the jury, the prisoner stands indicted for the murder of Thomas Bliss.

To prove this, a great number of witnesses have been called on the part of the king, not less than sixteen, to make good the charge.

The first thing necessary to be proved is, that the prisoner at the bar had the care and custody of the prisoners; for which purpose John Wilson was called, who proved that Darby was keeper, and the prisoner Acton turnkey and servant, and acted under Darby. That part stands plain, that the prisoner at the bar had the care and custody of the prisoners; and if he has behaved in such a manner to prisoners as death ensues, he must answer for it. It is said, that every prisoner must be treated with humanity, and the law is very tender, and directs that no prisoner shall die in gaol, but the coroner's inquest must sit upon his body; and the reason of that is, that he should not be killed by the duress of the gaol.

The question stands singly, whether upon what you have heard, there has been such a behaviour of the prisoner to Bliss, that it has been the occasion of his death. If that is so, then you will find the prisoner guilty.

Wilson spoke much of the escape; he talked about it, but did not know when he escaped; he only goes to that. He says, that he never did see Acton beat him; but that he was well to some, and beat others, which came from the prisoner's own question; therefore I was put to ask it, and I have told you the answer.

The next witness, the wife of the unfortunate man, says, that her husband was there for a small sum of money, but that is not material; her husband was almost famished and starved, and therefore attempted a second time to escape. The means he used to escape is not material, that is not what you are to rely upon. She says, there was some assistance given him; a rope was provided, and he unfortunately miscarried in the attempt; and he was brought back into the prison again, and she saw him beaten by Nichols, Page, and Rogers; and what is remarkable, she saw the prisoner beat him with a bull's pizzle, and the end of a rope; that he cried out, if he had any mercy, he would have mercy upon him. He then put him into the Strong Room. As to the nature of the place, that is a consideration I shall take up by and bye. She says, she saw him with an instrument of iron on his head; that the blood came out of his mouth, and out of his thumbs; that he had thumb-screws on his thumbs, and sheers on his legs; that she saw him flung down, and saw the prisoner on top of him several times. After he had treated him in this manner, he began to relent, thinking he might die, and it was time for him to take care of him, and sent him a piece of meat. She says, his legs were swollen, his body was swollen; she got him a pair of stockings, but his legs were so swollen, she could not get them on. After this, when he was removed to another ward, she said, he grew something better. That when he was discharged, he used his endeavours to get work; (gentlemen, you did observe the question came from the prisoner) but though he was with the man that he treated with, he got another, he could not work, his legs were swollen, and there were marks on them. All the time, to the time he was put into the Strong Room, he constantly complained of one breast and his side; and afterwards, when he became so bad that he could not work, he was put into the hospital. One thing is very observable, that all his discourse was, when any one asked him concerning his usage, that he said, he did believe that he should never recover it, but would lay his death to Acton; this evidence was given by the widow; she was asked by a question from the prisoner whether she told her sister of this? She said, No: did you tell your mother, No; her mother and she were not upon good terms, and she never was with her but a very short time. Then she was asked, if Newland did not send for her; she said, Yes; it was thought that he was a very considerable man; and when she was asked, what did he say to you, he said, he would have her husband done right to. Then there was a question asked of Hester Long, as to money, she (Bliss) said she was to have; and Bliss says, that she never did say any such thing.

Susannah Dodd; she gives you an account that she has seen Bliss in irons in the Strong Room; that he was treated cruelly; that he had then screws upon his thumbs. There was a very particular circumstance, that he desired her to chew his meat for him, for that he could not do it himself, by reason of having the scull-cap on; that she carried him a three-farthing mug of ale, and the screws were upon his thumbs, therefore she was forced to give him the drink, as he could not put the mug to his mouth to drink, because of his thumbs being confined; that she saw fetters, very large ones, on his legs, and there was a pair of sheers cross his legs; that he continued there two days, and she saw him after, and saw his thumbs bleed; and the Strong Room was a strong room, and leaded, and that she thinks it not an unhealthful room.

Butler; she gives an account of his attempt

to escape; and tells you, that she saw the prisoner beat him (Bliss) with a bull's-pizzle, and that when Nichols was beating him, she saw him fling the deceased down, and saw Acton stamp upon him three times, and shewed the place of his breast that he complained of, and that his death was owing to such usage. It was his belly and stomach that he stamped upon; that he was very ill when he did it; that both legs were swelled; but that he said, he should do very well but for the pain in his side. She says, that the Strong Room was not fit to put in any human creature; that he went out about August, and came about Christmas. The prisoner asked as to his character: she said, it was good and bad; and says, that she heard there was a complaint made, that Acton was the author of his death.

[Matthew Bacon takes no notice of, Sic MS.]

Mrs. Gillis; she agrees as to the fall from the house; and she says, that Nicholas, Page, and Rogers held Bliss till Acton beat him with a bull's-pizzle; that he was carried to the sick ward. She was asked how long they were using him in this manner; she said, half a quarter of an hour. Reputation is not so material to be made use of; you are to consider if the fact was done.

The next witness was one James Abbot; he saw Bliss, (I will take it in his own words) he saw him so drubbed, that he never saw any one so drubbed in his life, with a rope and bull's-pizzle. He says, he did not see Acton there, but after charges him with it; and he agrees as to the cruel behaviour of Acton. If the act was committed, he might be there, and yet Acton not seen by him. He was asked, as to his (Acton's) character; and he said, he saw him beat many.

Matthew Brandon says, that his legs were much swollen, and the skin was broke; that he saw the marks of the irons. As to the fall from the house, and the straining of one of his legs, he knows nothing of it. He swears directly to the skins being broke of both legs; and he says, that he often talked with Bliss, and he said, that he did believe the injuries he had received from the prisoner would be the death of him, and he gave an account, that the marks round his legs were circular: that it must be owing to the irons, and not to arise by a strain, is the observation the counsel make, but you will be governed by sense and reason.

Mary Renwood; she says, that she saw him very often, and that his legs were so bad, that the irons were forced to be pulled off; that the irons eat into his legs; and into his ancle, they had eat very deep; that the skin was broke, and they were sore; this she saw in the sick ward: that he was in so terrible a condition from his poverty, that he had nothing to help him, no clothes, but a piece of blanket: she relieved him, and carried him some of her husband's clothes. It is remarkable, that she carried him a pair of stockings, and they would not fit; she could not get them on. She says, they were her husband's, and that her husband was not a very large man.

Peter Purchace; he says, that his legs were very much swelled, and he took it to be the marks of the irons; he saw his thumbs very black, which he took to be hurt by the thumb-screws.

Commins; he says, that his legs were very much swelled, and apprehends it to be occasioned by the irons; compares it to the fetlock of a horse cut with a clog; that the Strong Room was a place of terror, to keep them from being disorderly; and that he heard Acton say to Bliss, he thought he had given him enough, but he would give him more.

Edward Murfey says, that he never saw any thing so much beaten in his whole life; that his legs were black, and blue, and green. The counsel desired you, gentlemen, to take notice what this witness said, that he complained of his side, which had been hurt by the bruises he had received from Acton.

Roberts says, that he went to Mr. Darby upon a particular occasion; but I can't mention to you what he said, because it is not evidence; he confirms the others in some measure that he had rather have larger irons; that his legs were so swelled, that he could scarce see the pair of fetters on the side, because the swelling came over.

The king's counsel called three witnesses, as to the deceased working at Southgate. Cowley says, he wanted work, and he was willing to let him have it. The man went down, and came up again, and the second day he treated him with mutton broth, &c. but this is not material. But he says, he complained of his side, and always said he had received it from the prisoner at the bar; he said, there were holes in his legs, and that Acton was the author of his death.

Cowley, the younger, says the same; that they treated him like an old acquaintance, and provided him with broth; that the man was so sick he could not work; that his legs were swollen black and blue, and he complained of his breast; both shewed with their hands how, by pointing to their own breast, and said, he pointed to his; and that Bliss said, if he died, he would lay his death to that rogue Acton.

Parker says, that he was to be his comrade, to be employed in some task work; that though they laid him by the fire, his sickness increased, and they brought him to town in a cart; and all his complaint was, through the injury he had received from Acton; that his legs were swollen.

Therefore, upon the whole, what credit you will give to the witnesses for the king, is in your own breasts.

Now, as you have given great attention to what has been said against him, you will take notice of what has been said on his own part; if it is contradictory, I can't say any thing to that; you will weigh them in an equal balance.

He has called twenty-three witnesses, to answer the evidence for the king. The first is,

Samuel Bullock; he says, that he saw Bliss brought in after his fall; that he had hurt his ancle; but he saw no barbarity used; and saw him carried into the sick-ward. The next is,

Robert Holmes; he says, That there were no irons, only on one leg; and Acton always used him well, and if it had not been for Acton, he would have perished. This character differs from what has been laid before you. He gave an account that he caught a sad cold, which was the occasion of his death; he says, that he never saw him in the Strong Room: and that as to his health, it was very good the whole time. This is their opinion of Bliss; these people would make you believe that he was perfectly well, and had received no injuries from Acton. He says, further, that he met the woman on Saffron-hill, he asked how her husband did? When he asked her, she said, she thanked God he was dead, (the woman was glad to get shut of him) and said he died of an ague and fever.

Chapman saw him after the fall. The first place he begins with, is the sick ward, and that Acton sent doctor Draper, and that nothing was done to him in the yard. The yard is the place that the principal evidences speak to; that the prisoner was humane to him, that he had so great compassion for him, that he allowed him two-pence halfpenny or three-pence a day, till he was better; therefore, he would have you to believe he was a very humane man, and that he could not use the man as others say the prisoner did. He says, that he was removed to the pump-ward, and was constable there, and came to the tap; that he saw him at Gresham's very well, and saw him after he came from Southgate very well. It is very remarkable he should never complain of Acton. He says, that he looked upon it that the occasion of his death was, from the cold he caught at Southgate; that the Strong Room was not so terrible a place; that it was a dry room, though a Strong Room; that the prisoners were so far from thinking this room a terror, that they chose it; that he complained only of one leg, which differs from the other witnesses. All were conversant with it.

Thomas Fletcher you will find was a surgeon; he says, one leg was very much swollen, from the fall he got; he said it was a tumour, in his way of dialect; he went home, and brought proper things, got some ointment and a scar-cloth. He says, that Bliss told him he should never have been discharged but for Acton.

Thomas Whitfield; he tells you Mrs. Bliss told him, that her husband had got cold in the country, and had a fever and ague. He was asked in relation to the Strong Room, which he said was the best place on the common side; that the prisoner had a good character, and gave victuals to many of the prisoners that wanted.

Robert Walter says, he was not privy to any ill usage Bliss received from the prisoner; that he walked well, and talked heartily, and complained of nothing, only one leg, which he apprehended he had hurt by the fall. He spoke in praise of the prisoner for his humanity.

The next is John Chope; he says, Bliss was well in the February before he died; he complained of nothing of the prisoner; that after he was discharged, he says, he went to Southgate; that he came from thence, and after that complained of a great cold.

William Bolland says, that he never saw the prisoner misuse Bliss; that he complained only of his leg; that he eat and drank well; that he saw him after he was discharged, and he said, that the prisoner had been civil and kind to him.

Westbury says, that he complained of one leg only; that he went into the country and catched cold, and that was the occasion of his illness.

Fandy; he says, that he lay with him in the Queen's ward several months. I don't apprehend he was in the Queen's ward, but he did prove him to be there. I will tell you how that matter was: This man speaks to a considerable length of time after his escaping; the time is not settled, both are at a loss on the one side and the other; it should have been reduced to a certainty, because the indictment is confined to the second escape. He says one leg was bruised only, the other swelled; that he liked to drink, and did not go to bed, and sat up, and that was the reason of it; that he saw Bliss in the hospital, and he said to him that he had catched cold; that he was at work in the country, and that he was brought into that condition by an ague and fever.

Hester Long has given a long evidence; I hope you have taken it, because it is a very long evidence, and affects the character of Bliss. She says, that she saw him several times, and that he was as well as ever he was in his life; that he was to go to his master for 7*s.* 6*d.* the profits of his labour; therefore he was fit to work, and had obtained that liberty from Acton. It seemed she had some discourse with Mrs. Bliss, and said she was her sister-in-law, and she desired leave to lodge with her. After the death of her husband, she never heard any complaint made about Bliss: that four months ago, a gentleman sent to her (Bliss) to swear against Acton; that Long was there, and Anne Bliss's brother, and he cautioned her not to concern herself; that a man's life ought to be taken care of with the utmost caution; that she was to leave her master, one Jennings, to go to another place; and Jennings said, that she should not make it up for forty or fifty pounds. Her brother said, that if she would make it up with Acton, she might have forty or fifty shillings. Bliss denies that she had any sum, that she was never offered forty or fifty pounds to swear, and her master said she should not take any, and advised her, that if they would give a hundred pounds not to take it, to hinder the prosecution. She (Bliss) says, that Jennings let her have two or three gui-

neas, and she went into another service, and not being very capable, had two or three with her to lay it out for her.

Cole says, that Anne Bliss told him, she was to have five pounds for swearing against Acton. This discourse was upon London-bridge. How far you will think this probable, not having any other discourse, that she should immediately introduce this, I must leave to you.

Rogers; he says, that he held the man after the fall; that he saw him that very day; that he complained only of one leg, and that he never knew the scull-cap used.

Grace says, that he had seen such an instrument in the prison, and that it was made use of to keep their heads steady, when felons were burnt in the cheek; that this instrument was never designed for any prisoner; that this was the county gaol a few years ago, and that it was not made use of since.

Boswell says, he knew Bliss when in the sick ward; that he was lame of both legs; sometimes was lame of one, sometimes of both, but was very well in health.

Samuel Davenish says, that he was with him frequently, and that he was always very well, only had a lame foot, and said he had no irons on. The prisoner asked him in respect of his behaviour; he gives him a very good character, that his behaviour was just, charitable and humane.

Brown says, that he complained of both legs, one was worse than the other; and as to his behaviour, gives him a very good character.

Bowdler; he was with him in the same ward; and says, that he only complained of one leg, the other was very well, and gave him a very good character.

Gosling saw him carried into the sick ward, and says he only complained of his ancle.

Robert Gresham says, that he lodged at his house three weeks after he was discharged, and only complained of a cold he had got from the bad weather in the country.

Jane Lapworth, the nurse; she is a very material witness indeed; she says, that he had an ague and fever, and gave a description of the different operations of it. He, poor man, died of a fever; he had medicines applied by doctor Coatsworth. She says, she apprehended he died of a cold, which brought him into a fever; what was very remarkable, she laid him out, and there were no bruises on his head; all his body was clean from scabs, or any thing that looked like ill usage.

Now, gentlemen, what credit this will receive from you, I can't say; but this evidence strongly contradicts all that have given you a different account. I am very glad you have taken notes; and I desire, if I have made any mistake, you will tell me, on either side.

As to the character of the prisoner, his witnesses say he is a very humane man; and if you have them down, they are in number sufficient too.

My brother Darnell says, he has been steward of the Palace court about five years, and never heard any complaint against the prisoner; that it is three years since Acton has been in the office he now is in, and in all that time he thought him a very humane man, and never thought him cruel or severe.

Mr. Halsey says, he was a very humane man.

Mr. Ryall, Mr. Lade, Mr. Haysey, give him a very good character.

Mr. Morrison says, that the other rooms were under ground, and the Strong Room was ten inches above; it was a dry place, and covered over the top with lead.

Mr. Terrant says, that he thinks the Strong Room a very dry place, and gives Acton a good character.

Then, gentlemen, Mr. Taylor says, he was a man of humanity; and that there was no drain near the Strong Room.

Mr. Bowdler gives him a good character; and four or five other witnesses have been called up, and given him a very good character. As to the Strong Room I don't find much evidence to affect the prisoner as to that. There is great difference in opinion as to what immediately gave him the distemper to carry him off. A great many again say, that he did seem to be pretty well in health; but what will particularly affect the prisoner, is what happened in the prison yard. Upon the whole, if you are satisfied that the prisoner treated Bliss in that manner as the king's witnesses said, and that was the occasion of his death, and that he had treated him ill, and beat him, you will find him guilty; but if he was not so treated, and it was not the occasion of his death, you will find him not guilty.

There are great contradictions in the evidence, I scarce ever heard so great. It is a matter of great consequence, and deserves your mature consideration.

Then one was sworn to keep the Jury, and they withdrew, and Baron Carter went to dinner; and when he returned, they gave their Verdict.

Cl. of Arraigns. Gentlemen, are you all agreed in your Verdict?—*Omnes.* Yes.

Cl. of Arr. Who shall say for you?

Omnes. Foreman.

Cl. of Arr. William Acton, hold up thy hand. (Which he did.) Look upon the prisoner; how say'you; Is he Guilty of the felony and murder whereof he stands indicted, or Not Guilty?

Foreman. Not Guilty.

483. The Trial of WILLIAM ACTON, for the Murder of John Bromfield, at Kingston-upon-Thames, in Surrey, before the Hon. Mr. Baron Carter, August 2: 3 GEORGE II. A. D. 1729.*

Saturday, August 2, 1729.

Proclamation was made for all persons concerned to attend.

Cl. of Arr. YOU good men, that are impannelled to enquire, &c. answer to your names, and save your fines.

Cl. of Arr. William Acton, hold up your hand. (Which he did.) You stand indicted by the name of William Acton, &c.

Cl. of Arr. How sayest thou, William Acton, art thou Guilty of the felony and murder whereof thou standest indicted, or Not Guilty?

Acton. Not Guilty.

Cl. of Arr. Culprit, how wilt thou be tried?

Acton. By God and my country.

Cl. of Arr. God send you a good deliverance.

He was also severally arraigned upon two other indictments; one for the murder of Robert Newton, and the other for the murder of James Thompson, to which he severally pleaded Not Guilty, and put himself upon God and his country in manner aforesaid.

Then proclamation was made for information.

Cl. of Arr. Thou the prisoner at the bar, those men that thou shalt hear called are to pass between our sovereign lord the king and thee, upon the trial of thy life and death; therefore if thou wilt challenge them, or any of them, your time to speak is as they come to the book to be sworn, before they are sworn.

Then the same pannel was going to be called over, which had tried him the day before.

Upon which Mr. Paxton, the solicitor for the crown, three several times insisted upon a new pannel.

Mr. *Strange.* The other pannel cannot write; these are men of ability and experience.

Then the pannel was called over.

Mr. *Ward.* We challenge Robert Parkhurst, we have an affidavit ready to produce, if occasion. (But the challenge being allowed, the affidavit was not read.)

JURY.

Thomas Cole,	George Wadbrook,
Miles Poole,	Thomas Bandford,
Vincent Hollis,	William Browne,
Charles Buckland,	John Walter,
William Goswell,	Robert Patten,
John Sigins,	James Wellbeloved.

* See the preceding and following Cases.

Cl. of Arr. William Acton, hold up thy hand. (Which he did.)

Mr. *Strange.* My lord, you will please to admit him to the other bar.

Mr. Baron *Carter.* It shall be allowed.

Cl. of Arr. You of the jury, look upon the prisoner, and hearken to his charge. He stands indicted by the name of William Acton, &c. (*prout* in the indictment *mutatis mutandis.*)

Acton. I desire it may be read in Latin.

Mr. Baron *Carter.* You had the indictment yesterday read in Latin, you found it no advantage to you; if you purpose any advantage by it, you may have it read.†

Acton. I desire my counsel may hear it read.

Mr. Baron *Carter.* Let it be read. (Which was accordingly done.)

Mr. *Harding.* My lord, and you gentlemen of the jury, I am counsel for the king. The prisoner at the bar stands indicted for the murder of John Bromfield. The indictment sets forth, That——

We will call our witnesses, and don't doubt, if we prove him guilty, but you will find him so.

Mr. *Ward.* Gentlemen of the jury, you see what the nature of the indictment is; it is for the inhuman and barbarous treatment of John Bromfield, of which he died. If we shew you, that that was the real and true cause of his death, it cannot be doubted but that he put him to death. Gaolers ought to treat their prisoners with humanity; they are to confine them in a place of a secure custody, but not to treat them inhumanly.

On the first of March, 1725, captain Bromfield became a prisoner in the Marshalsea prison, gentlemen; he fell under the displeasure of Acton, the prisoner at the bar, and in order to satisfy his resentment, he beat him inhumanly and unmercifully, that the marks and strokes of the blows were visible after his death. Not satisfied with this, he put him in double irons, which the man could scarce well bear; and put him into a hole which is damp, dirty, and strait; so that he could not stand upright, or lie at length: he was kept there for several days. The prisoner then began to relent, and took him into another place, but did not take the irons off at that time; but the man having contracted an ill state of health, when the prisoner thought it would be the occasion of his death, he then took off the irons; but that was too late, for he soon died. This, gentlemen, will shew you the reason why, consequently, the coroner's inquest should have sat upon the body of captain Bromfield; but no coroner's inquest did sit; and the reason is plain that it did

† See the preceding Case.

not, for if it had, they would have seen that he had come to his death by a violent occasion. If we prove this to be the case, gentlemen, you will do justice to your country, and find him guilty.

We will call our witnesses to prove the facts.

William Wheeler sworn.

Mr. *Ward.* Do you know the prisoner at the bar?—*Wheeler.* Yes.

Mr. *Ward.* Do you know whether he was turnkey in 1725?

Wheeler. He was turnkey to Mr. Darby.

Mr. *Ward.* What was the business of turnkey?

Wheeler. To take care of the prison and prisoners.

Mr. *Ward.* Did you know captain Bromfield to be a prisoner then?

Wheeler. Yes; he was a prisoner in the beginning of the year 1725.

Mr. *Ward.* Give an account of what usage you saw captain Bromfield have.

Wheeler. I lodged in the same room with him. We were locked up; and coming down stairs there was a hatch, which was locked, and one Perkins kept the key of it; and he made words to let captain Bromfield come down.

Mr. *Ward.* What was Perkins?

Wheeler. Servant to the gaoler.

Mr. *Ward.* Go on.

Wheeler. There were some words passed; but at last Perkins did let the captain down, and he went into the chandler's shop, and Perkins and the captain fell into greater disputes; and the captain took a knife, and jabbed it into Perkins's breast.

Mr. *Ward.* Did you see Acton there?

Mr. Baron *Carter.* What did he do then?

Wheeler. He dropped down the penknife, and it was found in the chandler's shop. The captain was carried into the pound.

Mr. Baron *Carter.* Where is the pound?

Wheeler. The pound and the chandler's shop join.

Mr. Baron *Carter.* Where was he carried from thence?

Wheeler. He was carried from the pound to the lodge; further I could not see. He took him away refractory.

Mr. *Ward.* Did you see him with irons on?

Wheeler. I saw him with irons on in the evening.

Mr. *Foster.* What did Acton order?

Wheeler. After the court broke up, Acton came down and spoke to the captain; and asked him, what was the reason that he stabbed the man in a passion.

Mr. *Ward.* Did you see the fetters on?

Wheeler. I did.

Mr. *Ward.* How long was he confined in the hole?

Wheeler. He continued in the hole from the time he was taken out of the lodge, till the next day nine o'clock.

Mr. *Ward.* Did you see Acton with him during all or any part of this time?

Wheeler. When Acton had ironed him, he turned him over from the master's to the common side.

Mr. *Ward.* How long had he the irons on?

Wheeler. He had the irons on about five days; Acton sent him from the hole to the common side, to George's ward.

Mr. *Ward.* When did he die?

Wheeler. He died the latter end of June.

Mr. Baron *Carter.* When did he die?

Wheeler. About four years ago, the latter part of June 1725.

Mr. Baron *Carter.* Tell me when the fact was?

Wheeler. I can't tell the month.

Mr. *Ward.* Did you see him after he was dead?

Wheeler. Yes.

Mr. *Ward.* What condition was his body in?

Wheeler. It was all black.

Mr. *Ward.* What was the occasion of its being black.

Wheeler. It was said to be the jaundice.

Mr. *Ward.* When did it turn black?

Wheeler. It turned black after his decease.

Mr. *Ward.* Was it one continued black, or was it in streaks?

Wheeler. It was one intire black.

Mr. *Ward.* Did the coroner's inquest sit upon him?

Mr. Baron *Carter.* That is no charge upon the prisoner. It was not, in Fiens's case; if the coroner's inquest had sat on all others, and had not sat upon this man, then this had been evidence; but as it is generally omitted, it is no evidence.

Hugh Martin sworn.

Mr. *Ward.* Did you know capt. Bromfield?

Martin. Yes; he was prisoner about the beginning of the year 1725.

Mr. *Ward.* Give an account of what usage he received from Acton.

Martin. He was bedfellow with me in the nursery ward, and on a court day he was down in the chandler's shop; and one of Acton's servants would have had him go up into his ward, but he refused to go; and, upon that, the servant would force him up.

Mr. *Ward.* What is the servant's name?

Martin. John Perkins.

Mr. *Ward.* Go on.

Martin. As they had a scuffle together, capt. Bromfield privately stabbed him, and dropt down the knife. There was an outcry, and a doctor was sent for; and in the time that he was called, Acton's servant carried the captain to the common side.

Mr. *Ward.* Was Acton there at that time?

Martin. I did not see Acton.

Mr. *Ward.* Who took him away?

Martin. Acton's servants.

Mr. *Ward.* Did Acton give any orders?

Martin. I don't know.

Mr. *Ward.* Did you see Acton in the yard?

Martin. I saw Acton in the yard, or between that and the lodge.

Mr. *Ward.* Which way was captain Bromfield carried?

Martin. He was taken out of the chandler's shop, and carried through the pound.

Mr. *Ward.* Was Acton in the chandler's shop, or pound?—*Martin.* No.

Mr. *Ward.* Did you see Acton before captain Bromfield was carried into the yard?

Mr. Baron *Carter.* You say you saw Acton in the yard, and that captain Bromfield was put on the common side?—*Martin.* Yes.

Mr. *Ward.* After he was brought into the yard, did you see any thing done to him?

Martin. I did not see any thing done to him, because I could not go out, I was confined.

Mr. *Ward.* Did you see any body beat him?

Martin. No, but I saw irons on him.

Mr. *Ward.* What irons?

Martin. They were double irons; I saw him come out of the hole the next morning with irons on, between eight and nine o'clock.

Mr. *Ward.* Who put him in the hole?

Martin. I was not there to see it.

Mr. *Ward.* What sort of a place is the hole?

Martin. It is a little place under the stairs; little bigger than a large coffin in width and length.

Mr. *Ward.* Did he lie or stand?

Martin. He stood, but could hardly stand upright; he had nothing but the earth to lie on.

Mr. *Ward.* Was the earth wet?

Martin. It was dampish.

Mr. *Ward.* How do you know?

Martin. I saw it at that time.

Mr. *Harding.* Was there any door to it?

Martin. There was.

Mr. *Harding.* When it was shut, was there any place to let in the light?

Martin. There was the key-hole, and a crevice of the door.

Mr. *Ward.* When did he come out?

Martin. Between eight and nine o'clock the next morning.

Mr. *Ward.* Where did he go afterwards?

Martin. Afterwards he lodged in George's ward, opposite against the hole, upon the left-hand; I think it is called George's ward.

Mr. *Ward.* Had he irons on in George's ward?—*Martin.* Yes.

Mr. *Ward.* How long?

Martin. I don't know.

Mr. *Ward.* Did you see him after he was dead?

Martin. I did; I helped him into his coffin. His body was a sad spectacle; but I can't say whether by the distemper or not.

Mr. *Ward.* What state of health was he in before he was confined in this hole?

Martin. He was in good health on the day the scuffle happened.

Mr. *Ward.* What sized man was he?

Martin. A middle-sized man.

Mr. *Ward.* Was he in bodily health?

Martin. I did not discern his body; he was healthy, and eat his victuals when he had it.

Mr. *Ward.* Did you hear him complain of any illness?—*Martin.* I never did.

Mr. *Harding.* How did he appear?

Martin. As a man used to appear with irons on. He was altered miserably after, about a week before his death.

Mr. *Harding.* How long was it from the time of his coming out of the hole, to the time of his death.

Martin. I believe it may be three weeks or a month, to the best of my knowledge.

Mr. *Harding.* How soon did you see him after he was taken out of the hole?

Martin. I saw him the same morning he was put in George's ward.

Mr. *Harding.* How was he then?

Martin. He was in good health, but went cripling by, having the irons on.

Mr. *Harding.* What do you apprehend was the occasion of his death?

Martin. I believe the ill usage, and lying in the hole, were the occasion of his death, and for want of necessaries.

Acton. When he was in George's ward, whether he did not lie in a hammock?

Martin. He lay under a hammock.

Mr. Baron *Carter.* What distemper do you look upon it he died of?

Martin. Some people were apt to judge that he died of the jaundice.

John Saunders sworn.

Mr. *Ward.* Did you know captain Bromfield.

Saunders. I did; he was a prisoner on the master's side; he came on the first of March, 1725.

Mr. *Ward.* Give an account of what usage he had.

Saunders. It was upon a court day, at the latter end of May, captain Bromfield was brought up from the master's side to the common side, and there locked up.

Mr. *Ward.* Did you see him brought along?

Saunders. He was brought along by Rogers and Nichols, and Acton followed, and ordered him to be taken to the lodge, and ironed, and from thence they brought and put him into the hole, under the stairs, adjoining to George's ward.

Mr. *Ward.* How long did he continue there?

Saunders. Three or four nights and days.

Mr. *Ward.* Was he let out in that time?

Saunders. He was let out sometimes, when they thought fitting, to ease his body.

Mr. *Ward.* What sort of a place is it?

Saunders. It is a place under the stairs, which a woman used to put greens in; it was not fit for a Christian to be in; there was no floor, and a cold place, and there was nothing to sit on, but what the woman put her greens on, which was an old broken chair.

Mr. *Ward.* Did you see him there?

Saunders. I saw him every day.

Mr. *Ward.* What sized man was he?

Saunders. He was taller than me, and I don't believe he could stand upright in the hole.

Mr. *Ward.* Could he lye down?

Saunders. He could not lye at length, and

he durst not lye down, it was so damp and wet.

Mr. *Ward.* What did Acton order?

Saunders. Acton ordered him to be taken to the lodge, and ironed.

Mr. Baron *Carter.* What did he order after?

Mr. *Ward.* Was there any application made to Acton?

Saunders. One King attended Bromfield, and Bromfield desired me to go along with him to Acton; and I said it was more proper for King.

Mr. Baron *Carter.* Answer my question.

Saunders. I saw captain Bromfield carried into the lodge, and from thence immediately into the hole.

Mr. *Ward.* Was Acton there?

Saunders. I saw Acton there at the time when he was carried to the hole.

Mr. *Ward.* Was he by when the irons were put on?

Saunders. He was by then, and ordered the captain to be carried from the lodge into the hole.

Mr. *Ward.* Was he first ordered to the lodge?

Saunders. That order to carry him to the lodge was first given.

Mr. *Ward.* What did he order after?

Saunders. He then ordered him to be carried into the hole.

Mr. *Ward.* Whether you saw any other force or violence used to him by any one?

Saunders. As to this purpose, Acton came himself, and saw the irons put on.

Mr. *Ward.* Were the irons taken off?

Saunders. I heard they were taken off by King and Rogers, with Darby's leave.

Mr. *Ward.* Where was captain Bromfield put, when he was taken out of the hole?

Saunders. He was carried into George's ward; I went with him into the ward.

Mr. *Ward.* Were his irons taken off then?

Saunders. They were taken off when he was ill and weak.

Mr. *Ward.* What state of health was he in before he was put into the hole?

Saunders. He appeared to me to be a man in perfect health; if he had any distemper, I did not know it.

Mr. *Ward.* Do you believe his being confined in the hole, and the ill usage, were the occasion of his death?

Saunders. I do, in my conscience, believe they were the occasion of his death.

Mr. *Ward.* How long did he live after this usage?

Saunders. I believe, from his being first put into the hole, to the day of his death, was about 14 days.

Mr. *Ward.* Did you see him after he was dead?

Saunders. I helped to put him into his coffin, and his body *was of* several colours, black and yellow.

Mr. *Ward.* Were there any marks upon his body?—*Saunders.* I saw no marks.

Mr. *Harding.* Were you with him when he died?

Saunders. I staid by him when he died; (he said the night before he should not live till morning) and he gave me his hand, moved his mouth, but could not speak.

Mr. *Ward.* You were with him when he died; did he declare then, or at any other time, what was the cause of his death?

Saunders. The night before he died he declared, that the punishment (which was being put in irons, and confined in the hole) was the occasion of his death. In the morning he could not speak.

Mr. *Ward.* Was there any coroners' inquest sat on the deceased?

Saunders. No, there was no coroner's inquest sat upon any one then.

Mr. Baron *Carter.* If the coroner's inquest had sat upon all others, and not sat upon this man, then this had been evidence; but as it is not generally so, it is no evidence.

Mr. *Ward.* How soon was he buried after he died?

Saunders. He was hurried away, I believe, the same day of his death.

Martha Johnson sworn.

Mr. *Ward.* Did you know captain Bromfield?—Mrs. *Johnson.* Yes.

Mr. *Ward.* Give an account of the usage he had.

Mrs. *Johnson.* I never saw any thing done to him.

Mr. *Ward.* Did you see him in irons?

Mrs. *Johnson.* I saw him come out of the hole in irons, and go into George's ward.

Mr. *Ward.* Who brought him out?

Mrs. *Johnson.* When the door was unlocked, he came out of himself.

Mr. *Ward.* Did you see him after he was dead?—Mrs. *Johnson.* I saw his body.

Mr. Baron *Carter.* When you saw his body, did you see any marks?

Mrs. *Johnson.* His body was covered when I saw it, he did not lie naked.

Mr. *Ward.* We shall call no more witnesses; for if what John Saunders says is true, it is a full proof of the indictment.

Mr. Baron *Carter.* You have heard the charge and evidence against you, you may now proceed upon your defence.

Acton. Captain Bromfield stabbed Perkins, and I went for a surgeon, and whilst I was gone, Bromfield was put in irons. Mr. Darby had him put in irons, till the man was out of danger. After this, he was very well; and had the yellow jaundice, of which he died. As to the coroner's inquest, there was none ever sat upon the bodies of any prisoners at that time.

Mr. Baron *Carter.* You are not to answer for that.

Acton. I will call my witnesses. Call George Carew.

George Carew sworn.

Acton. My lord, one witness says, that cap-

tain Bromfield continued one night in the hole, and the other says, he continued two or three nights. Did you see captain Bromfield stab Perkins?

Carew. Acton went for a surgeon.

Acton. What was done whilst I went for a surgeon?

Carew. John Littleton, who was turnkey, came in with two or three more, and took Bromfield from the pound, and carried him to the lodge, and ironed him.

Acton. What was done with him after?

Carew. He was brought on the common side, and there ordered to be put in George's ward.

Mr. Baron *Carter.* Who brought him there?

Carew. John Littleton.

Mr. Baron *Carter.* Did Acton give any directions for putting him into the hole?

Carew. No.

Mr. Baron *Carter.* Who put him in?

Carew. John Littleton put him in.

Mr. Baron *Carter.* How long did he continue there?

Carew. Three or four hours as I heard.

Acton. How was he after he came out of the hole, as to his health?

Carew. I saw him come out of the hole, and he was very well in health.

Mr. *Ward.* He has contradicted himself; he just now said, he was carried from the common side to George's-ward.

Mr. Baron *Carter.* If the man mistakes, you must allow him to correct himself. How soon after he came out of the hole did you see him?

Carew. The next day, I saw him walk about the yard.

Acton. Please to ask, Whether Bromfield was in irons before I returned back from the surgeon.

Carew. Yes, and he was put on the common side.

Acton. When did he die?

Carew. He was on the common side a month before he had any sickness.

Mr. Baron *Carter.* When did he die?

Carew. In six weeks time.

Mr. Baron *Carter.* What distemper did he die of?

Carew. Of the black jaundice, as it was given out in the gaol.

Acton. Did you see him a week before he died?

Carew. Yes, and his face was yellow and black.

Mr. *Ward.* You saw him when the scuffle happened; he was very well then?

Carew. I can't say he was very healthy in constitution.

Mr. *Ward.* Who carried him to the hole?

Carew. He was carried by John Littleton to the place.

Mr. *Ward.* Were there no orders given by Acton?

Carew. Acton was gone before John Littleton came into the pound for him; he was gone for the surgeon, as he said he would.

Mr. *Ward.* Who carried *him* to the lodge?

Carew. Littleton carried *him* to the lodge, and after that to the common side.

Mr. *Ward.* Was not the common side shut?

Carew. It was then.

Mr. *Ward.* How did he get in?

Carew. He was let in.

Mr. *Ward.* How long did he continue on the common side?—*Carew.* Six weeks.

Mr. *Ward.* Was he not put in the whole?

Carew. I don't know that he was in the hole at all, for I saw him put on the common side.

Mr. *Harding.* After the stroke with the penknife, was not Bromfield seized?

Carew. No.

Mr. *Harding.* When did Acton come?

Carew. Acton came down when Bromfield was in the pound.

Mr. *Harding.* How long was Acton gone?

Carew. Some minutes.

Mr. *Harding.* Might not Acton give orders to Littleton, before he went for the surgeon?

Mr. Baron *Carter.* I must not hang a man upon a might or might not. Did Acton come back with the surgeon?

Carew. He brought the surgeon back, and stood by till Perkins was dressed.

Francis Cartwright sworn.

Acton. I desire, he may give an account of what he knows of this matter.

Cartwright. Mr. Acton came out of the court into the pound, hearing a noise, and they told him that captain Bromfield had stabbed Perkins; Bromfield was ironed, and Littleton put him into the hole, without Acton's directions.

Mr. Baron *Carter.* Was he in the pound before Acton came down?

Cartwright. Yes.

Mr. Baron *Carter.* Did Acton say any thing about ironing him?

Cartwright. No, but said, that he would fetch a surgeon.

Mr. Baron *Carter.* When was he taken out of the hole?

Cartwright. He was taken out in about six hours. They usually lock up the prisoners at nine o'clock at night, after Lady-day, and he was taken out, and put in George's-ward, about that time.

Mr. Baron *Carter.* How long did he remain there?

Cartwright. He staid there three or four months after the thing was done.

Mr. Baron *Carter.* Who used to lock the prisoners up?

Cartwright. The servants to Acton used to lock them up every night.

Mr. Baron *Carter.* Answer me another question. What state of health was captain Bromfield in?

Cartwright. He was always a very weakly man, but very mischievous.

Mr. Baron *Carter.* When was he taken ill?

Cartwright. After I was gone.

Mr. Baron *Carter*. Was he ill whilst you were there?

Cartwright. He was not ill, only poor and weak.

Mr. *Ward*. When was Bromfield ironed?

Cartwright. Littleton ironed him, while Acton was gone for the surgeon, and put him into the hole.

Mr. *Ward*. Where was he ironed?

Cartwright. He was carried first into the lodge and ironed, and then put into the hole.

Mr. *Ward*. Where is the hole?

Cartwright. On the common side.

Mr. *Ward*. Did you see George Carew there?

Cartwright. I don't know whether he followed him down.

Mr. *Ward*. Did Carew go along with Littleton, when he put him into the hole?

Cartwright. I can't say, whether he did or not.

Joseph Wood, a surgeon, sworn.

Acton. Please to ask him, my lord, if I came to fetch him.

Mr. Baron *Carter*. What say you to that?

Wood. Acton came to me, and desired me to go along with him; which I did, and found a person stabbed in the breast. The next day I went to the person who had wounded him, and I asked him how he could be so barbarous.

Mr. Baron *Carter*. That is not material. What state of health did Bromfield seem to be in?

Wood. Bromfield seemed to be pretty well in health.

Acton. Where did you see Bromfield?

Wood. In the lodge.

Acton. Did you say any thing to him?

Wood. I said, I find you are ironed: I think you deserve it; and he said, that Darby ordered him to be ironed, and he was glad Acton went for a surgeon.

Mr. *Ward*. What time did you see Bromfield?

Wood. The next morning, about nine o'clock.

Mr. *Ward*. Where did you see him?

Wood. In the yard.

Mr. *Ward*. How long did you stay there?

Wood. I staid there a trifling time, about half an hour, and left him there.

Lewis Jones sworn.

Acton. I desire, my lord, he may give an account of what he knows as to captain Bromfield.

Jones. Bromfield came in April from the master's side to the common side, and was put in irons by John Littleton.

Acton. Please to ask what state of health he was in.

Jones. Bromfield was in a sad state of health, he fell sick of the gaol distemper, he had the jaundice on him.

Acton. What did he die of?

Jones. A fever.

Acton. How do you know?

Jones. I am a surgeon; I took notice of him continually.

Acton. How did I behave myself to captain Bromfield?

Jones. You were kind to him at all times.

Acton. Please to ask, my lord, how I behaved myself to the prisoners in general.

Jones. Acton would never suffer any thing of hardship.

Acton. Have you seen any acts of friendship?

Jones. Both your pocket and your table have been made use of.

Mr. Baron *Carter*. Did you see captain Bromfield put in the hole?

Jones. I saw nobody put in the hole.

Mr. *Ward*. Did not you see Bromfield in the hole?

Jones. I never saw him in the hole.

Mr. *Harding*. I beg leave to make an observation.

Mr. Baron *Carter*. You can't observe; I don't think you have used me well before. A gentleman that is a young counsel, should open no more than the record.

Mr. *Harding*. I opened no more than the fact.

Mr. Baron *Carter*. Gentlemen of the jury, the prisoner at the bar stands indicted for the murder of John Bromfield. The Indictment sets forth,——

You are to consider, whether you have sufficient evidence, to induce you to believe him guilty of this fact. Whatever is opened by the counsel, that is not proved to you, is to have no weight with you. It is set forth, that he was beat, and that the marks and strokes were upon him. I don't observe by the evidence, that any stroke was given to the man at all.

Gentlemen, let the consequence be what it will, evidence is to determine every man's fate.

The Indictment sets forth, that Darby was keeper of the gaol on the 15th of July, and that Bromfield died the second.

The fact is charged preceding to that time; the fact is laid in April, and all this is laid to be in the space of five days.

Wheeler is the first evidence for the king; he says, that Acton was turnkey, and servant to Darby; that he knew Bromfield; that he lodged in the nursery, and coming down the stairs, there was a hatch upon the stairs, and Perkins kept the key; that he and the captain quarrelled, and that they went into the chandler's-shop, and quarrelled further, and then Bromfield stabbed him with a pen-knife, and thereupon dropt the knife. He was carried from thence to the pound and carried from thence away to the lodge, and was refractory; but he did not hear Acton order any thing.

He says, gentlemen, that he saw fetters on him, when he came out of the hole the next morning; and that he was turned from the master's to the common side; that his body

was all over black, and turned so after his decease. He says, that it was not in streaks, but one continued blackness.

The second witness, Hugh Martin, says, that he knew captain Bromfield: that he was his bedfellow; that he saw the captain in the chandler's shop, and Perkins refused him a favour, and Bromfield stabbed him; that he did not see Acton there, but saw him in the yard, and saw him go to the court-house. That he saw Bromfield on the common side with fetters on, and saw him in the hole, but saw no beating; that he continued in there all night, and the hole is a little place, has no floor, and is damp; that there is no place to let in the air and light, but the key-hole and crevice. He says, that he saw Bromfield in George's ward in irons; that it was three weeks or a month before he died; that he wanted necessaries, and that he was apt to judge he died of the jaundice.

On the 1st of March, 1725, Saunders says, that Bromfield became a prisoner; that Nichols and Littleton brought Bromfield along; and that he saw him ironed by Acton's orders. This is the only witness that says Acton ordered it. That Bromfield, he believes, was in the hole three days, it might be a little longer; that the hole was under a pair of stairs, there was no light, nothing in it, but a piece of a chair that a woman set her greens on: that Bromfield could not stand upright, that he dared not lie down, because it was so wet; that King and Bromfield spoke to Acton to take the irons off, but he could not do it without Darby's order. It was his opinion that Bromfield was well, and that the hard usage was the occasion of his death. That he saw his body after he was dead, and it was of several colours. He was asked, if he saw any sign of a stroke on his body, and he said that it was all of a colour. He says that Bromfield told him, that the usage of the hole, and the fetters, were the occasion of his death, the night before he died. So that what he said is evidence, and ought to have its weight; such cruelty should not have been continued.

Martha Johnson; she says, that she saw Bromfield come out of the hole in irons.

So that there is but one witness that says he was put there by Acton's order; and the prisoner insists, that he did not order him there; and if he did, he did not die by duress, but by the jaundice.

George Cazew, the first witness for the prisoner, says, he was there; and Acton went for a surgeon, and Littleton came from the lodge, and took Bromfield there, and ironed him, and put him into George's ward, but that Acton gave no directions; that he was in there three or four hours, and that he saw him well the next day, and that he walked about the yard. That he fell ill of the jaundice, and his face was black and yellow a week before he died. He was asked by the king's counsel, if he was a healthful man? And he said, he was not. He says, that Acton was gone before Littleton came; so that in his opinion, Acton did nothing; and says, that Bromfield died of the jaundice.

The second witness for the prisoner says, that he saw Acton run out of the court into the pound, and Acton said he would go for a surgeon. That Littleton ironed him, and put him into the hole, and it was all done before Acton came from the surgeon. He was there before Littleton came, and said, he would go and fetch a surgeon. He says, that Bromfield was in the hole six hours; that he looked him up every night, and he looked upon him to be a weak man.

Wood says, that he saw Bromfield the next day, and talked with him about irons; and he said he was ironed by the direction of Mr. Darby; and that Acton was always very kind to him.

Jones says, that Littleton ironed Bromfield; and that it was in April, and he died in June. He says, that he was a surgeon, and that Acton was always very kind to the deceased.

Gentlemen, in the first place you are to consider, whether the man was put into the hole by the direction of Acton; and in the next place, if it was done by Acton, and this was not the occasion of his death, you will acquit him as to that. But if you believe Acton ordered him into his hole, and that it was the occasion of his death, he was guilty of duress; but that will be contrary, four witnesses to one.

The Jury agreed upon their Verdict immediately, without going out of Court.

Cl. of Arr. Gentlemen, are you all agreed in your verdict?

Omnes. Yes.

Cl. of Arr. Who shall say for you?

Omnes. Our Foreman.

Cl. of Arr. Hold up thy hand. (Which he did.) Look upon the prisoner; how say you; Is he Guilty of the murder and felony whereof he stands indicted, or Not Guilty?

Foreman. Not Guilty.

484. The Trial of WILLIAM ACTON, for the Murder of Robert Newton, before Mr. Baron Carter, at the Assizes held at Kingston-upon-Thames, for the County of Surrey, August 2; 3 GEORGE II. A. D. 1729.*

Saturday, August 2, 1729.

The said William Acton having been before arraigned for the murder of Robert Newton, the Counsel proceeded as follows:

Mr. *Harding.* MY Lord, and you Gentlemen of the Jury, I am of counsel for the king. This is an indictment against William Acton for the murder of Robert Newton. The indictment sets forth——

Mr. *Marsh.* My lord, and you gentlemen of the jury, this is an indictment against the prisoner at the bar, William Acton, for the murder of one Robert Newton. It sets forth that Darby was principal gaoler, and Acton under him. Newton and Hartness were chums or ward-mates; and whilst they were there, one of them attempted to escape; they were prevented in that; and Acton clapped on Newton very severe shackles, and he was ordered into a place called the Strong Room, a place, we think to satisfy you, was a room not at all fit to put persons into. We say it is a very bad place, and a very dangerous place to the health; there this Newton was confined for a considerable time; there he was locked up, and the key kept by an inferior officer of the gaol. And Acton was so very sensible he was in a declining way, that purely for his own safety, he first ordered him out of that place into the lodge, then carried him into the sick ward. He continued there some time, and complained of this hardship, this imprisonment, and the hardship put upon him by Acton; and that that rogue of a man was his murderer: For that he had applied to the judge of the court, and he was pleased to make an order, after being very angry with what Acton had done, to release him out of his hardship; but he, notwithstanding, disobeyed that order. Therefore, if we call our witnesses to shew he contracted by this usage an illness of which he languished and died, it will remain on the prisoner to shew what he died of, and that he died of some other distemper; and then you will judge of the fact.

Mr. *Ward.* I am counsel of the same side, and we will call our witnesses.

Captain *Tudman* sworn.

Mr. *Ward.* Did you know Robert Newton?

Tudman. I did; he was a prisoner in May 1725.

Mr. *Ward.* Give an account of what you know concerning him?

Tudman. Newton and Hartness lay in the Park when they were prisoners in the Marshalsea; and they broke out, and afterwards were retaken, and committed to the prison again; and Acton put them in irons. Newton fell sick, and languished for some time, and died.

Mr. *Ward.* Who had the care of the prisoners then?

Tudman. Mr. Darby was head man, and Acton was under him.

Mr. *Ward.* Was Newton ironed?

Tudman. I went to see him in the lodge; he was ironed there, and then sent to the Strong Room.

Mr. *Ward.* How long were the irons continued on?

Tudman. Till he petitioned sir John Darnell.

Mr. *Strange.* If he petitioned sir John Darnell, and there was any order, they ought to produce it in writing, and prove it. It might be a parole order, and that may be given in evidence.

Mr. *Ward.* Did you hear any verbal order given by sir John Darnell for his releasement?

Tudman. No.

Mr. *Ward.* How long did Newton lie in the Strong Room?

Tudman. I can't guess at the time.

Mr. *Ward.* What was done after the irons were put on?—*Tudman.* I cannot say.

Mr. *Ward.* Where did he die?

Tudman. He died in the sick ward. I saw him four or five days before he died.

Mr. *Ward.* What sort of a place is the Strong Room?

Tudman. The Strong Room is built of wood, and is a very strong place to keep prisoners in like a shed.

Mr. *Ward.* Is there not a common sewer runs under it?

Tudman. The common sewer is pretty near it, within twenty or thirty yards.

Mr. *Ward.* Who was he ironed by?

Tudman. I saw him ironed by Darby.

Mr. *Ward.* Was Acton head-turnkey?

Tudman. Yes.

Mr. *Marsh.* Was there any coroner's inquest sat upon him after he was dead?

Tudman. There was not.

Mr. *Harding.* Was there any place to let in the air?

Tudman. There was a little hole to let in the air.

Mr. Baron *Carter.* From the time that he was put in irons, how long did he live?

Tudman. I can't charge my memory.

Mr. *Marsh.* Had he any illness before he was put in irons?

* See the preceding and following Cases.

Tudman. He had no illness before he was put in irons; he was a hale, strong, young man.

Edmund Carr sworn.

Mr. *Marsh.* Did you see Newton in the Marshalsea?

Carr. I was a prisoner there when he and another broke out; they were taken again, and carried into the lodge, and when I saw them come out of the lodge, they were brought along by Rogers in irons, and put into the Strong Room, and he locked them up there.

Mr. Baron *Carter.* What was the name of the other?—*Carr.* I have forgot.

Mr. Baron *Carter.* Was it Hartness?

Carr. Yes.

Mr. *Ward.* How long did he continue in the Strong Room?

Carr. He continued there two court days, which is about fourteen days.

Mr. *Ward.* You knew Newton. What state of health was he in before he was put in that room?

Carr. I knew Newton very well; he was a fat, jolly young man, and seemingly very well.

Mr. *Ward.* When did he die?

Carr. He fell sick in the Strong Room, and was carried to the sick ward.

Mr. *Ward.* How long did he live after?

Carr. I cannot tell.

Mr. *Ward.* What was the distemper he had in the Strong Room?

Carr. I do believe that it was the gaol distemper he took in the Strong Room.

Mr. Baron *Carter.* What is the distemper of the gaol?—*Carr.* The ague and jaundice.

Mr. *Ward.* You say he took the distemper in the Strong Room; do you believe that was the occasion of it?

Carr. I do believe that did occasion the distemper.

Mr. *Ward.* What irons had he on?

Carr. Double irons; an iron on each leg, such as I had.

Mr. *Ward.* What might the irons weigh?

Carr. Twenty pounds, or less.

Mr. *Ward.* Who was with him when he was brought from the lodge?

Carr. I saw nobody but Rogers and Clark.

Mr. *Ward.* Did you see Acton in the lodge?

Carr. I did not look in to see if he was there or not.

Mr. *Marsh.* Who ordered the irons to be put on?—*Carr.* I don't know.

Mr. *Marsh.* Did Acton go to the Strong Room?—*Carr.* I can't tell.

Mr. *Marsh.* Was Newton locked up there?

Carr. He was locked up every night close.

Mr. *Marsh.* Had he liberty of coming out of days?—*Carr.* Not at first.

Mr. *Marsh.* How long was he confined in the Strong Room, before he had leave to come out?—*Carr.* I cannot tell.

Mr. *Marsh.* How long was he in the Strong Room before he fell sick?

Carr. About fourteen days or more.

Mr. *Marsh.* What sort of a place is the Strong Room?

Carr. It is a boarded place, and there is a damp hole under it; and there is no drain to carry the water off.

Mr. *Marsh.* I ask you, what kind of a place it is? Whether there is any place to let in the air; and whether the sun visits it?

Carr. It is an odious place, and there is only a little hole to let in the air; it is built against the side of a wall, and the sun does not visit it; it is covered with boards, and seemed like the deck of a ship.

Mr. *Marsh.* What was the occasion of his being taken out of that room?

Carr. He was taken out for sickness.

Mr. *Marsh.* How long was he in the Strong Room in all?—*Carr.* About fourteen days.

Mr. *Marsh.* How long did he lie sick in the Strong Room?—*Carr.* I cannot tell.

Mr. *Marsh.* Where was he carried when taken out of the Strong Room?

Carr. To the sick ward.

Mr. *Marsh.* What condition was he in when carried to the Strong Room?

Carr. He was very well; he then was a hale, jolly man

Mr. *Marsh.* Were you with him in the sick ward?—*Carr.* I was almost every day.

Mr. *Marsh.* How long before he died?

Carr. I cannot tell.

Mr. *Marsh.* Was it within a day or two?

Carr. Within a week.

Mr. *Marsh.* Did he tell you what was the occasion of his death?

Carr. He said, that the confinement in the Strong Room was the occasion of his death.

Mr. *Marsh.* Do you believe it to be the occasion of his death?

Carr. He being a hale man, and coming in fresh, I believe the confinement was the occasion of it.

Mr. *Marsh.* Was there any coroner's inquest sat upon his body?

Carr. There was no inquest sat upon him or any other.

Acton. Please to ask, my lord, if they were not let out of the Strong Room.

Mr. Baron *Carter.* What say you to that?

Carr. At first they were not, but afterwards they were.

Mr. Baron *Carter.* What became of Hartness?—*Carr.* He was let out.

Mr. Baron *Carter.* Did he lie there as long as the other?—*Carr.* Yes.

Mr. Baron *Carter.* Did he contract any illness?—*Carr.* No.

Mr. Baron *Carter.* Were his irons as heavy as Newton's?

Carr. I can't tell, I never weighed them.

Mr. Baron *Carter.* The question I ask you is, whether the irons were one as heavy as the other? Which I expect you to answer.

Carr. I believe they were coequal.

Mr. Baron *Carter.* Answer me another question. You were saying there was no drain to

carry off the water; where does the water come in?

Carr. There was a place about as big as the table in the Court, where the water settles, and runs under the room, and makes it damp.

Mr. Baron *Carter.* What ill smell is there?

Carr. A sort of a damp smell; and abundance of rats creep into it.

Mr. Baron *Carter.* When the prisoners are let out of days, is the door always kept shut or not?

Carr. Sometimes it is locked up, sometimes not.

Edward Phillips sworn.

Mr. *Ameron.* Did you know Newton?

Phillips. I was a prisoner in the Marshalsea during the time Newton and Hartness were in the gaol.

Mr. *Ameron.* Did you see him in irons?

Phillips. I saw Acton and Rogers in the lodge when they were ironed.

Mr. *Ameron.* Where were they carried after?

Phillips. They were carried to the Strong Room.

Mr. *Ameron.* What kind of a place is it?

Phillips. It is a place not fit for a human person to be in.

Mr. *Ameron.* Is the common sewer under it?

Phillips. The common sewer runs by it.

Mr. *Ameron.* How long did Newton stay there?

Phillips. About fourteen days.

Mr. *Ameron.* How near is the common sewer to it?

Phillips. The soil that comes from the necessary-house runs within three or four yards of it.

Mr. *Marsh.* Was it infested with vermin?

Phillips. I saw rats there, and the side of a man's face eat away in three or four hours after he was dead.

Mr. *Marsh.* What might be the weight of the irons Newton had on?

Phillips. The irons he had on were twenty pounds weight.

Mr. *Marsh.* How long was Newton in the Strong Room before he was taken sick?

Phillips. Ten or twelve days.

Mr. *Marsh.* What became of him then?

Phillips. He was carried to the sick ward.

Mr. *Marsh.* How long was he sick in the Strong Room?

Phillips. I cannot say.

Mr. *Marsh.* Were his irons taken off?

Phillips. His irons were taken off, I believe, by petition.

Mr. *Marsh.* Who was the other man?

Phillips. The other was one Hartness.

Mr. *Marsh.* How was he as to his health?

Phillips. Very well.

Mr. *Marsh.* What sort of a man was Newton?

Phillips. He was a robust man.

Mr. *Marsh.* From the time of his being put first into the sick ward, to the time of his death, how was he?

Phillips. He continued to grow worse and worse till he died.

Mr. *Marsh.* Did he say what was the occasion of his death?

Phillips. I heard him say, that the ill usage and confinement were the occasion of his death.

Mr. *Marsh.* What was your opinion of him before he was put in the Strong Room?

Phillips. My opinion is, that he was a strong young man when he came in.

Mr. *Marsh.* When did he tell you that his death was occasioned by his confinement and usage?

Phillips. I believe it was some days after he was in the sick ward.

Mr. *Marsh.* What, in your opinion, was the cause of his death?

Phillips. My opinion is, that the confinement and usage were the cause of his death.

Mr. *Marsh.* Was the prisoner at the bar in the lodge when the irons were put on?

Phillips. The prisoner at the bar was there with Rogers when they were put on.

Mr. *Marsh.* Was there any bed in the Strong Room?

Phillips. There was no bed there; and if he had had one, they would have prevented it's coming in.

Mr. *Marsh.* Do you know of any application made to Darby, in relation to Newton?

Phillips. No.

Robert Smith sworn.

Mr. *Ward.* Did you know Newton?

Smith. I knew Newton very well; I knew him to be a lusty, hale man; and that he was confined in the Strong Room eight or ten days, or more.

Mr. *Ward.* Did you see him in the Strong Room?

Smith. I never saw him but through the hole.

Mr. *Ward.* Did he complain of his irons?

Smith. Yes.

Mr. *Ward.* Did you draw a petition for him?

Smith. I did.

Mr. *Ward.* You have seen the Strong Room, what sort of a place is it?

Smith. I have smelt noisome stenches, and seen persons dying in it.

Mr. *Ward.* Was it damp?

Smith. I believe it was damp; I saw it once open.

Mr. *Ward.* Was it open when you saw Newton there?

Smith. No. I saw him through the hole; nobody was admitted to him then.

Mr. *Ward.* How often were you there?

Smith. I was there twice or thrice in the middle of the day to see him, and the door was always shut.

Mr. *Demotet* sworn.

Mr. *Ward.* Did you know Newton?

Demotet. I knew Newton before he come in de park, (which he spoke in a very broken manner); I cannot speak English well.

Mr. *Ward.* He is a foreigner, and can't speak English to be understood, therefore we desire he may be allowed an interpreter, who is here ready.

Acton. He can speak English very well; here is one that heard him, who can prove it.

Mr. Baron *Carter.* When I went the Oxford circuit, the Welch would not speak English, because it was a dishonour to their country. If he can talk English to be understood (which I shall judge of when he is examined), I can't allow him an interpreter.

Mr. *Ward.* Give an account, as well as you can, of what you know of Newton.

Demotet. I knew Newton the time he broke out of the room; he was retaken three or four months after, and was carried into the Strong Room very soon in the morning.

Mr. *Ward.* How long did he continue there?

Demotet. He continued there fourteen or fifteen days, and lay on the ground, and had nothing to keep him there.

Mr. *Ward.* Was he ironed?

Demotet. He came ironed out of the lodge.

Mr. *Ward.* Who brought him out of the lodge?

Demotet. Rogers and Nichols brought him down.

Mr. *Ward.* Was Acton there?

Demotet. Acton came and saw Newton locked into the Strong Room. When he was first put in, capt. Delagol was confined there at the same time.

Mr. *Ward.* Was Newton sick in the Strong Room?

Demotet. He fell sick there; both of them were lousy; his wife and young child came to take care of her husband, and petitioned to sir John Darnell to have him released; he was put in the sick room, and there died in four or five days after. His wife broke her heart, and she and the little child died in the same week.

Mr. *Ward.* What was the occasion of his being sick?

Demotet. That he was on the ground, he had no bed to lie on, and the water came in at the top.

Mr. *Ward.* What kind of a place is the Strong Room?

Demotet. It is not fit to put a man in, the rain comes in.

Mr. Baron *Carter.* Were you ever in it?

Demotet. I was in it myself; Grace put me in there.

Mr. Baron *Carter.* How long were you in the Strong Room?

Demotet. I was in there for ten minutes, and there were two dead men in at the same time, and I fell sick for five months.

Mr. *Marsh.* Was it infested with rats?

Demotet. It was very much infested with rats and vermin.

Acton. Do you know Hester Overstoun?

Demotet. I do not know her. (All spoke in broken English.)

Martha Johnson sworn.

Mr. *Marsh.* Did you know Newton?

Mrs. *Johnson.* I did, he lived in the park, on the master side, before he broke out.

Mr. *Marsh.* Did you see him confined in the Strong Room?

Mrs. *Johnson.* I never saw him confined in any place, but I saw him in irons.

John Johnson sworn.

Mr. *Ward.* Give an account of what you know of Newton.

Johnson. I saw Newton in the Strong Room.

Mr. *Ward.* What sort of a place is it?

Johnson. It is a close place.

Mr. *Ward.* Is it fit to put any one in?

Johnson. It is not fit to put a man into.

Mr. *Ward.* Was there any smell there?

Johnson. There was a noisome smell, and so there was on all the common side.

Mr. *Ward.* Is it more or less healthy than the other rooms on the common side?

Johnson. They are all unhealthy, it is much the same as the rest.

Acton. I desire he may be asked, when he went to captain Delagoll in the Strong Room, if the door was open.

Johnson. It was open; it was opened for me to go to shave him.

Ruth Butler sworn.

Mr. *Ward.* Did you know Newton?

Mrs. *Butler.* I remember Newton very well; he was confined on the master side in the park, and there broke out; he was retaken, and brought to the prison again, and put into the Strong Room by Mr. Acton's order; I heard Acton give the orders.

Mr. *Ward.* Was he ironed?

Mrs. *Butler.* He was ironed on both legs; I heard Acton order them to be put on.

Mr. *Ward.* How long did he continue in the Strong Room?

Mrs. *Butler.* He continued there a good while, more than a month; he was sick there.

Mr. *Ward.* How long was Newton confined in the Strong Room?

Mrs. *Butler.* About two months.

Mr. *Ward.* Are you sure it was two months.

Mrs. *Butler.* I really think it was so long.

Mr. *Ward.* When was he taken ill?

Mrs. *Butler.* He fell ill in the Strong Room, and continued there some time after he was taken sick, and then was carried to the sick ward, and died in three or four days after he was put there.

Mr. *Ward.* When were his irons taken off?

Mrs. *Butler.* His irons were taken off in the Strong Room.

Mr. *Ward.* What was the occasion of his sickness?

Mrs. *Butler.* I can't tell what it was occasioned by, unless by the rain and wet that came in.

Mr. *Ward.* Was it covered at top?

Mrs. *Butler.* It was boarded at top, but the rain came through the top, the boards not being close enough to keep the rain out.

Mr. *Ward.* How near is the common sewer to it?

Mrs. *Butler.* The common sewer runs just by it, and smells very offensive.

Mr. *Ward.* Had Newton any bed there?

Mrs. *Butler.* No.

Mr. *Ward.* Was it a fit place for any man to be put in?

Mrs. *Butler.* It was not fit for any man to be in it.

Mr. *Ward.* What gave the man his sickness?

Mr. Baron *Carter.* She has answered that question already.

Mr. *Ward.* Did he make any complaint?

Mrs. *Butler.* He complained his legs were sore with the irons; I saw his legs when his stockings were off, in the sick ward, and his legs were swelled, the irons being too tight for him.

Mr. Baron *Carter.* Will you ask her any questions?—*Acton.* No, my lord.

Nicholas Purden sworn.

Mr. *Ward.* Do you know the Strong Room?

Purden. I was in it several times, when two unhappy men were in it, who came from the King's-bench. Every time it rains, the rain runs through, and there stagnates, till it dries through the boards.

Mr. Baron *Carter.* When was that?

Purden. About a year and a half ago.

Mr. Baron *Carter.* That is short of the time laid in the indictment.

Mr. *Ward.* I allow it short of the time.

Edmund Cummins sworn.

Mr. *Ward.* Give an account of what you know of Newton.

Cummins. I remember Newton's being put in the Strong Room; at that time it rained in, and settled between the joists.

Mr. *Ward.* Did it rain in when Newton was there?

Cummins. It did rain in then, and so it did when I was there.

Mr. *Ward.* Had Newton irons on?

Mr. *Cummins.* I saw him in irons in the Strong Room.

Mr. *Ward.* What kind of a place was it?

Cummins. It was wet and dirty, the rain coming through at that time; and it was not fit to put any person into.

Mr. *Ward.* Was it a wholesome place?

Cummins. No.

Mr. *Ward.* We shall call no more witnesses.

Mr. Baron *Carter.* Now, prisoner, say what you will.

Acton. On the 26th day of July, Hartness and Newton broke out of gaol, and were retaken in Kent, and brought to the gaol; and I dispatched a messenger to Mr. Darby, to know if he would have them put in irons; and he sent word back, they should. They were not put in that night, but were put in irons the next day, and went about the yard; and in about eight or nine days time were discharged. Newton was afterwards taken ill, and put in the sick ward, and there died.

Robert Holmes sworn.

Acton. Please to ask him, what he knows of Newton.

Mr. Baron *Carter.* Give an account of what you know.

Holmes. Newton escaped out of a room in the park, and was retaken and brought to the gaol, and I helped one of them down into the lodge, and Acton bid me go to Mr. Darby, to know how to dispose of them: and Darby's orders were to iron them, and put them in the Strong Room.

Acton. Please to ask, my lord, if he brought the message back to me, or any other person.

Holmes. I came back to Acton, and told him, that Mr. Darby's orders were to have them put in the Strong Room, and ironed; and the next day they were put in irons by Greenway and Nichols.

Acton. Did Darby come there the next day?—*Holmes.* Yes.

Acton. Please to ask, if they were locked up and unlocked, as the rest of the prisoners.

Holmes. Yes, they were.

Mr. Baron *Carter.* What irons had they on?

Holmes. Common irons, as the felons used to wear.

Mr. Baron *Carter.* How long were they confined there?

Holmes. Seven or eight nights.

Mr. Baron *Carter.* What day did they come in?—*Holmes.* On a Thursday.

Mr. Baron *Carter.* How long were they in irons?—*Holmes.* Seven or eight days.

Mr. Baron *Carter.* What condition of health were they in then?

Holmes. In perfect good health.

Acton. How long did Newton continue so, after he was taken out of the Strong Room?

Holmes. Newton went into the Duke's ward, and staid there six weeks, and was in good health all that time; I drank with him several times, and played at trap-ball with him.

Acton. Please to ask, whether his friends did not bring him necessaries.

Holmes. There were his wife and sister came to him; but Hartness's wife did more than either.

Acton. What was the cause of his death?

Holmes. The gaol-distemper; there were a great many sick at that time.

Acton. Were other persons sick of the same distemper at the same time?

Holmes. It is my opinion, but I can't be certain.

Acton. What think you of the Strong Room?

Holmes. I think it is the best room on the common side for any two or three to lie in, and I have known several desire to lie there.

Mr. *Marsh.* Consider with yourself, that many persons have said, that he lay 14 or 15 days in the Strong Room, and was then carried to the sick ward; and you say, that he was six weeks in the Duke's ward.

Holmes. It was when he was taken out of the Strong Room, and carried to the Duke's ward, he got his illness, to the best of my knowledge.

Mr. *Marsh.* When was he taken after the escape?

Holmes. He was taken the latter end of August.

Mr. *Marsh.* When was he put in the Strong Room?

Holmes. He was brought to the gaol the latter end of August, and put in the Strong Room on a Thursday.

Mr. *Marsh.* How long did he continue in the Strong Room?

Holmes. He continued there eight nights.

Mr. *Marsh.* Was he sick there?

Holmes. He was not.

Mr. *Marsh.* What day did he die on?

Holmes. I can't tell what day.

Mr. *Marsh.* Do you know the month?

Holmes. He died in November.

Acton. Please to ask, whether, when his sister or Hartness's wife visited him, he made any complaints to them.—*Holmes.* No.

Mr. *Marsh.* What sort of a place is the Duke's ward?

Holmes. It is a place that will contain thirty or forty, and there are as many put in on nights; it is the common place where people are put into when they come into the gaol. I imagine he got his illness there.

Mr. *Marsh.* How long did he lie in the sick ward before he died?

Holmes. I did not visit him.

Mr. Baron *Carter.* If you can, ascertain the time he died.

Mr. *Marsh.* I ask you when he was carried to the Strong Room, and how long he continued there?

Holmes. He was carried into the Strong Room on Thursday night, and continued there till Thursday se'nnight.

Mr. *Ward.* Where did he go afterwards?

Holmes. From the Strong Room he went into the Duke's ward, and continued there six weeks.

Mr. *Ward.* Are you sure he continued there six weeks?

Holmes. I am sure he continued there above a month.

Mr. *Ward.* What service have you, or what capacity are you in? Do you serve in the gaol under Acton?

Holmes. None. By Mr. Darby's leave I have a lodging there.

Mr. *Ward.* You say, prisoners have chosen to lie in the Strong Room; pray name one.

Holmes. Capt. Thompson desired me to go to Mr. Acton, to let him lie there.

Mr. Baron *Carter.* When was the Strong Room built?

Holmes. It has been built about four years, rather more.

Mr. *Ward.* How many years ago is it that you were speaking of Newton?

Holmes. About three years.

Robert Walter sworn.

Mr. Baron *Carter.* What do you know of Newton?

Walter. After he was retaken, he was put into the Strong Room, and remained there eight days, and then was put into the Duke's ward, and continued there five weeks.

Mr. Baron *Carter.* What condition was he in?—*Walter.* He never complained for want.

Mr. Baron *Carter.* What distemper had he?

Walter. It was commonly said, the gaol distemper.

Mr. Baron *Carter.* What do you think of the Strong Room?

Walter. I have worked many a day and many a week in it, and asked it as a favor to be there.

Acton. Had Newton a bed there?

Walter. Newton had a bed, I lent it him.

Acton. Was Newton confined there continually, or let out?

Walter. He was locked up, and let out as we were.

Mr. *Marsh.* When did Newton die?

Walter. I can't tell justly, in about ten or twelve weeks after he was retaken.

Mr. *Marsh.* When was he retaken?

Walter. The latter end of August.

Mr. *Marsh.* When did he die?

Walter. He died in November, to the best of my knowledge.

Mr. *Marsh.* How long did he continue in the Strong Room?

Walter. Seven or eight days.

Mr. *Marsh.* When was he put in the Strong Room?

Walter. The next morning after he was retaken.

Mr. *Marsh.* How long did he continue in the Duke's ward?

Walter. A month or five weeks, and then was removed into the sick ward.

Mr. *Marsh.* How long did he lie there?

Walter. He lay in the sick ward five or six weeks, or more.

Mr. *Marsh.* Did he make any complaint to you?

Walter. I never conversed with him.

Mr. *Marsh.* When you worked in the Strong Room, had you any other place to work in?

Walter. I had another place to work in, in George's ward, but I was hunted about by other prisoners. I would choose to lie there, and have lain there for a week together, rather than lie in a place where there are thirty or forty; for it is better to lie in a clean place where there are not so many.

Mr. *Ward.* You say, you furnished Thompson with a bed; how came you to have a bed to spare?

Walter. I purchased several beds, and let them out to hire.

Mr. Baron *Carter.* He said he sent in a bed like an upholder.

Mr. *Ward.* I was really surprised, that a prisoner should have more than one.

Sarah Hartness sworn.

Acton. Please to ask, if she was in the Strong Room when Newton was there, if he had a bed.

Mr. Baron *Carter.* What say you to that?

Hartness. I was in the room with Newton, and he had a bed there.

Mr. Baron *Carter.* Had he liberty to go out?

Hartness. He had liberty to go out of days.

Mr. Baron *Carter.* When he went out of the Strong Room, where did he go?

Hartness. I think he went into the sick ward.

Mr. Baron *Carter.* When he went out of that room, how was he?

Hartness. Very well.

Mr. Baron *Carter.* How long after was it before he was taken ill?

Hartness. He was not taken ill in three weeks after.

Mr. Baron *Carter.* Where did your husband go, when he left the Strong Room?

Hartness. Into the Petitioning-room.

Mr. Baron *Carter.* How long did Newton live after he went out of the Strong Room?

Hartness. Six weeks, or better.

Acton. Please to ask her, if one captain Delagoll was not there at the same time?

Hartness. He was; and my husband and Newton were very glad that they were favoured so much, in having so good a gentleman with them, he having candle there.

Mr. Baron *Carter.* What sort of a place was the Strong Room?

Hartness. It was clean and dry; I could have wished my husband there all the time.

Acton. Please to ask, my lord, whether she ever heard them complain of ill usage?

Hartness. No.

Mr. Baron *Carter.* Did Newton complain that the irons had hurt his legs, and that they were swelled?—*Hartness.* No.

Mr. Baron *Carter.* Who were the irons taken off by?

Hartness. They were taken off by Darby's order.

Acton. Please to ask, if Newton ever complained of me?

Hartness. I never heard him say a miss word of you.

Acton. Please to ask, my lord, if she applied to Darby to have the irons taken off.

Hartness. I went to Darby on a court day, and he said, he would have them off.

Mr. *Ward.* Who do you live with?

Hartness. One col. Brown.

Mr. *Ward.* Where does he live?

Hartness. He lives in Charles-street, Covent-garden.

Mr. *Ward.* How comes it that you live with colonel Brown?

Hartness. I am servant to colonel Brown.

Mr. *Ward.* What is your husband?

Hartness. He is cook to the captain of a ship.

Mr. *Ward.* Where did Newton lie after he came out of the Strong Room?

Hartness. My husband and Newton were bedfellows.

Mr. *Ward.* I expected you worse than I find you. After your husband came out of the Strong Room, where was he carried to?

Hartness. To the Petitioning-room.

Mr. *Ward.* Was your husband in the sick ward?—*Hartness.* No.

Mr. *Ward.* How could they lye together?

Hartness. I spoke of this before they went out.

Mr. Baron *Carter.* She does not say a word as to the Strong Room; one lay in the petitioning-room, and the other in the sick ward.

Mary Berkley sworn.

Acton. Do you remember Newton being in the Strong Room?—*Berkley.* I do.

Acton. Had he a bed there?

Berkley. He had.

Acton. What kind of a place is the Strong Room?

Berkley. It is a boarded room, and floored at bottom; it was every day washed; I washed it.

Mr. Baron *Carter.* Did he not complain of any hardship?—*Berkley.* No.

Mr. Baron *Carter.* Where did he go when he came out of the Strong Room?

Berkley. He went into the Duke's ward.

Mr. Baron *Carter.* How long was he there?

Berkley. Seven weeks.

Mr. Baron *Carter.* Where did Newton fall ill?

Berkley. In the Duke's ward.

Mr. Baron *Carter.* Did you see Newton when sick?

Berkley. I did see him, I was nurse; his distemper was the gaol distemper, an ague and fever; he was taken ill with a shivering and shaking.

Mr. Baron *Carter.* Did you look after him all the time he was ill?—*Berkley.* Yes.

Mr. Baron *Carter.* When did he die?

Berkley. He died in November.

Mr. Baron *Carter.* Did he complain of any hard usage?

Berkley. No; he went about with his fetters.

Acton. Did you see him after he died?

Berkley. Yes, I washed him; he was a very clever, clean corpse, without spot or blemish.

Mr. *Marsh.* Did you see no marks of the irons?—*Berkley.* No.

Mr. *Marsh.* Did you wash the Strong Room with the water that fell from the heavens? You dried it up——

Mr. Baron *Carter.* Did it rain in?

Berkley. It never rained in there; it was a dry, neat place.

Mr. *Ward.* Have you no office in the gaol?

Berkley. I looked after the sick.

Mr. *Ward.* Had you any allowance as nurse, and by whom paid?

Berkley. I had no allowance.

Mr. *Ward.* Had you nothing paid you?

Berkley. Who should pay me?

Mr. *Ward.* What did you do it for?

Berkley. I did it for Christianity sake.

Mr. Baron *Carter.* Did Acton make you any allowance?

Berkley. I had three-pence a-piece from the people that came into the ward, which was paid at the bar.

Mr. *Ward*: Had you nothing but threepence?—*Berkley.* No.

Mr. *Ward.* Who was you appointed by?

Berkley. The men in the gaol chose me.

Mr. *Ward.* How came they to choose you?

Berkley. They took me to be a sober, modest woman, and so chose me.

Mr. Baron *Carter.* You see you have an answer; she is a sober, modest woman.

Mr. *Ward.* But it is difficult to get the truth out of her.

John Boswell sworn.

Acton. Did you build the Strong Room?

Boswell. I did; it was made to put pirates in.

Acton. Is it a wholesome place?

Boswell. It is a very wholesome place; it is nine inches from the ground.

Mr. Baron *Carter.* Is the common sewer under it?

Boswell. It is not, it is twenty four feet from it.

Mr. Baron *Carter.* How come you to know it?

Boswell. Because I measured it several times.

Acton. Was there a covering at the top?

Boswell. It was covered with whole deals, and pitched and tarred.

Mr. *Morris* sworn.

Acton. Do you know the Strong Room?

Morris. I do, and it is better than any ground-room on the common side; there is a step up above the surface.

Acton. Please to ask him, what business he is?—*Morris.* I am a carpenter.

Mr. Baron *Carter.* How is the room covered?

Morris. With boards, and I think there is a tarpaulin at top.

Mr. Baron *Carter.* How near is the common sewer to it?

Morris. It is above eighteen feet from it.

Mr. Baron *Carter.* Is it offensive?

Morris. I don't think there is any thing offensive.

Mr. *Ward.* Do you know when it was built?

Morris. It was built about four or five years ago.

——— *Overston* sworn.

Acton. What did you hear Mr. Demotet say concerning me?

Overston. I heard Mr. Demotet say, he would hang Acton, right or wrong, to be an example to all other gaolers; and that he was maintained by some gentlemen to hang him.

Mr. *Ward.* How long ago was it that you heard him say this?

Overston. It was the fourteenth day of July last, in the cellar of the Fleet prison.

Mr. *Marsh.* How came you to be in the Fleet?

Overston. I went backward and forward to the Fleet.

Mr. *Marsh.* What are you?

Overston. A servant, I live in Fetter-lane.

Mr. *Demotet* was called, to confront *Overston.*

Mr. *Marsh.* Do you know that woman?

Demotet. I do.

Mr. *Marsh.* What was it you said to her?

Demotet. I said, I would say nothing but the truth, and do nothing but what the law required.

Mr. *Marsh.* Overston, What was it Demotet said to you on the 14th of July, in the Fleet prison?

Overston. He was in the cellar there, and said he would swear against Mr. Acton, right or wrong, in order to make an example of him.

Demotet. I said, I would say what was truth.

Elizabeth Clayton sworn.

Acton. What did you hear Demotet say?

Clayton. In the cellar in the Fleet prison?

Mr. *Marsh.* Mistress, hold; were not you a prisoner in the Marshalsea?

Clayton. I was a prisoner there twelve months; but hearing that Demotet had sworn against Acton, I had a mind to talk with him about it; and he said, that Acton had killed a hundred, and that he would be revenged of him, if he swore himself to the devil.

Mr. *Marsh.* She was a prisoner in the Marshalsea, how came she into the Fleet?

Mr. Baron *Carter.* How came you there?

Clayton. I went to Mrs. Overston, she was at one Mr. Solas wife's.

Demotet. (In a passion.) She is an old bawd, and brought whores to Solas.

Mr. Baron *Carter.* You must not behave yourself ill to witnesses.

Demotet. What she has said, is not true.

John Hull sworn.

Acton. Please to ask him, what Demotet declared to him.

Hull. Mr. Demotet declared, that he would hang Acton right or wrong, to be an example to all other gaolers.

Mr. *Ward.* There is a very remarkable difference in the witnesses, in relation to the place the man was supposed to go to, after he came out of the Strong Room.

Mr. Baron *Carter.* Gentlemen of the jury, the prisoner at the bar stands indicted for the murder of Robert Newton; the indictment sets forth, that he put him, against his will, into a place called the Strong Room, and kept him there fourteen days; that there were unwholsome, noisome smells; that it was damp and wet, and that he got a distemper there whereof he died. To prove this, they called several witnesses. The first was captain Tudman; he says, that he knew Newton and Hartness, and that they broke out; and in a month or two after, Newton was taken again, and brought into the lodge, and ironed, and then carried into the Strong Room; he says, that there is a little hole to put in drink; and says, that before Newton went into this place, he was a hale, strong young fellow.

Carr; he says, that he saw Newton in the Marshalsea: that he came ironed out of the lodge, and that he was brought out by Rogers, and carried to the Strong Room, and he, and Hartness, remained there two court days; that Newton was a strong, hale fellow, and that he fell ill in the Strong Room; gentlemen, it was of the gaol distemper, which he thought the jaundice, such as they were used to, no uncommon disease. He was asked then, whether the Strong Room was opened on days, and locked up on nights; he says, that after two or three days, the door was opened on days. —He says, gentlemen, that there was no drain to carry off the water; that the sun does not visit it; that it is built in a corner in the yard, and the sun does not shine upon it, and says, that wet comes from the top; that he was with Newton a week before he died, and Newton said, that the confinement was the occasion of his death, and the witness thinks so too. He says, gentlemen, Hartness was all the time in the Strong Room, and ironed, and caught no distemper.

Edward Phillips says, that he knew the Strong Room; that there is a sort of a pool, where the water settles, that comes from the necessary-house that is under it, so makes it damp: and says, that it was sometimes open: That, upon asking him his opinion, if there were any noisome smells, he says, that it was a noisome place, and not fit for a human creature to be in. He says, that the irons were small, and he believes Newton was in the Strong Room ten or twelve days, and that it was so long before he was taken ill: that Hartness was not so strong a man as Newton, and he received no injury by being there; but that Newton's confinement was the occasion of his sickness.

Robert Smith says, that he knew Newton; that he was a lusty, hale man; but he can't say that he was sick in the Strong Room; he was in it, and saw it opened.

Mr. Demotet says, that he knew Newton: that he broke out, and was retaken, and was put in the Strong Room, and continued there fourteen or fifteen days, on the ground, without having a bed; that he came out of the lodge ironed, and Acton came and followed him, and saw him locked up in the Strong Room; that his wife came to see him, and he died in three or four days after he came into the sick ward; and that the occasion of his death was vermin and lice; that the water came in at the top, and it was not fit to put a man in; that the floor was bad. He says, that he himself was in the Strong Room about ten minutes, and it was infested with rats.

Martha Johnson; she says, she never saw him confined.

John Johnson; he says, that he saw Newton once in the Strong Room; that it is a close place; that there is no air, and it has the same noisome smell as the common side, and the door was opened for him to go and shave him.

Ruth Butler says, that she knew Newton: that he was retaken and put in the Strong Room; that irons were put on his legs; that he fell sick there, and died in three or four days in the sick ward; that she can't tell the occasion of his death, unless the injury caused from his confinement. She says, that the Strong Room is boarded at the top, but that the rain comes in. Gentlemen, she says, what was not mentioned before, that he complained of his legs.

Nicholas Purden said nothing to the purpose.

Cummins said, that it was an ugly room; that it was never swept, and was wet and dirty.

This is the substance of the evidence for the king.

The prisoner is insisted upon to be a severe man; it is said, that he put Newton into this place; now says he, if I did not do it, I am not affected.

What was the consequence; if he did not put him into irons, he put him in the Strong room.

Holmes, the first witness for the prisoner, says, he was there when the man came back, and said, that Darby ordered him to be put in irons; admit he had given orders, the irons were not of so extraordinary a weight; the room was not so bad.

The witnesses called for the king all agree, that he fell ill in the Strong Room; now the witnesses for the prisoner will shew you, that the man was taken out of the Strong Room, and was taken into the Duke's ward, where he remained a considerable time; that when Hartness and Newton were uneasy under the irons, they desired to have relief, and applied to Darby, and he ordered the irons to be taken off. That is a confirmation that Darby had the sole power. This is the manner of the evidence in his favour. If Darby did do it, Acton was not to answer for it.

The first witness is at a loss as to the time of the man's death. When he came in, according to the evidence given for the king, he remained fourteen or fifteen days in the Strong Room, and was carried to the sick ward, and died in three or four days.

Holmes says, he was in very good health; he drank with him several times, and played at trap-ball; and he believes he remained six weeks before he died, and that he died of the gaol-distemper. He says, that he was retaken the latter end of August, and died in November; here are two months complete; and the witnesses for the crown account but for six weeks. He says, that it is the best room on the common side for two or three to be in; and that several, of his own knowledge, desired to be there. The counsel pressed him very much, to name any one person that was there, by his own desire; so he said, that one Thompson was there. He says, that it could not rain through, because it was just built.

Walter says, that he knew Newton in the Duke's ward; and says, that he was there about four weeks; that he heard him make no com-

plaint, but just before he was carried there: He had a good opinion of the Strong Room, and requested to work there, and says, that he let Newton have a bed; which contradicts all the other evidences. He was asked about the beds, and said, that he got them by his savings, and that he let them out to hire.

Hartness says, that she knows very well that Newton had a bed, and her husband and he lay together, and a captain was there; that she never found the room wet, nor any thing like it; that they went out of days, and were locked up in the Strong Room of nights; that Newton was six weeks or two months, before he died, in the Duke's ward; that her husband received no damage. She says, that it was a clean room; that she never heard Newton complain of his irons, or ill usage of the prisoner. She says, that she went to Darby to have the irons taken off, and he ordered them to be taken off, while she stood by, and gave directions accordingly.

Burton; she says, that she saw Newton in the Strong Room, and she saw a bed; so there are three witnesses as to that. She says, she washed the room every day; it is very extraordinary, after so many have swore it to be very dirty. She says, that he never did complain of the prisoner; that he went into the Duke's ward for seven weeks; that she was nurse, and that he died in November, and died of an ague and fever; that she laid him out, and never saw a finer corpse; and that the rain never came into the Strong Room. In order to take off part of her testimony, she was asked, Whether she was not obliged to the prisoner at the bar? She said, that she was nurse, and that she had three pence a-piece of those she took care of; and that she was chosen by the free election of the prisoners.

The prisoner called two or three others, to the Strong Room.

Boswell says, he built it, and that it was very wholesome, and it was twenty four feet from the common sewer.

Morris says, the Strong Room was very wholesome, and that it was better than any ground-room on the common side, and that there was a tarpaulin at top.

Overston was called to impeach the credit of Demotet. She says, that in the Fleet cellar, she heard him say, that he would hang Acton right or wrong, as an example to other gaolers, to deter them from being rogues. The prisoner called two others. Elizabeth Clayton; she heard him say, that he would hang Acton, though he sent himself to the devil; and the other, John Hull, heard him say, that he would hang Acton right or wrong.—Demotet being called to confront these witnesses, denies he ever said what they assert he did.

This is the evidence on both sides; therefore you will consider if Acton caused him to be put into the Strong Room; for if he did not, then he must be acquitted: If he did put him in, you are to consider, whether this place is such a place as they have set forth.

There is not a single witness for the king that does not give the same account of the Strong Room: It is pretty extraordinary, that to a man the witnesses should remain in one opinion for the self-same purpose; their words were, that it was not fit for a human creature to be in.

The witnesses for the king say, that he died in two or three days after he was taken out of the Strong Room; the others say, that he lived two months; therefore consider, if he was put in this room, and it was not the occasion of his death, he ought not to be found guilty, in that he was very well for a month, some say six weeks after; and that he fell sick of the gaol distemper in the sick ward.

If he did nothing in relation to the irons, he must be acquitted as to that.

If the room was such as was fit for a man to be put in, there was no harm in putting him in there.

If he did not die by duress, by being put in that room, I believe he must be acquitted on that head.

If he was put in the Strong Room by Acton, against his will, and it was so unwholesome that he caught a bad distemper, and died of it, you must find him guilty.

The Jury agreed upon their Verdict immediately, without going out of Court.

Cl. of Arr. Gentlemen, are you all agreed in your verdict?—*Omnes.* Yes.

Cl. of Arr. Who shall say for you?

Omnes. Foreman.

Cl. of Arr. William Acton, hold up thy hand. (Which he did.) Look upon the prisoner. How say you, Is he Guilty of the felony and murder whereof he stands indicted, or Not Guilty?—*Foreman.* Not Guilty.

485. The Trial of WILLIAM ACTON, for the Murder of James Thompson, at the Assizes held at Kingston-upon-Thames, in Surrey, before the Honourable Mr. Baron Carter, August 2: 3 GEORGE II. A.D. 1729.

Saturday, August 2, 1729.

WILLIAM ACTON having been before arraigned for the murder of James Thompson, and pleaded Not Guilty, the counsel proceeded as follows:

Mr. *Middleton.* My lord, and you gentlemen of the jury, I am of counsel for the king. The indictment sets forth—

We will call our witnesses to prove the fact.

Mr. *Marsh.* My lord, and you gentlemen of the jury, the evidence for the king against the prisoner at the bar for murdering one James Thompson, is to this effect: that the poor man had the misfortune to be troubled with a diabetes; and, according to the account given of that distemper, it does occasion persons to void a great deal of water. The prisoner was so far from compassionating of him, that he put him against his will into the Strong Room, and he lay there ten days or more in a bad condition; that no regard was had to him; he was there suffered to continue without a bed till his left side mortified. It was a very bad place. Some of the witnesses for the prisoner did give an account of it, that it was built for felons and pirates: this place was built up for them, that is now said by the prisoner to be the best room in this gaol. One of the witnesses in the last cause spoke of the pirates being put there. When Thompson was in this place, this was done; his miserable condition was represented to Acton, and he made use of a very harsh expression, 'Damn him, let him lie there, and perish.' We will call our witnesses to shew the fact, and it must be left to you to consider whether he is guilty or not.

There was so little care taken of this man, that after he was carried into the Duke's ward, he was suffered to be put again into this place, and there died.

Edmund Cummins sworn.

Mr. *Marsh.* Did you know James Thompson?—*Cummins.* Yes.

Mr. *Marsh.* Whose care was he under?

Cummins. He was under the care of Acton.

Mr. *Marsh.* Who put Thompson in the Strong Room?

Cummins. He was put in the Strong Room out of the ward.

Mr. *Marsh.* What was the occasion of his being put there?

Cummins. I don't know what was the reason of his being put there; but Acton gave that reason that the ward company complained of him.

Mr. Baron *Carter.* He was asked, who put him into the Strong Room? And he told you the ward company.

Cummins. My lord, I could not say so.

Mr. Baron *Carter.* I heard you say so.

Cummins. My lord, I heard you——just now indulge a witness for the prisoner to explain herself. I thought your lordship would not take so much notice of one of the king's evidence making a mistake. I came here to speak the truth; and if your lordship will not give me leave to explain myself, I will go down.

Mr. Baron *Carter.* Indeed you behave yourself very impertinently; but go on.

Cummins. Mr. Acton did say that was the reason, that the ward company complained of him for making water.

Mr. *Marsh.* How long was Thompson in the Strong Room?

Cummins. He was there five or six days; I saw him whilst he was alive there; he lay there on nights, and had no bed.

Mr. *Marsh.* When you saw him there, what condition was he in?

Cummins. I saw him in a bad condition.

Mr. *Marsh.* Where did he die?

Cummins. In the Strong Room.

Mr. *Marsh.* Did you hear Acton say any thing about it?—*Cummins.* No.

Mr. *Marsh.* Did you see him after he was dead?—*Cummins.* I did.

Mr. *Marsh.* How long was he dead when you saw him?

Cummins. He was alive over night, and I saw him dead the next morning. He had only a night-gown with him.

Mr. *Marsh.* Did you see his face?

Cummins. His face was disfigured with the rats; I saw the marks.

Mr. *Marsh.* What was the occasion of Thompson's death?

Cummins. He might die by lying in that room.

Mr. *Marsh.* What do you, in your opinion, believe to be the occasion of his death?

Cummins. I believe his being put there was the occasion of his death.

Mr. *Marsh.* How soon was he buried after he died?

Cummins. He was hurried away in an hour or two after he died, and was buried.

Mr. *Marsh.* Who gave any orders for hurrying him away?

Cummins. The men carried him away that used to do it.

Mr. *Marsh.* When was he carried away?

Cummins. The very same morning he died; in two hours after.

Mr. *Marsh.* How long was he in the Strong Room?

Cummins. Five, six, or seven days.

Mr. *Marsh.* Had he any bed to lie on?

Cummins. He had not.

Mr. *Marsh.* I ask you, whether you saw him carried to the Strong Room, and whether Acton was present?

Cummins. Mr. Acton was there; and the man was unwilling to go, and desired to stay; but Acton said, he should not.

Matthew Brandon sworn.

Mr. *Marsh.* Did you know captain Thompson?

Brandon. I did; he was in the same ward I belonged to, which is called Pump ward.

Mr. *Marsh.* Had he any infirmity?

Brandon. When he was in the ward he made a little water; and some complaint was made, and he was turned into the Strong Room.

Mr. *Marsh.* Did you visit him when he was there?

Brandon. Several times.

Mr. *Marsh.* Did you hear Acton give any orders about his being there?

Brandon. I did not.

Mr. *Marsh.* How long did he lie there?

Brandon. Ten days; then he was remanded back to his ward, and lay there one night; and then remanded back, and put in the Strong Room again.

Mr. *Marsh.* Did he tell you any thing?

Brandon. He told me, that he was unwilling to go back to the Strong Room, for that it would be his death.

Mr. *Marsh.* Did you visit him there?

Brandon. Several times; and the first time I saw him he had nothing to lie on, and I furnished him with a piece of a blanket, and after with a piece of a quilt.

Mr. *Marsh.* How long was it before he died that you saw him?

Brandon. I saw him two days before his death.

Mr. *Marsh.* What condition was he in?

Brandon. He could not stir; three or four days before he died, he lay on his left side.

Mr. *Marsh.* Did you not see one of his hips very sore, angry, and bad?

Mr. Baron *Carter.* You know you must not lead the evidence.

Brandon. There was a very bad, angry, sore place.

Mr. *Marsh.* Where was it?

Brandon. It was in one of his thighs.

Mr. *Marsh.* When did you see it?

Brandon. It was so when he was in that room; I don't remember it before.

Mr. *Marsh.* Did capt. Thompson complain to you of any thing?

Brandon. He complained, before he went into the Strong Room a second time, if he was to go in there again, it would be the death of him.

Mr. *Marsh.* How many days was it after he was put in again to the Strong Room before he died.

Brandon. I can't justly say, but I believe about six or eight days.

Mr. *Marsh.* Where did he die?

Brandon. In the Strong Room.

Mr. *Marsh.* Did you see him after he was dead?

Brandon. I saw him the next morning after; his thigh looked not quite so angry, but there was a sore place there.

Mr. *Marsh.* Did you, in behalf of the captain, make any application to Acton?

Brandon. Wilson, Cummins, and myself went to Acton, and represented his condition to him, and desired he would be pleased to let him go to the sick ward; and Acton bid Wilson go about his business; and that was all the answer we could get.

Mr. *Marsh.* When you saw him after he was dead, did you see any marks about him?

Brandon. I saw his nose and ear, and part of his cheek eat away.

William Jennings sworn.

Mr. *Marsh.* Did you know James Thompson?

Jennings. Yes; he was a prisoner in the Marshalsea, in 1726.

Mr. *Marsh.* Had he any distemper then?

Jennings. He had no distemper when he first came into the ward.

Mr. *Ameron.* What was the occasion of his being removed out of the ward?

Jennings. They found fault that he was troubled with a diabetes.

Mr. *Ameron.* Did you hear Acton give any orders to carry him to the Strong Room?

Jennings. Acton did order him into the Strong Room.

Mr. *Ameron.* How long did he remain there?

Jennings. He remained there eight or ten days, at first, and then was put into the Pump ward, and stayed there two nights, and then was put into the Strong Room again.

Mr. *Ameron.* Did Acton order him in again?

Jennings. I heard Acton order him to be put there again.

Mr. *Ameron.* What were you then?

Jennings. I was then one of Acton's watchmen; I went to see the gentleman, and he said, he should certainly perish if continued in that place; and I desired Acton to have him removed; and Acton said, What business have you to meddle with it? Let him die like a son of a bitch, and be damned.

Mr. *Ameron.* What, in your opinion, was the occasion of his death?

Jennings. I believe his lying there in that place was the occasion of his death.

Mr. *Marsh.* It was represented to be a clean room, was it washed?

Jennings. I don't believe it was.

Mr. *Marsh.* How long were you belonging to the Marshalsea?

Jennings. I lived four years out of seven there.

Mr. *Marsh.* Was it washed during that time?

Jennings. It was very seldom, if ever washed.

Mr. *Marsh.* Did you go into the room?

Jennings. I have been in it several times; I have rough swept it.

Mr. *Marsh.* Is it dry at top?

Jennings. No, the rain comes in.

Mr. *Richardson.* Had captain Thompson committed any crime before he was put in there?—*Jennings.* No.

Mary Seasband sworn.

Mr. *Marsh.* Did you know capt. Thompson?

Seasband. I remember him; he was a prisoner in Pump-ward, and he was removed from thence into the Strong Room; but I don't know upon what occasion.

Mr. *Marsh.* By whose order was he carried there?—*Seasband.* By Mr. Acton's.

Mr. *Marsh.* How do you know?

Seasband. Thompson said so.

Mr. *Marsh.* You never heard Acton give orders?—*Seasband.* No.

Mr. *Marsh.* Did you see captain Thompson when in the Strong-Room?

Seasband. I did; he had no bed to lie on, and the wet was under him.

Mr. *Marsh.* How long was it before he died, that you saw him?

Seasband. I saw him the minute he died.

Mr. *Marsh.* Did he then declare any thing to you?

Seasband. He declared nothing to me then; but three days before he died, a gentleman came in to see him, and Thompson told him, it would be the occasion of his death if he was not removed.

Mr. *Marsh.* What condition was he in in the Strong Room?

Seasband. His left side mortified, which was occasioned by his hard lying on the ground, and in the wet.

Mr. *Marsh.* Was not part of his face eat away?

Seasband. The rats had eat out his left eye.

Mr. *Marsh.* How long did he continue in the Strong Room?

Seasband. I can't say how many days, I believe he was there three weeks.

Mr. *Marsh.* How do you know that his face was eaten away by the rats?

Seasband. I have reason to know, for they were very troublesome when I was there.

Mr. *Marsh.* Was it a proper room to put any one in?—*Seasband.* No.

Mr. *Marsh.* Was it swept?

Seasband. I never saw it swept; I was in it from the first of January till the sixth, night and day.

Mr. *Marsh.* Was it washed?

Seasband. It was not washed while I was there; there were several barrows-full of dung in it then.

Mr. *Marsh.* What was there in it?

Seasband. Wet, and straw, and dirt.

Mr. *Marsh.* How did it smell?

Seasband. Very badly; I have seen there a score of rats at a time.

Acton. Please to ask, what time of the day captain Thompson died.

Mr. Baron *Carter.* What say you to that?

Seasband. He died about six o'clock in the morning, and was buried before ten.

Acton. Who gave directions for his burial?

Seasband. I don't know.

Acton. Was there any person to view the body?—*Seasband.* There were no searchers.

Acton. Who sent you to capt. Thompson?

Seasband. Nobody sent me, I went of my own accord; I carried him twice mutton broth.

Thomas Snape sworn.

Mr. *Ward.* Did you know capt. Thompson?

Snape. Yes, he was first in the Pump-ward, and went from thence into the Strong Room.

Mr. *Ward.* By whose orders?

Snape. I can't tell; he was removed from the Pump-ward to the Strong Room, and was there for some time, and then went into Pump-ward again, and was there some small time, and then carried back again to the Strong Room.

Mr. *Ward.* How long did he continue in the Strong Room the second time?

Snape. He was there nine or ten days both times.

Mr. *Ward.* Did he die in the Strong Room?

Snape. Yes.

Mr. *Ward.* Did you see him after he was dead?

Snape. Yes, I saw his corpse laid out, and his side was very bad; it was black, and turned as to a mortification.

Mr. *Ward.* How long was it before he died that you saw him?

Snape. Three or four days.

Mr. *Ward.* Did he make any complaint?

Snape. No.

Acton. Was he confined there all the time, or did he go about?

Snape. I saw him go out and in to the Strong Room.

Mr. *Ward.* When was he laid out?

Snape. Between six and seven o'clock in the morning.

Eleanor Ewer sworn.

Mr. *Ward.* Did you know captain Thompson?

Ewer. I remember the captain; he was in good health when he went into gaol.

Mr. *Ward.* When did he die?

Ewer. He died the 9th or 10th of July.

Matthew Bacon sworn.

Mr. *Marsh.* Did you know captain Thompson?

Bacon. I did; he was arrested and put into prison the latter-end of May, 1726. I remember he was brought into the Pump-ward, and continued there three weeks; and then was removed to the Strong Room?

Mr. *Marsh.* How long did he continue in the Strong Room?

Bacon. He lay there about ten nights, and then came into the Pump-ward, and remained

a night or two; and from the pump-ward, went back again to the Strong Room.

Mr. *Marsh.* How long was he in the Strong Room the second time?

Bacon. He was there about ten days more before he died.

Mr. *Marsh.* Did you see him there, the latter-part of the time, before he died?

Bacon. I did.

Mr. *Marsh.* In what condition did he lie?

Bacon. He had bundled up a piece of a blanket to lay his head upon.

Mr. *Marsh.* Did he make any complaints of his hardships?

Bacon. He said, a day or two before he died, that the cruel usage, and lying hard, would kill him.

Mr. *Marsh.* Did he complain of any sore, or hurt, or of his side?

Bacon. I can't say he did; but after he was dead, his left hip appeared black.

Mr. *Marsh.* What, in your opinion, was the occasion of his death?

Bacon. The hard and cruel usage was the occasion of his death.

Mr. *Marsh.* Was the Strong Room washed, or swept, or kept clean?

Bacon. It was not; and if any person swore so, they did not swear true.

Mr. Baron *Carter.* Were you there every day?—*Bacon.* I can't say every day.

Mr. *Richardson.* Was it fit to put a man in?

Bacon. It was contrived for a punishment, for people who had committed great crimes against the government.

Mr. *Richardson.* Were there other rooms fit to put Thompson in?

Bacon. Yes, there were.

Mr. *Richardson.* Was there any application to have him removed?

Bacon. There was none by me.

Peter Purchace sworn.

Mr. *Ward.* What part of the prison was Thompson confined in?

Purchace. He was first in the Pump-ward, and was taken out of that room contrary to his inclination, and put in the Strong Room.

Mr. *Ward.* How do you know it was contrary to his inclination?

Purchace. He often said so.

Mr. *Ward.* Did you see him removed from the Pump ward to the Strong Room?

Purchace. Yes.

Mr. *Ward.* Was he carried there?

Purchace. No, he walked there.

Mr. *Ward.* You were by when he went into the Strong Room?—*Purchace.* Yes.

Mr. *Ward.* Were you by when Acton gave orders to carry him there?—*Purchace.* No.

Mr. *Ward.* Who was with Thompson when he went there?

Purchace. Nichols and Rogers went along with him; and they said, they had orders to go to the Strong Room.

Mr. *Ward.* How long did he continue in the Strong Room?

Purchace. I can't be certain of the time.

Mr. *Ward.* But you saw him in the Strong Room?

Purchace. I frequently visited him in the Strong Room.

Mr. *Ward.* Did you observe that it was washed or cleansed?

Purchace. It was not, during the time I was a prisoner there.

Mr. *Ward.* What kind of a place was it?

Purchace. It was a wet, damp, nasty place, not fit for a Christian to be in.

Mr. *Ward.* Do you know of any application made to Acton concerning captain Thompson?

Purchase. Wilson and I went to the lodge to enquire for Acton, and told him, that Thompson said, the confinement in that miserable place, would be the cause of his death, and he desired to be removed to another place; but Acton would not hear us, but bid us go about our business.

Mr. *Ward.* When did you see him last, before he died?

Purchace. I saw him the night before he died; and he then said that the confinement in that place would be his death.

Mr. *Ward.* Did you see him after he was dead?

Purchace. I saw his body; he had on his thigh something like a mortification.

Mr. *Ward.* What was the occasion of his death?

Purchace. I believe lying upon the bare boards was the occasion of his death.

Mr. *Ward.* Was there any water in the room?

Purchace. At some times there was; when it rained, the water came in at top; I have seen the rain come in.

John Wilson sworn.

Mr. *Marsh.* Did you know captain Thompson?

Wilson. Yes, he was committed a prisoner the latter-end of May; he was a fortnight or three weeks in the Pump-ward.

Mr. *Marsh.* What sort of a man was he?

Wilson. He was a hearty, strong man, of a merry disposition, singing songs, and chorus's. He was in the pump-ward, and after was put into the Strong Room; some people came to fetch him, and said it was by the order of Nichols, Rogers, and others.

Mr. *Marsh.* How long did he remain there?

Wilson. He remained there a week and better, in a bad condition.

Mr. *Marsh.* Had he any thing to lie on?

Wilson. He had on a banyan cambiet night gown, but lay upon the bare floor, which was wet with the water that came in.

Mr. *Marsh.* Where did the water come from?

Wilson. It came from the top of the room; I saw it rain through.

Mr. *Marsh.* Could he come out?

Wilson. He had a power of coming out of the room in the day-time, but he had no power

of coming to lie any where else on nights; he lay two days in the Pump-ward, and then was put into the Strong Room again; and then desired me to go to the Petitioning room, to get him into another place.

Mr. *Marsh.* Did you make any application in his behalf?

Wilson. I went with Purchace to Acton, but was not heard.

Mr. *Marsh.* What did Acton say to you?

Wilson. I began to tell the story relating to the man's misery, and Acton said ——

Mr. *Marsh.* What did you tell Acton?

Wilson. I said, he would perish if not removed; and Acton bid me go and trouble my head with my own business.

Mr. *Marsh.* Did he order him to be taken out of the Strong Room?

Wilson. No.—I then went to the nurse of the sick ward, to desire her to entertain him in that ward; and she would not do it, because she had not orders; so he continued in the Strong Room very miserable. I took him out, and put him in the chimney corner to dry himself; and when he came to dry himself before the fire, he smelt very ugly and nasty (this was after the second time of his going into the Strong Room); then he went back, and lay very miserably for three or four days.

Mr. *Ward.* Did you ever see the Strong Room washed?

Wilson. I never saw it washed all the time the captain was there; within these twelve months, or within these six months, it has been washed.

Mr. *Ward.* Was it covered at top?

Wilson. There was a tarpaulin laid over it lately, since he was there.

Mr. *Ward.* What state and condition was it in when Thompson was there?

Wilson. It is in a better state and condition now; I have seen the water pour in, and it was in as bad a state when he was there, as ever; and there was no tarpaulin put upon it, till within these twelve months.

Mr. *Ward.* How was the floor?

Wilson. The floor lies five inches higher than the ground, but the boards not being thick, they were grown rotten, with the great deal of water that settled there after a rain, for the room was worse the next day.

Mr. *Ward.* What, in your conscience, do you believe to be the occasion of his death?

Wilson. I believe, in my conscience, that he was seemingly of a strong constitution, and continued the same till his going into that place; and that the severity of the weather, and his hard lying, were the cause of his sickness, of which he languished and died.

—— *Phillips* sworn.

Mr. *Marsh.* Did you know captain Thompson?

Phillips. Very well; he was troubled with a diabetes when he first came in; he was put in the Pump-ward, and there he continued three weeks or a month; he was then removed to the Strong Room: I saw Acton and his two servants there.

Mr. *Marsh.* What condition was he in?

Phillips. He was in a very miserable, deplorable condition, for he had that distemper when he went into the Strong Room; he was offensive to the rest of the people of the ward.

Mr. *Marsh.* Did you visit him in the Strong Room?

Phillips. I frequently went to him.

Mr. *Marsh.* How long was he there before he died?—*Phillips.* Ten days.

Mr. *Marsh.* Did you see him there in a good or bad condition?

Phillips. He lay in a miserable, deplorable condition.

Mr. *Marsh.* Did you make any application to Acton in his behalf?

Phillips. I had endeavoured to speak to him, but never could meet with him.

Mr. *Marsh.* How long before he died was it that you saw him?

Phillips. I saw him the night before he died.

Mr. *Marsh.* Did he make any complaint to you?

Phillips. He said, that lying in that condition would be the death of him; and said, that it was by Acton's order that he was put there.

Mr. *Marsh.* When did he say this?

Phillips. Some days before he died.

Mr. *Marsh.* Did you ever see the Strong Room washed?

Phillips. I was in the gaol nine or ten months, and never saw it washed.

Mr. *Marsh.* How long ago?

Phillips. Two or three years.

Mr. *Marsh.* Did it rain in?

Phillips. The rain did come in; I saw puddles of water in it several times.

Mr. *Marsh.* Was it fit to put any one into?

Phillips. It was a terror to every body to go there.

Mr. *Marsh.* What do you believe was the occasion of his death?

Phillips. I believe the diabetes, and lying in that manner, were the occasion of his death.

Mr. *Marsh.* Was there any other room empty, fit to put him in?

Phillips. There was a room over against his own ward that was empty. There was another room empty, and proper for any body to be put in, called the Petitioning room.

Mr. *Marsh.* Had he any marks about him when dead?

Phillips. I saw a wound, and put my fist in, which looked as if the flesh had been gnawed away.

Mr. *Marsh.* There was a ward called the Sick ward; was there room there for captain Thompson?—*Phillips.* Yes.

Mr. *Marsh.* We shall call no more witnesses, There is strong evidence given as to the fact and the Strong Room.

Acton. With humble submission to your lordship, captain Thompson was put into the Pump ward, and a complaint came from cap-

tain Thompson; I will acquaint your lordship what was the manner of it. Captain Thompson had the diabetes, and his ward-mates said he stunk, and fined him, and took his coat from him, and carried it away, and the man had not money to redeem it, or wherewithal to raise any, and desired he might go to some place where he might be in peace; I asked him, if there was any particular person he desired to be with, or if he would go into the sick ward? He said, he had rather go into the Strong Room, for if he went into the sick ward, they would fine him there again.

Christopher Gosling sworn.

Acton. I desire he may give an account of what he knows about captain Thompson.

Gosling. I was sitting at the lodge door, and captain Thompson came up to Acton, and desired him to let him go into the Strong Room; Acton said, he might go into the sick ward; and Thompson said, the men in the ward had tormented him so, that he had rather lie in the Strong Room; and Acton made answer, you may lie there.

Mr. Baron *Carter.* What did they torment him about?

Gosling. About pissing; he pissed very much there.

Mr. Baron *Carter.* What answer did Acton make him?

Gosling. He bid him do what he would.

Acton. When he was in the Strong Room, did they not use to torment him?

Gosling. Yes.

Mr. Baron *Carter.* How long did he lie there?—*Gosling.* Five or six weeks.

Acton. Please to ask him, if captain Thompson did not say he was much beholden to me.

Gosling. He said so.

Acton. Was there any anger, or any thing between us?—*Gosling.* No.

Acton. Did not captain Thompson say, he desired to go into the Strong Room?

Gosling. He expressly desired to be removed into the Strong Room.

Acton. Had he a bed there?

Gosling. Yes.

Mr. *Ward.* What do you call a bed?

Gosling. A pillow and blanket.

Mr. *Richardson.* Is it very usual for people to lie in such beds?

Robert Holmes sworn.

Acton. Please to ask, if he did not come to me from captain Thompson, and what was his request.

Mr. Baron *Carter.* What say you to that?

Holmes. He was so tormented by the ward, that he desired me to go to Mr. Acton, to desire him to let him (captain Thompson) go into the Strong Room; and I asked Mr. Acton, and he gave him leave, and offered him to go into the sick ward.

Acton. What was the occasion of his desiring to go there?

Holmes. He was so nasty, that the ward chid him, and he could lye sweet and clean in the Strong Room.

Mr. Baron *Carter.* Did Thompson come up along with you?

Holmes. He did; he was not sick at that time, but some time after he fell sick and died.

Mr. Baron *Carter.* Did he make any complaint?

Holmes. At last he did make complaint, that he was ill, but did not then desire to be released.

Acton. Had he liberty to go in and out of the Strong Room?

Holmes. He had, whenever he pleased, only some unlucky fellows locked him in.

Mr. *Ward.* Had he liberty to lie out?

Holmes. No.

Mr. *Ward.* I ask you whether Acton went with him to the Strong Room?

Holmes. I can't say he did; he gave him leave to go into the Strong Room.

Elizabeth Gosling sworn.

Mr. Baron *Carter.* How came captain Thompson to be in the Strong Room?

Mrs. *Gosling.* By his own desire; he was troubled with an infirmity.

Mr. Baron *Carter.* How do you know it was by his own desire?

Mrs. *Gosling.* I heard him say so.

Mr. Baron *Carter.* Had he liberty to go out night or day?

Gosling. He had the liberty to come in and out.

Mr. *Ward.* What are you?

Mrs. *Gosling.* My husband is a prisoner.

Mr. *Ward.* I ask you whether he has any office in the gaol?

Mrs. *Gosling.* My husband took a room before of Mr. Burleigh, and continues under Mr. Acton.

Benjamin Brown sworn.

Mr. Baron *Carter.* What do you know about Thompson?

Brown. He said, God bless Mr. Acton, for he had saved his life by putting him in the Strong Room, for if he had continued in the ward, he had died.

Mr. *Richardson.* Did he give any particular reason why he should have died?

Brown. That if he made water in the room he was to pay a quartern of gin.

Mr. *Richardson.* Did you visit him in the Strong Room?

Brown. I oftentimes visited him.

Mr. *Richardson.* Had he a bed?

Brown. He had a gaol bed.

Mr. Baron *Carter.* Had he the liberty of going in and out?—*Brown.* Yes.

Mr. *Richardson.* Was not the Strong Room a place of confinement?

Brown. Yes; but when I was a prisoner, I had the liberty of the gate, having several causes in my own right.

Mary Barton sworn.

Acton. What did you hear captain Thompson say?

Mrs. *Barton.* I heard him say that he asked

leave to lie in the Strong Room, and that he was disturbed in his own ward.

Acton. Please to ask, if he did not say, that he had rather go to the Strong Room, than come to the sick ward.

Mr. Baron *Carter.* Answer that.

Mrs. *Barton.* He said, he might have gone, if he would, into the sick ward, but he had rather go to the Strong Room, because he could be there in peace.

Acton. Had he a bed in the Strong Room?

Mrs. *Barton.* Yes, such a bed as poor people lie on, a flock-bed; it was a broad bolster, which he could lie at his whole length, and turn himself upon, such as they had in the gaol.

Mr. Baron *Carter.* Was he locked up on nights?—Mrs. *Barton.* No.

Mr. *Ward.* She is kept by Acton; she had three-pence out of every prisoner.

Mr. Baron *Carter.* She was put in by the gentlemen.

Mrs. *Barton.* Yes, or else they would have tore the gaoler to pieces.

John Bowdler sworn.

Bowdler. I was in the ward when captain Thompson went out; and the ward being uneasy with him, he said he would make interest to Mr. Acton to go into the Strong Room; and he took his bed and bedding, and went into the Strong Room.

Mr. *Acton.* Please to ask, whether Thompson told him he had made interest.

Bowdler. Thompson said, that he had asked leave of Acton, and he had granted it.

—— *Davenish* sworn.

Davenish. In the month of June 1726, I was sent into the Pump-ward to captain Thompson, and his ward-mates swore at him, and called him nasty son of a bitch. That his ward-mates were very uncivil; that he was troubled with a diabetes; and he said, he would desire Mr. Acton to let him go to the Strong Room; and the next day I saw a woman washing of it. When he was there, I asked him several times if he wanted any thing; for Mr. Wittingham said, he would relieve him if he wanted for any thing; and he said the woman of the sick ward came to him, and he wanted for nothing.

Robert Walker sworn.

Mr. Baron *Carter.* What do you know about captain Thompson?

Walker. He was carried to the Strong Room by his own consent; and asking him the next morning how he did, he said, Extraordinary well.

Mr. Baron *Carter.* Had he a bed there?

Walker. Yes.

Mr. Baron *Carter.* Did he complain of any illness?

Walker. I saw the people making game of him.

Mr. Baron *Carter.* Was he locked up on nights?—*Walker.* No.

Acton. A nurse sat up with him on nights, Mrs. Connor; she had been nurse of the sick ward.

Benjamin Johnson sworn.

Mr. Baron *Carter.* What have you to say to Thompson's consenting to go to the Strong Room?

Johnson. I spoke to him two days before he went there; and he said, he should be glad if Acton would grant him the favour of lying there.

Mr. Baron *Carter.* Had he a bed there?

Johnson. I saw him carry his bed there; and he thanked God that Mr. Acton was so good to let him lie there, for he hoped it would be the saving of his life.

Ralph Malban sworn.

Mr. Baron *Carter.* What do you know of captain Thompson?

Malban. I can say nothing, but that when I was in the ward one night I saw a great deal of abuse offered him; and the next day I asked him how he came to suffer such abuses; and he said he had a noisome distemper, and so they abused him; and in a month or three weeks I saw him again, and he then said, he had leave to get into the Strong Room, and thanked God for it.

Thomas Fletcher sworn.

Mr. Baron *Carter.* What do you know of Thompson?

Fletcher. I know Thompson had the diabetes, and that his fellow-prisoners did often reflect upon him. I was out of prison, and then came in again, and I asked Thompson how he did; he said, Very well as to his health, except as to the diabetes; and Acton had given him leave to lie in the Strong Room.

[Here the Prisoner rested his Defence.]

Mr. Baron *Carter.* Gentlemen of the jury, the prisoner at the bar stands indicted for the murder of one James Thompson. The indictment sets forth, that the said James Thompson died by duress, so that the prisoner was thereby guilty of murder.

There were several witnesses called for the king. The first was Edmund Cummins; he says, that he knew Thompson very well; that he was in the Pump-ward, and that he was put in the Strong Room, as Acton said for having the diabetes, some of the ward complaining of his being nasty; that he came out sometimes, and he saw him after he died; and he was very quickly buried; and he saw a mark upon his face. He says, that Acton did order his burial, because he was carried by those that usually carry corpse to be buried. He says, that he was resolved to stay in the ward, and would not have gone out, but Acton would not let him stay.

Matthew Brandon says, he saw Thompson in the Strong Room, and he did hear the prisoner order him to be put there. He says, that there was a complaint of the ward that he

was nauseous: that two days before his death he could not stir at all; that he had a sore place on his left side, and he says, that he complained if he should go there again it would be the death of him. He says, that Wilson and Cummins went to Acton, and they represented the condition he was in, and desired he might go to the sick ward; and Acton said to Wilson, Go about your business. He says, that there was a mark upon his nose and ear, and the wound was not so angry after his death as it was before.

Jennings says, he was not so ill when he came there, but only had the diabetes, and the prisoner ordered him into the Strong Room where he continued eight or ten days, and then came out for two days; and then was ordered back by the prisoner. He desired Acton to have Thompson removed; and Acton said, Let him die like a son of a bitch, and be damned. He said, he died the next morning, and died in this Strong Room. That the Strong Room was seldom washed, it was rough-swept; but what he means by that I cannot see: he says, that it was not dry over head.

Mary Seasband says, that he was removed into the Strong Room, and Acton gave no orders concerning him; there was some wet under him, but she does not explain from whence it came, therefore it might come from the distemper. She says, that his side mortified; that there was some disfiguration on the side of his face, it was eat by the rats. She thinks it a very strong room, and it was not a proper place to put any person in; that it was never washed; that about six in the morning he died, and was buried about ten.

Snape cannot say, whether Thompson went by his own consent or not; but that he went from the Pump-ward to the Strong Room, and staid nine or ten days, and then staid two or three days in the Pump-ward, and went back again, and staid nine or ten days both times. He says, he came in and out when he pleased. He says, that he saw his corpse, and one side of his thigh was black; he saw him three or four days before he died, and he never complained of his thigh: it was very wonderful he should not complain of it.

Eleanor Ewer said nothing to the purpose.

Bacon says, that he came in the latter end of May, 1726, and Thompson and he were in the pump-ward; that Thompson remained there three weeks, and was carried from thence into the Strong Room; that he has seen twenty rats there at a time; when he had been there ten days he came back, and staid in the Pump-ward two days, and then returned; that he had no bed, or but a little piece of one. He says, that Thompson complained of the severe usage, and that it would be the occasion of his death: but not of the sore. He says, the room was made on purpose to punish people for great crimes against the government, and Thompson told him, that it would be the occasion of his death.

Purchace says, that he saw him removed, and said he walked there; that he visited him very frequently, and the room was not washed all the time he was there a prisoner; that there was no complaint of his sore, but of his usage; he says, that it was wet, and the rain came in at top.

Wilson says, Thompson was in the Pump-ward; that he was very hearty and merry, and gave some instances of his mirth; that he was put in the Strong Room, and was in a bad condition. He gives you an account of the floor; that there was water there; that some came down from above, and some was made by Thompson. He says, that he was locked up on nights, but not on days; he went to Acton to intreat him to remove him, and he bid him hold his tongue; he told him he should die if he was not put in another place; and thereupon he went to the nurse of the sick-ward, but she refused his coming there.

He says, there was a tarpaulin put on the top of the Strong Room about a year ago, and before that the wet came in, and he believes that this was the cause of his illness and death.

Phillips says, that Thompson was troubled with a diabetes; that he was in a miserable condition; that he was in the room ten days before he died; and that he laid upon the ground all the time, and he was put there by the prisoner's order; and that he never saw the room washed. He says, that he might have been put in a better place, for there was room in the sick ward; and he might have been put in a room against his own ward, for it was empty.

Gentlemen of the jury, you will consider the state of this indictment; and that there are necessary to be taken notice of two things.

The first is, that Thompson was put in the Strong Room against his consent.

The next is, that the confinement there was the occasion of his death.

The prisoner says, that he was very far from putting him there, for he asked leave to go; so that a charge is laid upon him who never gave Thompson any offence, or used any hard words to him; therefore he cannot be so barbarous as represented.

There are eleven witnesses that he has called, who give an account of Thompson's having the diabetes, that the ward was very uneasy with him; and because he had done in the ward, what they used not to have done there, they took all his clothes away.

Christopher Gosling says, that Thompson was offered by the prisoner to go into the sick ward, and he refused, which confirms what the other witnesses say, (and then Acton bid him go whither he would,) and he said he would go into the Strong Room; and Acton said, if you go into such a room (the witness naming the room) won't that be as well. If he went into the Strong Room on his own desire, Acton is not guilty.

He says, that Thompson had a pillow and blanket, which is explained afterwards, that he could lie upon it and turn.

Holmes says, that Thompson was so tormented by the ward, that Thompson desired him to go to Acton, to desire he might go into the Strong Room, and upon that Acton gave leave; and says, that he was desired to go to the sick ward; and says, that he was not confined in the day-time, unless he was bolted in by his fellow-prisoners, that had played the rogue with him.

Elizabeth Gosling; she gives an account as her husband did; that Thompson owned how friendly the prisoner had been to him, and that it was so far from being looked on as a punishment, that it was a matter of favour thought by Thompson to be there.

Brown says, that he talked with Thompson, and Thompson said, God bless Acton, he had saved his life, for if he had stayed any longer in the ward, he should have died; and says, there was a bed there.

Barton; she heard the captain say, that he asked leave to go into the Strong Room, being quiet and easy to be there; and that he had rather be there, because he was always at ease.

Bowdler says, that the ward was uneasy; upon which Thompson made interest to go there, and took his bed and bedding, and asked leave of Acton to go.

Davenish says, that the people of the ward came for him, and he saw him carried quite through. He goes into the Strong Room, and asked Thompson, how he came to be there; and he owned, by the civility of Acton that he was there. He says, that Thompson had a bed, and that he went out and in when he pleased.

Johnson says, that Thompson said, that he thanked God that Acton was so good to let him be there.

There were two other witnesses, who spoke to his asking leave.

Gentlemen, now you will consider how the two evidences tally, and what injury there was done to Thompson.

For the king, they say, that he was put there without, and against his consent; and for the prisoner eleven witnesses say, it was with his consent. If you should be of an opinion that it was without his consent, then it deserves another consideration; but if you should be of an opinion that it was with his consent, then there must be an end of this.

In the next place, you will consider in relation to the distemper. As to the diabetes, some have said on one side, that they looked upon it to be mortal, and that he never complained. It is very observable, that he never should complain.

In the next place, they tell you, how he caught it, by lying upon the bare boards. Some of the witnesses for the king say, he had only a sort of a bed; and eleven witnesses for the prisoner say, he had a bed; and if he had, he did not lie on the ground, and could not have the distemper from lying there; it was impossible.

The third part is, whether he was a prisoner in the Strong Room? You have heard, the witnesses for the king all agreed that he went out on days, though he was locked up on nights.

The witnesses for the prisoner all agree, he went out on days, and he was not locked up on nights.

As to his going to the sick ward, the witnesses say, that Acton ordered it, and he refused to go.

If this place gave him the distemper of which he died, and if he went without his consent, you will find the prisoner guilty; but if he went out and in when he would, in consequence, he was not confined there; there is no reason to find him guilty.

When he asked leave to go to the Strong Room, the prisoner gave it in a very humane manner, and gave him his choice, to go there, or into the sick ward.

Upon the whole I must leave it to you.

The Jury agreed upon their Verdict immediately, without going out of court.

Cl. of Arr. Gentlemen, are you all agreed in your verdict?

Omnes. Yes.

Cl. of Arr. Who shall say for you?

Omnes. Foreman.

Cl. of Arr. William Acton, hold up thy hand. (Which he did.) Look upon the prisoner, how say you; Is he Guilty of the felony and murder whereof he stands indicted, or Not Guilty?—*Foreman.* Not Guilty.

Mr. *Strange.* The prisoner, my lord, has been very much fatigued, and desires, upon paying his fees, he may be now discharged.

Acton. My lord, I desire you will discharge me now.

Mr. Baron *Carter.* I can't comply with your request.

Mr. *Strange.* Mr. Paxton, speak to the judge. [Upon which Mr. Paxton went out of court.]

Mr. *Strange.* Mr. Oglethorpe, I desire you will interfere, and speak to the judge, and that you'll give your opinion. Pray speak, pray tell whether you consent.

Mr. *Oglethorpe.* Were I prosecutor, I should desire the prisoner might be released; not that I think him innocent, but that every Englishman, let him be never so unjustly acquitted, hath, by the Habeas Corpus act, on his acquittal, a right to be discharged; nor can any subornation of perjury, or any management of a jury, prevent it, for they are cognizable at another time.

[There being then a great noise in the Court, interrupted his speaking for some time, and as soon as it ceased, he went on again.]

As I said before, I am not the prosecutor: if I were, I knew what I should have done. The Attorney General was ordered to prosecute by the crown: and it is he, or his representative, that should answer this question, and not I; and since I am speaking, I desire to be in-

dulged a word more, that I may tell the reason of my coming here.

Having had the honour of being one of those gentlemen who were appointed to enquire into several matters, some of which have been this day under your consideration; not knowing, therefore, what questions might arise, for the clearing up of which I might be necessary, I thought it incumbent on me to attend.

I have had nothing to do in conducting the prosecution here, which has appeared evidently; therefore I can't imagine why any application should be made to me.

DOMINUS REX *versus* ACTON.

Michaelmas Term. 3 Geo. 2.*

The Defendant was deputy-keeper of the Marshalsea-prison; and upon the Address of the House of Commons, was prosecuted for several murders, supposed to have been committed by him on prisoners in his custody. He was tried on four several indictments, whereon the only question was, Whether a place within the prison, called the Strong Room, was a proper place to confine disorderly prisoners in? And the jury upon all the four trials acquitted him, to the satisfaction of almost every body; and in consequence of these acquittals he was discharged. Presently after he was at liberty, a single justice of the peace, upon information of a fifth person's having been put into the same Strong Room, and dying within a year after, thought fit to commit the defendant again for murder; and upon a Habeas Corpus, Strange pro Def. moved he might be admitted to bail, on producing copies of the informations, and affidavits of the former trials, and of the identical nature of the offences; but the Court refused to look into the informations, though they were pressed with the lord Mohun's Case, Salk. 124, where they looked into the depositions taken by the coroner, upon a motion to bail: And, in the present case, they remanded the defendant; who lay in prison till the next assizes; when the grand jury did him the justice to return the bill Ignoramus, and he was discharged.

* Sir John Strange's Reports, vol. 2, p. 851.

486. Several Proceedings relating to the bailing Mr. BAMBRIDGE, both at the King's-Bench, and at the Sessions-House, in the Old-Bailey, previous to his Trial for Felony:* 3 GEORGE II. A. D. 1729.

At the King's-Bench, June 7, 1729.

THIS morning Mr. Bambridge was brought by Habeas Corpus from Newgate to the Court of King's-bench. The Habeas Corpus, and the return, which contained the several matters, wherewith he was charged, were read, viz. 1. A Commitment by the honourable House of Commons, for many Barbarities, Cruelties, and Crimes, in the execution of the office of Warden of the Fleet. 2. An Indictment for the Murder of Mr. Castell. 3. A Charge of Felony for stealing goods.

The prisoner's counsel moved the Court, that he might be admitted to bail; for that as to the first of the said commitments it was ended by the expiration of the sessions of parliament; as to the second, the prisoner upon a fair trial, had been acquitted; and as to the third, it was a charge brought in upon the prisoner, on his being acquitted of the murder, and no bill of indictment either found, or offered to the grand-jury, though they continued sitting till the day after the trial; and more especially, was it reasonable to admit him to bail, for that by a late act of parliament, he is obliged, on the pains and penalties of felony, forthwith to make out true and perfect lists of all the prisoners in the Fleet, till June 14, and to give up all securities, &c. which it was impossible for him to do, without having his liberty to go to the Fleet, to inspect the books, and examine the officers there; and eight persons being ready to become his sureties, whereof notice was given; therefore, it was hoped the Court would admit him to bail. The king's counsel alledged that the crime which the prisoner stood charged with, on oath, was felony, without benefit of clergy: that, as to what was said of the prisoner's being liable to the pains of death, in case he refuses or neglects forthwith to make out the said lists, &c. the said word 'forthwith,' in this case, imports a convenient time, or as soon as is reasonable; and therefore, on behalf of the king, they hoped he should not be admitted to bail. The Court were of opinion, that as this case is circumstanced, there were not sufficient reasons to admit the prisoner to bail, the crime he is charged with being capital; and one of the king's evidence being out of the way, the last day of the sessions at the Old Bailey, the bill against him was not preferred, and the Court there having ordered the prisoner's detainer till next sessions. The Court also declared their opinion, that in case the prisoner, to the utmost of his power, complied with the act of parliament, in delivering such lists, &c. he would be no way liable to the penalties thereof; in the end he was remanded to Newgate.

* See the preceding and following Cases.

DNS. REX *ver.* BAMBRIDGE.

At the Sessions of Oyer and Terminer, and gaol delivery, held at Justice-hall, at the Old Bailey, on the 9th day of July, 1729, before sir Robert Baylis, knight, lord-mayor, and others his majesty's justices.

The Solicitor for the Crown not being ready to try Thomas Bambridge, who stood indicted for felony; the king's counsel did not attend till the 9th of July, the 1st day of the sessions; when lord chief-baron Pengelly, being ill, was out of town; and Mr. Justice Reynolds being obliged to go the circuit; there were only on the bench, sir William Thompson the recorder, and Mr. Serjeant Raby, the deputy recorder.

When Mr. Bambridge was brought from Newgate to the Old Bailey, he petitioned the Court, that he might be either tried, bailed, or discharged; and that in the mean time he might, under the custody of the keeper of Newgate, be permitted to go to the judges chambers, to inspect the bail-books, and commitments, to enable him to perfect the lists of all his prisoners, which the present warden had demanded; and which by a late act of parliament he is obliged to deliver, on the pains of felony without benefit of clergy; and the judges going their circuits on Monday next, his petition set forth, that it might be too late for him, after the end of the sessions, to inspect the said books. The Court were pleased to record the petition, and to grant the first part of it, viz. That he should either be tried, bailed, or discharged; and as to the other part of his petition, declared that he could not incur the penalties in the said act, if he did the utmost in his power to perfect the said lists.—And next day, (July 10,) Mr. Bambridge, who had petitioned the Court to be tried, bailed, or discharged, was indicted, together with James Douglas, and William Pindar, (his accomplices) for breaking open the door, and feloniously stealing the goods of Mrs. Berkley, a prisoner in the Fleet; when the grand-jury found the bill against them all; whereupon Douglas and Pindar absconded.

And on 12th July 1729, being the last day of the sessions,

Thomas Bambridge (being before arraigned) was brought to the bar, to be tried for the felony whereof he stood indicted; when sir William Thompson spoke as follows:

Sir *William Thompson.* As I have the honour to be a member of the House of Commons, and as this prosecution was ordered by Address from the House of Commons, it may be objected by the prisoner, that I am both a prosecutor and judge.

Bambridge. I have no personal objection to your trying me; but as you are a member of the House of Commons, I have long had a regard for you, and I beg I may not be understood as having any personal objection to you; but I beg no person belonging to the House of Commons may have any thing to do with it.

Sir *William Thompson.* Mr. Attorney, you see the prisoner thinks me not a proper judge to try him.

Att. Gen. I apprehend it is not a legal objection; I believe it has frequently happened, that members have sat as judges, where prosecutions have been ordered by the House of Commons.

Sir *William Thompson.* He may not think me divested of partiality; it may be thought in me a remote objection, but I would avoid lying under any imputation of partiality.

Att. Gen. I don't say it is not a legal objection; as the prisoner does insist upon it, it is not right in me to insist upon your trying him; but if you do not think proper to try him, for the sake of the prosecution, and the solemnity of it, I hope the trial will go off till a judge is here: but I am told there is danger that some of the witnesses may be gone out of the way; and as witnesses are the most material in all trials, I should be glad of its coming on as soon as possible.

Sir *William Thompson.* I will tell you how that matter happens; there is not a day next week, that my lord-mayor is not engaged in business; suppose it should be put off till Monday se'n-night, some of the judges may be come home from their circuits on Saturday night; the sessions shall be adjourned on purpose; there shall be all the care in the world to support the prosecution. As this matter does happen, and the prisoner still insists upon it, let it be Wednesday or Monday se'n-night.

Att. Gen. I believe Monday will be the properest day; lord chief-justice Eyre, and baron Carter, may be in town then.

Sir *William Thompson.* He sees the inconvenience; if he will wave the objection, I am ready to try him, and he shall have all the indulgence the law will allow; I do it not to wave the fatigue; and as for Mr. Serjeant Raby, he is not well, he has had an ill state of health for some time, and is not able to try him.

Att. Gen. If it goes off to Monday seven-night, it may be put off till next sessions; therefore I should think it better for the prisoner to be tried now: I don't desire him; it shall be voluntary in him.

Bambridge. I insist upon the objection.

Att. Gen. Pray let it be on Monday seven-night.

Sir *William Thompson.* It is the Attorney's desire, that it may be adjourned till Monday seven-night.

Bambridge. The trial I went under last sessions, for the murder of Mr. Castell, met with false representations in the papers; therefore, rather than run any hazard of a misrepresentation, I desire it may be adjourned to the time Mr. Attorney mentions.

Sir *William Thompson.* What was inserted in the papers I have nothing to say to.

Bambridge. If things were misrepresented then, they may again; and I have suffered so much in my character under such misrepresentations, that I ought to be cautious how I conduct myself.

Then the Court was adjourned to Monday seven-night.

July 21, 1729.

Proclamation was made for information.

Cl. of Arr. Set up Thomas Bambridge. (Which was accordingly done, and the indictment read in English.)

Sir *William Thompson.* This matter was put off till to-day (the prisoner having thought fit to object against me), in expectation that some of the judges would come to town.

My Lord Mayor has sent to those in town, and they sent word, that it would not be convenient for them, being fatigued with the circuit.

Att. Gen. Mr. Serjeant Cheshire and myself are ready, and the king's witnesses are ready.

Sir *William Thompson.* I have had the objection in my mind; and the more I consider of it, the more I think it will be very improper for me to try him. I know no instance, no parallel.—There was an act passed last sessions of parliament, to which I was a party; the prosecution was ordered by Address from the House of Commons, to which I was a party; and it does remain a scruple with me, that it does not become me to try this man.—The trial must be put off till next sessions.

Lord Mayor. The judges sent word, that they were so fatigued with the assizes, that their health would not permit them to attend.

Att. Gen. I have been here twice: next sessions is the 27th of August; I must be out of town, and cannot be able to attend the trial.

Serj. *Cheshire.* I shall be 150 miles out of town at that time.

Sir *William Thompson.* The sessions you don't usually attend; I wish it was otherwise: if you can tell me of any case where a judge acted as prosecutor and judge, I will try him.

Att. Gen. I can't recollect any precedent; but the Court of King's-bench grants informations, and tries the cause after.

Sir *William Thompson.* After the Court of King's-bench grants informations, they hear both parties. Whoever reads the act passed last sessions, if I had tried him, would say I was not impartial.

Att. Gen. If it is a scruple the prisoner makes, he cannot be discharged.

Sir *William Thompson.* The trial must go over; it must take its fate. Mr. Allen, take care of the prisoner.

At the Old Bailey, Aug. 27, 1729.

Dns. Rex *ver.* Bambridge.

Mr. Conningsby attended on behalf of the crown, and made a motion to put off the trial of Thomas Bambridge till next sessions; but the Court did not think fit to enter into the argument then, and deferred it till the 29th of the same instant.

August 29.

Mr. *Conningsby.* I am of counsel for the king, my lord. I have an humble motion to make to the Court, that the trial of Mr. Bambridge may be put off till the next sessions; and when I ask this, it will be necessary to assign some reason: the last time I made the motion to the Court, your lordship was pleased to determine, that the prisoner was not in the meaning of the Habeas Corpus Act, as he waved being tried himself; and therefore it is discretionary in the Court what they will do in this matter, as the trial was before put off by the prisoner's concurrence. My lord, the king's counsel being out of town, or upon the circuits, is one reason; but I don't barely insist upon that; for I have an affidavit, that a material witness for the king is absent, and can't be found; that he has absconded for debt; but that we shall be able to have him by next sessions, though not now; I submit it upon that.

Then the affidavit was read, which was to the following effect:

"Nicholas Comer maketh oath, That he had sought after Gifford Lane, formerly clerk to Mr. Gybbon, late deputy warden of the Fleet, to serve him with a subpœna; but could not find him out, because he has absconded for debt; but believes he shall find him by the next ensuing sessions; and that it was not safe to proceed to trial without his testimony, &c."

Mr. *Conningsby.* I hope, upon this, my lord, the trial will be put off.

Mr. Just. *Probyn.* While Mr. Wynn is speaking, I desire I may look over the affidavit.

Mr. *Wynn* (Counsel for the Prisoner). My lord, I hope the reason given is not sufficient to put off the trial: I will not mention now the long time that he has been kept in prison, it is so fresh in memory.

As to the absence of the king's counsel, there is no occasion for them, as that learned gentleman is present; and I humbly apprehend, that can be no foundation to put the trial off.

The next argument is founded upon the affidavit of Nicholas Comer, That he had not been able to find Lane; and that Lane was a material witness for the king: what foundation he had to believe Lane a material witness does not appear; and it is very easy to seek for a man where he is not to be found. The other day, my lord, there was nothing then pretended but the first part of the motion; and Mr. Paxton himself will own, that he could assign no other reason than the absence of the king's counsel; and, I presume, as your lordship would not allow that as a sufficient reason then, I hope you will not now. At the latter end of a sessions no affidavit, they themselves are conscious, can have any weight.

They supposed that your lordship would hardly enter into it now, and, for that reason, have very artfully spun it out: I called upon them then to give a reason for putting the trial off. Why was there not a proper application yesterday? The affidavit would have been filed, and the prisoner would have had a proper opportunity to give evidence as to the character of Comer; and if any thing is to be presumed,

your lordship will presume it in favour of the prisoner,

I will not take up any more of your lordship's time; but humbly insist, that your lordship will proceed upon the trial, or admit him to bail.

Mr. Conningsby. The learned gentleman, my lord, insinuates, that we searched for Lane where he was not to be found: the affidavit sets forth, That Comer searched at his place of abode, and at other places, where it was thought he was likely to be. We do take upon us to say, he is a material witness: if we swear falsely, that lies upon us to answer; and, I apprehend, the crown would be no more surprised than the prisoner.

Bambridge. As to Lane's being a material witness, if you look upon the indictment, you'll not see him upon the back of it.

Mr. Paxton. That's not to the purpose; for we seldom put the most material evidence on the back of the indictment.

Bambridge. I beg leave, my lord, to mention one circumstance, which is notorious, and now publicly talked of: there was one gentleman of the grand jury, who was very solicitous to the rest of his brethren to find this bill, has laid violent hands upon himself for the injury done to me.

Mr. Just. Probyn. That is not to the purpose.

Bambridge. He has not sworn to Lane's place of abode.

Mr. Paxton. There is one remarkable circumstance, that the Court was adjourned for several days, that the prisoner might have a legal trial, and it went off upon the prisoner's account.

Bambridge. I am surprised Mr. Paxton should say that; I did not speak one word that day. I have in writing what was said, which there is one ready to swear to. [Which he read over.]

Mr. Just. Probyn. That relates to the prayer of the Habeas Corpus Act.

When people are in custody a considerable time, without some particular reason, they should be discharged.

One of the reasons always admitted, is the want of evidence for the prosecutor: if endeavours have been used, and they cannot be had, that always is a sufficient reason. As to the affidavit, it is not so strong as usually is made upon such occasions: it says, that he was concerned for the prosecutor; but it don't appear how he was concerned. He says, that he had made enquiry at Mr. Gybbons's house, but don't say that he ever lodged there; but goes on and says, that he enquired at several other places where it was likely to find him; but don't say he lodged at those places. Why won't you consent that the prisoner should be bailed?

Mr. Conningsby. I don't know what service it will be to him.

Mr. Wynn (afterwards Serjeant). I am surprized that any thing should be mentioned about the appeal, which is a private cause.

Mr. Conningsby. I mentioned nothing of the appeal now.

Mr. Wynn. You did the other day.

Mr. Baron Comyns. As, on the one hand, care should be taken that the prosecution should be so carried on, that the person guilty should be punished; so, on the other hand, it should be carried on with such speed, that no person should be longer confined than necessary. It does appear, by the concessions on all hands, that the prisoner has continued in prison ever since May last: though, by the waver of not being tried, he is not intitled to his discharge, yet he ought to be considered as to the length of time he has continued in prison; unless you can show any disadvantage to the crown, if he is admitted to bail. If it secures the liberty of the subject, on the one hand, we shall take care on the other, that the bail shall be so sufficient, that he may be amenable to justice.

Mr. Paxton. The trial was put off upon Mr. Bambridge's own motion.

Mr. Justice Probyn. He ought to be admitted to bail. Mr. Bambridge, have you bail ready?

Bambridge. I can't say I have this instant; but if it is your lordship's pleasure to order bail, upon giving notice to the solicitor for the crown, I'll get them ready.

Mr. Just. Probyn. Give the names of the bail as soon as conveniently you can; for it should be done in court.

Mr. Wynn. Can you undertake to get them ready in two or three hours?

Bambridge. I have two or three ready in court now.

Mr. Wynn. What sum, my lord, shall they be bound in?

Mr. Paxton. I desire, my lord, they may justify in a particular sum.

Mr. Just. Probyn. He shall enter into a recognizance himself of 2,000*l.* and the bail 1,000*l.* a-piece.

Mr. Paxton. I should have an opportunity to enquire into their circumstances.

Mr. Williams. You know me.

Mr. Paxton. I know you to be a tradesman in Long-acre; but don't know what you are worth.

Mr. Just. Probyn. You that are here now may justify: you say you know one of them; only want to be satisfied as to his circumstances.

Mr. Wm. Beatniff (coachmaker in High-Holborn). I am ready, my lord, to justify.

Mr. Just. Probyn. Is he sworn?

Mr. Tanner. Yes, my lord.

Mr. Just. Probyn. Mr. Beatniff, are you worth 1,000*l.* when all your debts are paid?

Beatniff. I am, my lord.

Mr. Just. Probyn. Is Williams sworn?

Mr. Tanner. He is.

Williams. I cannot swear to 1,000*l.*; but I will swear to 500*l.*

Mr. Just. Probyn. Are you worth 500*l.* when all your debts are paid?

Williams. I am, my lord.

Bambridge. There is one of the serjeants of the compter has offered to be the other.

Mr. Justice *Probyn.* Let him be sworn.—Titus Parker, are you a house-keeper?

Parker. Yes.

Mr. Just. *Probyn.* Are you worth five hundred pounds, when all your debts are paid?

Parker. I am, with my place.

Mr. Just. *Probyn.* I have nothing to say how you make it up; but I ask you, whether you are worth 500*l.*, over and above what is necessary to pay your debts?

Parker. I really believe I am.

Mr. Just. *Probyn.* That is not enough for you to say.

Upon which he would not swear otherwise, and withdrew; and Mr. Bambridge was directed to get another.

Saturday, August 30, 1729.

The Calendar being called over, Mr. Bambridge was brought to the bar.

Bambridge. The person that I did propose for the third man, I cannot have while the Court is sitting, for he is out of town.

Serj. *Raby.* Then you can't comply with the whole.

Bambridge. I can't now; therefore I desire I may be referred to the lord mayor to take the bail.

Mr. *Harbing.* The third person was just now in town; I saw him with an agent of Mr. Bambridge at Fleet-ditch.

Bambridge. My lord, Harbing is one in the conspiracy: I shall have you, and Comer too, by-and-bye.

Harbing. That audacious front of your's will do you no service.

Serj. *Raby.* You say you can't be able now to comply; you can't give security now; and you desire it may be referred: Whoever takes that authority upon them, will do it by the order of the Court. Let it be referred to the Lord Mayor, and any two of the aldermen upon the rota. When do you propose to give in bail?

Bambridge. I propose on Tuesday morning.

Serj. *Raby.* Let it be Wednesday, and give three days notice: it will be better for you; for the Solicitor for the crown may say that he had not sufficient notice, and that may delay you.

Lord Mayor. You may attend me on Wednesday morning at ten o'clock. Take care to give Mr. Paxton notice.

On September 9th, he was bailed before the Lord Mayor and Court of Aldermen, at Guildhall, for the felony of which he stood indicted; having given sufficient sureties for his appearance at the next sessions at the Old-Bailey; though he was continued a prisoner in Newgate, being charged on an appeal for the murder of Mr. Castell.

DNS. REX *versus* BAMBRIDGE, At the Old Bailey, Oct. 20, 1729.

The said Thomas Bambridge being brought to the bar (the king's counsel not being then in Court), proclamation was made for information.

Cl. of Arr. Thou the prisoner at the bar, these men that thou shalt hear called, and personally appear, are to pass between our sovereign lord the king and thee, upon the trial of thy life and death; therefore, if you challenge them, or any of them, your time to speak is as they come to the book to be sworn, before they are sworn. [Then part of the pannel was called over, as follows:]

Cl. of Arr. Robert Johnson.

Johnson. Here.

Bambridge. I object to him. I am surprised he should be summoned: He was a prisoner in the Fleet, and was cleared by the late Act of Insolvency; and so are half of the persons that are now summoned.

Officer. I took the best care I could.

Bambridge. These ought not to have been upon the pannel: I am ready to be tried by any twelve honest and indifferent men.

L. C. J. *Raymond.* I don't know how this matter is; if you have any just cause, you may challenge any of them.

Cl. of Arr. John Lewis. (Who answered, and was sworn.)

Bambridge. Half of them were prisoners.

Mr. *Matthews.* Have you any other pannel?—*Officer.* There is another pannel.

Cl. of Arr. William Berry (not here).

Cl. of Arr. John Fowler (answered, and was sworn.)

Cl. of Arr. Richard Evans.

Richard Evans. Here.

Cl. of Arr. Look upon the prisoner.

Mr. *Kettleby.* Let the prisoner look upon him, to see if he knows him.

Then the King's Counsel came into Court.

Serj. *Cheshire.* My lord, there is a witness, that is to go through the whole cause, one Turner, who is very ill; and we shall have an affidavit presently, that he can't without peril of his life, come out. He was here on Friday, and this is the act of God: Three or four times the king's counsel have attended, and hoped this would have been the last. It is our duty to acquaint your lordship, that he goes through the whole cause: We are very sorry it has so happened; but we cannot try it, unless we are to try the cause without this witness.

Att. Gen. It is impossible for us to go on without this witness; this accident is what we did not meet withal till the Court was sitting; there is a messenger sent, and an apothecary, to desire him, if possible, to come in any manner, in a chair, or otherwise; if not, we shall lay before your lordships, by affidavit, the condition he is in, when the apothecary comes. This witness is the most material in the cause; it is impossible to charge the prisoner, or try the cause without him. The witness was here on Friday, and there can be no inconvenience to the prisoner, for that in regard to this indictment he is bailed; he is not in the same case where he

would be kept in custody; but if that was the case, it is a sufficient cause to put off the trial, supposing he was not upon bail. I have attended here several times, and should be glad to have done with this attendance.

L. C. J. Raymond. I can't say any thing to it till the affidavit comes.

Bambridge. I did not hear one word that that gentleman said.

L. C. J. They have alleged, that a material witness, that goes through the whole cause, cannot with any safety to his life attend. There is no affidavit come, so it cannot be taken notice of till it does, and they say it cannot be any inconvenience to you, because you are already bailed. I wish you hear me, for I am hoarse.

Bambridge. My lord, I do hear you; this cause has been depending ever since May last.

L. C. J. You have no occasion to take notice of that.

Bambridge. I don't know but this witness is one of the people maintained in the Fleet at board wages. It has been put off already several times, and your lordship knows, I surrendered on Friday to take my trial.

Att. Gen. It was not our fault it was not tried in July last, we had all our witnesses then ready.

Mr. *Strange.* An honourable gentleman made the objection, then upon the bench.

Att. Gen. I must observe that the prisoner insisted upon it himself.

Bambridge. I am very sorry, so weak a stratagem as this is made use of to put it off.

L. C. J. Have a little patience till the affidavit comes, I cannot say any thing to it till then.

Bambridge. I have had a great deal of uncommon sufferings in this cause.

L. C. J. That is nothing to me, I can't say any thing to it; I am here only to try the cause.

Bambridge. I have brought a gentleman, Mr. Holder, one hundred miles, and this trial being put off from time to time, the expence is so great, that it is enough to ruin any man.

L. C. J. You must stay till the affidavit comes.

Serj. *Cheshire.* This witness swears to the stealing the goods.

Then Mr. Bambridge went from the bar, and the court waiting some time, Mr. Paxton produced an affidavit, which the parties swore to in court.

Att. Gen. I believe you should bring the prisoner to the bar. (Which was done accordingly.)

Serj. *Cheshire.* Now the affidavit is come, there are three witnesses, though I mentioned but one. Now it appears, from the evidence of three persons, that there is another person, a prisoner in the Fleet, that cannot come; he has had a violent fever, that fell into one of his thighs, and caused a dangerous wound to be made, six inches in length and three in depth.

Att. Gen. My lord, we pray the affidavit may be read, (which was accordingly done,) and is to the following effect:

"James Current, surgeon, —— Goodacre, apothecary, Nicholas Comer, severally make oath, each for himself; and James Current saith, "That he hath attended captain John Lillingston about fourteen days last past, and that he was seized with a violent fever, which fell into his thigh, and occasioned a tumor, which was forced to be laid open; and Lillingston now lies dangerously ill; that the wound is six inches long, and three deep, and he cannot be brought out without manifest danger of his life.

"Goodacre; he swears that he has been to visit John Turner, and that he found him violently ill of a pleuretic fever, and he cannot be brought out of his lodging without danger of his life.

"Nicholas Comer; he says he was employed by Mr. Paxton, and he is well acquainted with John Turner and John Lillingston, and is well acquainted with their affidavits, and says, that they are very material witnesses, and it is not safe to proceed to trial, without the benefit of their testimony; and that Turner did attend on Friday, though he was then ill."

Att. Gen. We that are counsel for the king, cannot oblige the attendance of witnesses; we cannot keep them in health; I should have been very glad to have went on with the trial; what has been one of the means of putting it off, was the prisoner's insisting upon an objection, that was made by an honourable person, then upon the bench. The affidavit is so full, that I need not trouble your lordship with any observations upon it. The course of all courts is upon such an affidavit to put off the cause, and it is not safe to go to trial without this witness. By my brief we cannot safely proceed, for the prisoner was committed upon the affidavit of Turner.

Sol. Gen. I apprehend, that what we apply for, is so reasonable it will be granted.

L. C. J. The affidavit is sworn by three witnesses.

Mr. *Kettleby.* I am counsel for the prisoner. In cases of felony, counsel may be assigned for the prisoner upon motions, but not upon trials.

L. C. J. I allow it to be so, you may go on.

Mr. *Kettleby.* I hope the trial will not be put off at this time; this is so small a matter to object, to put off the trial; they don't mention when they first came to the knowledge of this: If they came to the knowledge of it so soon, that the defendant might have had an opportunity to send people to view the persons ill too, then this affidavit is not sufficient.

L. C. J. He was here on Friday.

Mr. *Strange.* It is not said in the affidavit, that he was subpœnaed, he might attend as a hearer.

Att. Gen. None of us knew it till just now. He don't lie in prison upon this; he is confined upon the appeal.

Mr. *Kettleby.* He has an iron knocked off one leg, and ready to be put upon the other.—And if this holds him, he may be continued for ever. I submit to your lordship, that they must give notice to put off the trial, if it is to be put off; they don't say whether they knew of this cause before, or not; Mr. Attorney said, he did not know of Lillingston's being ill.

Att. Gen. I knew Lillingston's being a witness, by my brief.

Mr. *Kettleby.* They should have set forth in the affidavit, that they did not know of the illness till this morning, and that they did not know it before: If that had been the case, it had been some excuse; besides, the jury has been charged with the prisoner; the attorney did not come in so soon: he has made an objection against the pannel, before the king's counsel came in; they said they were to have an information, of the disability of one witness. Now there are two ill, without saying when they first knew of their disability.

Comer says, that he was employed under Mr. Paxton, and he knows they are material witnesses. If Mr. Paxton had given it upon oath, that they were material witnesses, I should have believed it; I don't know from whence Comer comes, I do not see it in the information; he says, that he is acquainted with them, therefore concludes, they are material witnesses. I must submit it, if they are material witnesses or not; it is an easy matter to get three or four people, may be clerk's clerks, to swear, that they are material witnesses, who I have no reason to believe had sufficient reasons to ground their belief upon that they were material witnesses; should we not have had some information before? Perhaps the prisoner might have sent one to visit these people, who might have swore, that they were as able to come, as these say they were unable; and I humbly beg leave to say that the affidavit is not sufficient. Besides, there is another reason, why it should not be put off, he is surrendered by his bail to take his trial, and we do not know that they will stand again.

Att. Gen. They must stand till they are discharged by the Court.

Mr. *Kettleby.* They have not so much as given notice to stand again, he has not had so much as an opportunity of asking; I hope he may be tried, or else the consequence must be, that he must lie by till December, and then somebody else may have a broken leg.

Mr. *Wynn.* I can't pass over this affidavit, without making one observation; I shall not call it an affected delay, though it looks exceeding like it. The affidavit last sessions was not shewed the beginning of the sessions, that he might have had an opportunity to answer it, but the last day of the sessions; I am sure then it looked like an affected delay. The affidavit was then not looked upon to be sufficient; the objection then to Mr. Comer was, that he was no solicitor. Is a person sufficient to swear to witnesses being material, that has only served a subpœna? Mr. Paxton is the only person that has appeared as a solicitor. Another thing that is pretty extraordinary is, that the bail is discharged; there may be no render, but the gaoler will hardly part with him without fresh bail.

I should be glad to know, if the gaoler will give liberty for him or no; I would not add more to your lordship's trouble; but as this case is, there is no manner of reason to put off the trial.

Mr. *Strange.* I am counsel of the same side, and I must observe to your lordship, that this affidavit is not sufficient as to the inability or materialness of the witnesses; as to the first it appears, that they must have had fourteen days time to have made this enquiry, as to Lillingston; and though they pretend to say Turner was here on Friday, they do not say Lillingston was; they could have gone on without this Lillingston then, for it does not appear that he was here on Friday last.

That if it had suited the convenience of the Court to have gone on on Friday, they must have gone on without Lillingston. There is a great ambiguity in the affidavit; it says, that the tumour had been laid open, and that he had a hole in his leg, and lies in the Fleet, and that Lillingston positively cannot be brought out. Really, as to Lillingston, he has fallen in very particularly; the objection arose as to him above fourteen days ago, and they might have applied to the Court in time, so he ought to be laid out of the case, and he is to be laid out of the case.—It is sworn as to the other, that he was out on Friday: but whether he was subpœnaed or not, is not sworn. As to their indisposition, the apothecary only swears, that Turner was ill of a pleuretic fever; but I submit it, whether they must not swear positively, that he cannot come out. I dare say, there is no such witness wanted. I take notice of this, to shew that when they come to speak of Turner, they cannot speak so full as they do to Lillingston. Comer says, that it is not safe to go to trial without this witness, but he don't say whether it is safe to proceed to trial with; I don't know whether the trial is safe, if he was tried upon this witness. Here is the solicitor for the crown, to be sure he knows the secrets of the cause, if this man is so material a witness, he ought to swear to it: We ought to have the best account we can; and now we have not the best account, because the solicitor for the crown does not take upon him to swear to the fact. It is not made out that they are so material that they can't go on without them; nor does it appear, that they are so bad as not to be able to come out; though Mr. Attorney is pleased to say, that it cannot be any injury to the prisoner, for that his bail must stand; I don't believe the keeper of Newgate will venture to let him go out without fresh bail, and whether that bail will stand or not, I don't know.

Bambridge. On the 8th of this instant, I served notice on Mr. Paxton, that I would surrender myself on Friday, to take my trial, and

it is fourteen days since Lillingston has been so ill: this is an indictment for stealing the goods of one Mrs. Berkley, who has lately declared that she is not concerned in the trial. As to Comer, who has made the affidavit, he is a common Ubiquitarian, and if I am to be confined upon his affidavits and Harbing's, and the rest of the conspirators, I shall be kept in gaol to the day of judgment; and it is such an expence, it will ruin any one. I am under a necessity to importune the Court to be put upon my trial, for there is a person come out in a chair, that is a material witness for me, that is in danger of his life, and cannot, in all probability, live till next sessions; it is Mr. John Boneham, the king's jeweller.

L. C. J. You must make an affidavit of it; I cannot mind any thing but upon oath. You have mentioned, that there has been great delays in this affair: you should acquaint the Court that it has been put off irregularly: has it not been done in this place, that the same sessions, that a man has been brought to be tried, it has been put off? This is the act of God.

Bambridge. They should have set forth the time when they were taken ill.

Att. Gen. There is no criticism in the affidavit: I will ask any of those gentlemen, whether they ever knew in the King's-bench, or Court of Exchequer, the times mentioned?

Mr. *Strange.* In the last instance (that they had been subpœnaed).

L. C. J. Subpœnaed is not the question.

Att. Gen. Did you ever say they were subpœnaed in an affidavit?

L. C. J. As to the merits, I know nothing of that: this is nothing but a motion to put off the trial; I don't see any thing distinguishable in it. It would be very hard for him to lie in gaol, if he was not admitted to bail.

Serj. *Cheshire.* They say, it don't appear that the man was subpœnaed: I ask any of those gentlemen, to shew, if ever they found it so in an affidavit? I was surprised when either of them mentioned it: they insist so much upon it, that they will think there is something in it at last.

L. C. J. They must say what they can for their clients.

Mr. *Kettleby.* We don't know who this Comer is: if Mr. Paxton will swear these people are material witnesses, we will give it up.

L. C. J. Has not Comer been employed in the whole prosecution, and been fully apprized of the affidavits?

Att. Gen. This is the slightest of all their objections; for they may as well desire the Attorney General to make an affidavit: the Court expects no more than that a person, acquainted with the merits of the cause, should swear that they are material witnesses. If it is done by a person to shew to the Court, that they have reason to believe that they are material witnesses, that is sufficient. He swears, that he had been employed to carry on the prosecution for felony against Bambridge, of which he is indicted, and acquainted with the informations taken upon oath. It is said, why did not Mr. Paxton swear it? May there not be two solicitors in a cause? Does it not often happen, that there is a clerk in court and solicitor concerned in one cause? Why don't they say a clerk in court should make it? We have done all that is requisite to show that they are material witnesses. He could not swear it, unless he himself had seen the informations.

L. C. J. He swears, that they cannot safely go to trial without these witnesses.

Att. Gen. He says, they both are material witnesses, and it is not safe to proceed to trial without them; and that is taking upon him to swear as much as ever was required. It is urged, that Mr. Bambridge's bail has surrendered him: supposing that he was quite out of custody, and that he gave notice that such a day he would take his trial, is that a discharge of his bail? No; his bail is bound till he is discharged by the judgment of the Court: such notice to take his trial can be no discharge. One of the gentlemen says, that there was something like an affected delay; we were ready to have tried him in July last.

L. C. J. That don't appear from you: whom has it arisen from?

Att. Gen. It might have been tried in July: there was then a tenderness in the judge, and a very laudable one; but he said, If Mr. Bambridge did not insist upon it, he would try him. When the witnesses are here, then the prisoner is for having it put off; when they are not here, then he is for having it tried.

Bambridge. That honourable gentleman caused the trial to be adjourned; and I must submit, whether it was known for a judge, that was a party, ever to try any man. What the Attorney urged before was, that the Court of King's-bench ordered informations, and then proceeded to the trial of them. As to Comer, he is not a clerk of Mr. Paxton's; he is only a Hic et Ubiquitarian.

Mr. Just. *Denton.* I am of the same opinion as my brother Raymond.

Bambridge. I will not take up the time of the Court. If this gentleman, who I before mentioned to be a material witness for me, should die, it will be greatly detrimental to me; therefore, if your lordship will let him be examined in court, and leave the ring in court, I will consent to let the trial be put off.

Mr. *Kettleby.* I should be very glad the Attorney General will take the trouble to examine him.

Att. Gen. I can't take upon me to consent to any thing particular; but must submit it to your lordship.

Mr. Just. *Denton.* Mr. Bambridge, why won't you bring your witness into court?

Bambridge. The high sheriff, he not being well, was so good as to let him be in his room; he is there, and is coming in.

Att. Gen. I never knew it done in capital cases.

L. C. J. I don't know that ever it was done.

Mr. Just. *Denton.* What do you say, that he may not live till next sessions?

L. C. J. He is weak and aged; but, if I was upon my oath, I don't see any likelihood of his immediately dying.

Bambridge. He is seventy years of age.

L. C. J. He may live 5 weeks.

Bambridge. If you will let him declare, that I bought the ring of him——

L. C. J. It can't be done. In several cases, where witnesses have been going abroad in civil causes, it has been done.

Mr. *Kettleby.* If your lordship don't consent to this, I hope the Court will indulge us in another thing we pray——

Mr. Just. *Denton.* Mr. Attorney General says he won't consent.

Mr. *Kettleby.* Whether, if you put off the trial, you won't admit this gentleman to be examined?

Att. Gen. It never has been done without consent; and I never knew it done in capital cases. I should be very tender to come to make a precedent in a capital case: I have known it done in civil cases with consent.

Mr. *Kettleby.* If this affidavit won't do, I beg leave further to desire there may be two juries.

L. C. J. Let us make an end of one thing first. We are all of opinion the affidavit is full.

Mr. *Kettleby.* I submit it entirely; and when I know your lordship's opinion, I am not only ready to give over, but am always convinced; and though Mr. Attorney is unwilling to make a bad precedent in one case, I hope he will be willing to make a good one in another. He was not here when the prisoner made his objections to the jury, to have a disinterested pannel to try him: it would be very odd to try the warden of the Fleet by a jury that came out of Domus Mansionalis; prisoners that have been discharged by the late act.

L. C. J. What would you have me do?

Mr. *Kettleby.* If it goes over to another time, I hope the sheriff will take care to have a good jury: the first pannel were most of them prisoners; I am sure the sheriff will do every thing that is right.

Sir *John Williams* (one of the sheriffs.) There is a new pannel, where this person, Johnson, is not one.

L. C. J. What do you think of the sheriffs?

Mr. *Kettleby.* I have no ill opinion of them; I would be bound body for body for them.

Att. Gen. This is the first time I heard of this objection: I don't know any foundation for it; for my part, I never trouble my head about juries, nor ever will. I take it for granted, the officer that summons them will do his duty; if he don't, the party has his legal challenge.

Mr. *Strange.* If it is so understood, that he may be let out, according to the former recognizance, we shall submit.

L. C. J. I don't see but he may be admitted to bail upon that.

Bambridge. The recognizance is here.

Att. Gen. Was it not to appear upon the party's surrendering him in court?

Cl. of Arr. It was.

L. C. J. Let me see the recognizance; don't let me do things in the dark.

Cl. of Arr. The recognizance is not returned: all that he prayed was, that the appearance might be entered.

Bambridge. The recognizance was to appear here, and not to be discharged without licence.

L. C. J. The recognizance is continued; it can't be discharged, without all the conditions are performed.

Bambridge. I did not hear your lordship before.

Whereupon the Prisoner withdrew.

487. The Trial of THOMAS BAMBRIDGE, esq. for Felony, before the Right Hon. Sir Richard Brocas, knt. Lord Mayor of the City of London, the Right Hon. Lord Chief Justice Eyre, the Hon. Mr. Justice Reynolds, the Hon. Mr. Baron Carter, the Worshipful Mr. Serjeant Raby, and others, his Majesty's Justices of Oyer and Terminer, and Gaol Delivery, for the City of London, and Gaol Delivery of Newgate, for the said City and County of Middlesex, held at Justice-Hall in the Old-Bailey, on Wednesday, Thursday, Friday, and Saturday, being the 3d, 4th, 5th, and 6th Days of December: 3 GEORGE II. A. D. 1729.*

Friday, December 5, 1729.

Proclamation was made for all persons concerned to attend.

Clerk of Arraigns. IS the London Jury here?

Officer. Yes.

Cl. of Arr. Set Mr. Bambridge to the bar. (Which was accordingly done.) You stand indicted by the name of Thomas Bambridge, late of the parish of St. Bride's, London; for feloniously stealing one feather-bed, a bolster, two pillows, two blankets, one quilt, two cane chairs, one easy chair and cushion, two stuff chairs, two tables, a looking-glass, fire-shovel and tongs, gridiron, one pair of bellows, three pairs of window curtains, China ware, value 5*l.* a head of Mecklin lace, value 10*l.* a head of Flanders lace, value 6*l.* six silver-handled knives, value 3*l.* six silver forks, value 40*s.* two tea-spoons, strainer, and tongs, four ounces of gold lace, value 10*l.* twe gold seals, one emerald, value 3*l.* five diaper napkins, one piece of dimitty, a sable tippet, value 3*l.* a piece of blue and white sattin, value 7*l.* two stone seals set in gold, value 3*l.* three silk gowns, value 6*l.* two pieces of sarsnet, value 55*s.* a garnet and other rings, with other things of considerable value, the goods of Elizabeth Berkley, on the 31st day of October, 1727.

Cl. of Arr. How sayest thou, Thomas Bambridge, art thou Guilty of the felony whereof thou standest indicted, or Not Guilty?

Bambridge. Not Guilty.

Cl. of Arr. How wilt thou be tried?

Bambridge. By God and my country.

Cl. of Arr. God send thee a good deliverance.

——Thou the prisoner at the bar, these men that thou shalt hear called, and personally appear, are to pass between our sovereign lord the king and thee, upon the trial of thy life and death, therefore if thou wilt challenge them, or any of them, thy time to speak is as they come to the book to be sworn, before they are sworn.

Then the pannel was called over, and the following persons challenged by the prisoner: Francis Nolder, John Mich. Harnick, Thomas Caddey, Henry Houghton, Jos. Hartwell, Richard Hughes, John Batler, John Hopkins, John Palmer, John Basset, Stephen Bris, William Saul.

JURY.

Richard Collier,	Jos. Collier,
Henry Clark,	John Lyddall,
John Poole,	Austin Tyer,
Edward Jones,	William Lyon,
Henry Palmer,	John Taylor,
Thomas Mallet,	Thomas Test.

Then Proclamation was made for information.

Clerk. Thomas Bambridge, hold up thy hand. (Which he did.) You of the Jury look on the prisoner, and hearken to his charge: he stands indicted by the name of Thomas Bambridge *(prout* in the indictment, *mutatis mutandis.)* And as the clerk was reading the several parcels, particularly when he came to the rings, Mr. Bambridge spoke as follows:

Bambridge. I desire to know, how many rings there are mentioned in the indictment: whether one, two, or three, or four-score.

Then the clerk did read the several rings mentioned in the indictment, and went on with reading the following part of the indictment.

Bambridge. I will not give your lordship any unnecessary trouble; but I desire the clerk may read the form of the indictment in Latin.

L. C. J. Eyre. What do you desire?

Bambridge. The whole indictment to be read, except the parcels of the goods.

L. C. J. Mr. Matthews, speak loud, when you read.

Bambridge. Is it 'vicesimo die?'

Clerk. It is 'tricesimo primo Octobris.' And then the Clerk of the Arraigns went on with reading the other part of the indictment.

* See the preceding and following Articles.

Bambridge. That is not all the indictment; I am informed, that several others are mentioned as accomplices.

Mr. *Kettleby.* There are Pindar and Douglas.

L. C. J. Mr. Matthews, have you read all the indictment? Are they mentioned?

Mr. *Matthews.* The latter part of the indictment is relating to Pindar and Douglas.

L. C. J. I have not that in my paper: you should have put it in.

Mr. *Matthews.* My lord, they are not here.

L. C. J. Read it.

Mr. *Kettleby.* You should have read it before.

Then Mr. Matthews read the remaining part of the indictment relating to them.

Mr. *Holland.* May it please your lordship, and you gentlemen of the jury, I am of counsel for the king. This is an indictment against Thomas Bambridge, for feloniously stealing and taking away several goods, the property of Elizabeth Berkley. The indictment sets forth, That Thomas Bambridge, late of London, did on the 31st of October, 1727, in the first year of his present majesty, with force and arms, in London aforesaid, in the parish of St. Bridget's, alias St. Bride's, in a felonious manner, and with an evil intent, steal and take away the goods of Elizabeth Berkley in the indictment particularly set forth, being in a certain mansion-house, where the said Elizabeth Berkley and divers others did inhabit. This is laid against the peace of our sovereign lord the king, his crown and dignity.

Serj. *Cheshire.* May it please your lordship, and you gentlemen of the jury, I am of counsel for the king. Thomas Bambridge, the prisoner at the bar, stands indicted upon the statute of the 12th of the late queen: he is charged for feloniously stealing and taking away the goods of Elizabeth Berkley, to the value of 40*s.* and upwards, out of a mansion-house, where she the said Elizabeth Berkley and several others dwelt. The evidence, in support of the indictment, will be this; that some time before the 23d of Oct. in the year 1727, the said Thos. Bambridge was deputy warden of the Fleet prison, under Mr. Huggins; and at that time the said Elizabeth Berkley was a prisoner, and lodged in the second gallery on the master's side; that some time before the first day of Michaelmas term in that October, the said Thomas Bambridge, and some other persons, viz. Pindar, Barnes, King, and Douglas, came in company together, and entered the room where the said Elizabeth Berkley was: the room, gentlemen, was furnished with very good goods: they did, gentlemen, pretend to rifle the room, and take some account of some of the goods; and a person in company did write down, about twelve lines, part of the effects; and the man did not proceed any further then; but Bambridge, and the other persons with him, hurried Mrs. Berkley away to the common side: there, gentlemen, she was locked up; there she lay five or six weeks, till he had turned her senses; and she has continued in that melancholy condition ever since.

The first time, gentlemen, that they entered the room, he wrote some lines, and did take some account of the goods; but did not then proceed any further: but as he turned the owner out of the place, he put a padlock on the door, and she put her own key in the door, and locked the door; and there was nothing done further at that time.

Gentlemen, on the 23d of October, Bambridge and others, in company with him, did come to this place in the gallery: he easily did remove the padlock, but it was not so easy to force open the door; and therefore, gentlemen, he sent for one Greenway, a carpenter, to bring tools to force the door open. He was sent for, gentlemen; but they were impatient; and one of the people with the defendant, in the mean time with a poker forced open the door. When Greenway came, they did bid Greenway stay a little; then told him, they had no occasion for him. When he came into the room, the prisoner himself did direct and assist in breaking open the trunks and boxes; and when they were all open, there were found several rings, and some jewels; and those things that were light and portable Bambridge put in his pocket. There were, gentlemen, very good apparel, all of them made up, linnen and other things of a considerable value: for these, gentlemen, Bambridge had provided a large portmanteau, and put them up and carried them away. This, gentlemen, was the second time of his entering the said room; and at this time, I should tell you, gentlemen, he did go on with the twelve lines wrote before, and perfected the said inventory, I suppose, by adding some more goods. And then, upon this 23d of October, he was pleased, gentlemen, to fix a head to the paper, and directed in what words it should be wrote, which were these: "An Inventory or Appraisement of Goods, of and belonging to Elizabeth Berkley, distrained the 23rd of October, 1727, for 56*l.* of an arrear of rent due to John Huggins, esq." Gentlemen, according to my instructions, it will come from our witnesses, that there was a person who pretended to be, and was a constable; and there was a person there who pretended to appraise the goods; but nobody was sworn, as by law they ought: in this condition he did perfect the paper before-mentioned.

In looking over the things, gentlemen, Bambridge did observe there was a brush and a little chalk, something usual among persons that wear jewels to clean them: he cried out, 'Look about, there are probably some jewels; for there is something to clean them with;' and they looked and found some rings, as garnets, emeralds, and topazes; and when he had done he carried them away: but what he did with all of them afterwards, we cannot tell. Give me leave to say, my brief informs me that he did sell part of them for 14 guineas to one West; some gold lace, near 30 ounces, to one Mr. Harris; and some silver tea-spoons, gilt with

gold, he sold or presented to Corbett's wife (who was one of his tipstaffs): and her bed and bedding, which he was pleased to think was very good, he caused to be delivered to one Wilkins, to deliver to Jenkins a waterman, to be carried to his lodgings at Wandsworth. This, gentlemen, made a great noise, and Mr. Huggins came to hear of it, and expostulated with the prisoner, and said to him, You have taken a good many goods belonging to Mrs. Elizabeth Berkley, under pretence of seizing for an arrear of rent owing to me; how could you do so? There is no rent due to me. Gentlemen, in this manner he expostulated. How came you to do it? There is no rent due to me, for there is an agreement with my deputy, Mr. Gibbons, who was to have the produce of that time; to what value did you take? To which the prisoner replied, I have only taken to the value of 10*l.*; notwithstanding, gentlemen, he had sold a ring for 14 guineas, besides 30 ounces of gold lace, and some tea-spoons, and sent the bed and bedding to his house in the country: this was indeed very extraordinary.

It is plain, gentlemen, through his whole conduct, he never intended to use this as a distress; for when he sold the clothes of Mrs. Berkley, he did not sell them as goods taken by distress, but to conceal from whence he had them; he said, These are my wife's goods.

It is very remarkable, and worthy your observation, that though all the clothes were made into garments or apparel, he ordered and directed the person who took the inventory, to put down only so many yards, sufficient to make a gown or petticoat; there was, gentlemen, a dimity gown, which he particularly ordered to be put down, dimity sufficient to make a wrapper; which, gentlemen, you will easily guess, was only to conceal its being wearing apparel, that it might not be followed; or otherwise, why were they not entered into the inventory in the form they were, as made into apparel? It is very extraordinary, that he should say, so much of such and such a thing only sufficient to make a gown, or whatever it was; this, I hope, he will give a good account of; this, gentlemen, he ought to explain to you: after he had got the other part of the goods into his possession, as he had said, the former were his wife's, these he said, were left in his hands to make money of; not saying any of them were Mrs. Berkley's, taken by distress; but he sold part of them as his wife's apparel, and part as left with him by a friend, to make money of. We are far from thinking, where a man takes a distress for rent, where rent is due, though he does not let a constable, or an appraiser attend, and demean as they ought, that this is felony; though this is a great offence, and an enormous abuse, and the law will punish it civilly and criminally, but not capitally. If landlords send servants to make a distress, and they misconduct themselves, and do not behave themselves rightly, it would be very hard to have that turned into felony: we gentlemen, aim at no such thing; but that is to be taken into your consideration, with my lord's advice. When there is no pretence of rent due, no authority for distraining; when he makes use of a pretence of distraining, to get goods into his possession, to dispose of them as his own, or as left with him to sell; that pretence to get them into his hands, and dispose of them as his own, or as left with him to sell, and not selling them as prescribed by law, after due appraisement, and returning the surplus to the owner, will make it capital. Gentlemen, I need not tell you what the law is in this case; but, my lord, I will dare to say, that though a man comes by goods lawfully, by consent of the owner, if he disposes of them to his own use, it is felony. For if I deliver goods to a carrier, to carry them to Deal, and he carries them to sea; and he should open the packs, and sell the goods, this is felony: this has been adjudged so by all the judges in England, assembled for that purpose.

There is a particular case of an attorney, which I shall take notice of to you: it was in the 18th year of king Charles the 2d: he had, gentlemen, a mind to get abundance of goods, belonging to a woman, out of her house, into his power and possession: he did, gentlemen, take a process against her, and laid the woman in Newgate: upon which he gets judgment in ejectment, and got possession of her house; and then, gentlemen, he gets judgment, and takes the goods out of the house, and takes them into his own possession: there was a colour of a process of law; but this was a trick to get the goods from the woman, and done with a felonious intent; and the man was hanged for it. These things are proper for your consideration. Without any further observations, we will call our witnesses, and submit it to your lordship, and the jury, whether the prisoner's conduct did not shew a felonious intent, and whether the distress was not made use of to get the goods into his possession, for his own use.

Att. Gen. I am of counsel of the same side, for the king. The indictment against the prisoner at the bar, is founded upon an act passed in the 12th year of the reign of the late queen Anne, chapter the 7th, for taking away, and seizing feloniously, goods of the value of 40*s.*, in a dwelling-house. Gentlemen, this being the statute upon which it is founded; the question before you is, upon the fact being given in evidence. At the time when the fact was committed in October 1727, T. Bambridge was deputy warden of the Fleet prison, under Mr. Huggins; an unhappy woman, Mrs. Berkley, a prisoner in his custody, being committed there for debt, had a room in the prison, where she had several things of value: she being a prisoner, and there having goods of value, the prisoner at the bar, who was gaoler, ought to have suffered and permitted her, according to law, to have the use of her own goods brought there, and enjoy them quietly, without disturbance from

him; but, gentlemen, probably the value of these goods was the temptation to the fact afterwards committed. There were, gentlemen, two times that will be mentioned by the witnesses, that he entered the room, both in the month of October; one some days before the other. I don't find that the first day is particularly fixed, but the second was the 23d of October 1727; and the first time the prisoner came, was some days before the 23d of October 1727; the prisoner then, with three or four other persons, Pindar, Barnes, and King, came to the chamber of Mrs. Berkley, in a violent manner, and caused her to be removed out of her room; and as a preliminary step to what was intended, caused her to be carried down on the common side, and there locked her down; after they had disposed of her, they put a padlock on the door, and she locked the door. I don't find that the goods at that time were particularly taken away by the prisoner, but they thought fit to secure them; but before they took away Mrs. Berkley, they made her put her key into the lock and lock the door, and they put a padlock on it, this was the first time of entering the room; the second time, after dark, the prisoner with Barnes, Douglas, Pindar, and a person to whom they thought fit to give the title of constable, but whether he had any authority or not to act as such, that don't appear to us, but it is incumbent on him to shew; then pulled off the padlock; one should have thought, if any thing fair had been intended, Mrs. Berkley should have been sent for to have opened, or at least, to have seen the door opened. There was a lock upon the door, but the prisoner ordered the door to be opened; but he not having strength enough himself, ordered another to break open the door, which he accordingly did: the door being opened by force and violence, without sending for Mrs. Berkley, they fell to rifling the boxes; the prisoner with his own hands, broke open the locks of three boxes, and two trunks; things were taken out, and some of those of the most value, the prisoner thought fit himself to take, and put in his pocket; those were two cornelian seals, gold rings in number five, which were of some value, one a garnet, another had a small diamond in it, and another was an amethyst ring of some value, which the prisoner thought fit to put in his pocket; a silver-handle knife and fork, in a shagreen case, and other things of value, he put into a portmanteau, which the prisoner sent out of the prison. After this was done, the rest of the goods were taken away; and as Mr. Serjeant has mentioned to you, there was a pretence of taking an inventory of the goods; if that shall appear only a pretence and colour, that will not vary the case as to him. The bed and bedding (the prisoner then wanted a bed and bedding) he thought fit to take away; and, if my instructions are true, sent it down by water to Wandsworth, to his lodgings; and Mrs. Berkley, ever since that, has been kept on the common side, without bed or bedding, or at least was kept so for a time: we apprehend the witnesses will come up to this. This being the nature of the case, the question to be submitted to my lord, is, gentlemen, what the design of the transactions, and nature of it was? We apprehend the design was to get these goods wrongfully and feloniously into his own custody, and take them to his own use; if that was the case, the manner of taking them will not alter the thing; for I must observe to you, gentlemen, if a man designs to take goods feloniously, let him put it in what shape he will, if that is only the pretence and colour, it is felony; nay, if by colour of the law, any man possesses himself of goods with a felonious intent, in that case it is so far from being an excuse, that it is an aggravation of the offence; for the law will not admit, that under its colour, a man should be stripped of his property; that instead of being a defence against one man, it should be an injury to another; for if any person should possess himself by force of another man's goods, it is felony. Besides the case mentioned to you by Mr. Serjeant, I will take notice of one; that after goods distrained, and the goods carried away, there is got a replevin of these goods; if that replevin was only colourably taken out, to get these goods into his possession, that replevin will not excuse him from felony. The question is, whether if a distress is taken, if that distress is only colourably taken, it is not felony? Therefore, though it can't be pretended, and none will have a thought, I hope, that it is insisted on, if a man intends fairly to make a distress, and errs in the doing it, though he errs in a great many instances, that that should subject him to felony; God forbid: yet if he makes use of a distress only as a colour to get goods into his possession, then it is felony, and circumstances will come to be material, and his not observing the method which the law directs, will further shew with what intent the beginning was, and with what intent he took the goods, which, we apprehend, is material. But what, I apprehend, is most material for your consideration, is to shew the concealed manner of describing these goods, the method of disguising them, and the manner of selling them. As to the first of these, it will appear, that the wearing apparel, instead of being described, as really they were, he ordered to be described, as so much stuff and silk sufficient for to make a gown, petticoat, or whatever it was. We apprehend there could be no other view in that, than to disguise it, that the truth might not appear. And, gentlemen, as to the disposal of them, it will appear plainly, we think to you, such as shews that the prisoner had no intention to make use of this distress; but that his original design was, to convert them to his own use. It is very truly said, by the learned gentleman that has spoke before me, that where a man possesses himself of goods, though lawfully, supposing he disposes of those goods for his own use, it will make it felony. There have been instances given you, where persons came by

goods lawfully, but their disposal of them to their own use made felony. Now in the present case, it will appear, the goods, gentlemen, were many: as to the ring mentioned, particularly that in which the amethyst was set, the prisoner, after taking that ring, sent it to one Mendez Solas to enquire the value, and disposed of it to him; as to the garnet, with a brilliant in the middle, that was sent likewise to him to be disposed of, to enquire the value of that also: as to the wearing apparel, that was sold to one West for fourteen guineas; the gold lace was sold to one Harris; the gilt teaspoons were sold to Corbett's wife; and as to the bed and bedding, he put it at first in another place in the prison, and after sent it to his own house, with the portmanteau, wherein other things of value were put. If he had any intent to dispose of these goods, as taken by distress as a satisfaction for any demand or debt he might have, should not he have given an account to Mrs. Berkley? And if there was any surplus, ought not he to have paid it over to her? It will be incumbent on the prisoner, to shew that he accounted to her for the surplus; but if there is no colour of right to make the distress, no regular method taken in the disposal upon the distress, no account thereof given, we apprehend that it will appear a pretence of distress, and that only the pretence of distress was made use of to convert the goods to his own use; if so, this will amount to felony. We will beg leave to call our witnesses, and then leave it to your lordship's directions.

Sol. Gen. Call John Turner. (Who was sworn.)

Bambridge. My lord, Mr. Attorney General, in his declamation that he has made, was pleased to admit, that if there was a legal distress made, there could be no attempt upon my life.

Att. Gen. My declamation!

Bambridge. That Mr. Attorney, in his declamation allowed, if it was a distress——

Att. Gen. My declamation! I said, that it would appear as a colour of distress to commit a fraud.

Bambridge. You meant *in fraudem legis.*

Att, Gen. I spoke in English, believing it to be more intelligible to you; you may make use of Latin words if you will.

Sol. Gen. Did you know Mrs. Berkley, and when?

Turner. Yes; I knew her in October, 1727.

Sol Gen. How came you to be acquainted with her?

Turner. By being a prisoner in the Fleet prison; she was a prisoner at the same time, and lodged in the second gallery, within two or three rooms of mine.

Sol. Gen. In what part of the gaol did you lodge?

Turner. I lodged on the master's side, in the second gallery.

Sol. Gen. How long?

Turner. I had the misfortune to be there two years before this seizure was made.

Sol. Gen. You mention a seizure, give an account how it was made.

Turner. I was called in by Pindar.

Sol. Gen. What day?

Turner. Between the 23d and 27th of October, 1727.

Sol. Gen. What were you called in for? What to do?

Turner. I was called in by Pindar, and he told me, that a distress was to be made; for being an upholder, Mr. Bambridge called me frequently to make distresses.

Sol. Gen. Who was there?

Turner. Pindar, and I think King.

Sol. Gen. Was Mrs. Berkley there then?

Turner. Yes, but not Bambridge.

Sol. Gen. What did you do?

Turner. I took an inventory of all that did appear; we did not then open any boxes; we mentioned them in gross, and took every thing that appeared in the room, as earthenware, bed and bedding, and such like things. In about fourteen days afterwards, Mr. Bambridge came again, and I was called in.

Sol. Gen. Was there any thing more done then?

Turner. Nothing more than taking an inventory.

Sol. Gen. Was there any constable there?

Turner. There was a person there, who said he was a constable.

Sol. Gen. Who was there the second time, about fourteen days after the first? Was Mr. Bambridge there?

Turner. Yes, after they had broke the door open, I was called in, and she said, they had committed felony.

Sol. Gen. Did you hear it said, whilst Mr. Bambridge was there?

Turner. Yes.

Sol. Gen. What did Mr. Bambridge say?

Turner. Mr. Bambridge wondered the trunks were not opened before, and asked Mrs. Berkley for the keys, and when she would not give him the keys, Mr. Bambridge himself broke open the trunks, and rifled them.

Juryman. Was it in the presence of Mrs. Berkley?—*Turner.* Yes.

Juryman. Was she there all the time?

Turner. She was there all the time.

Sol. Gen. What did you do then?

Turner. When the boxes were opened, I made an inventory of all that was in them; here are both inventories.

L. C. J. *Eyre.* Tell us who broke open the boxes.

Turner. Mr. Bambridge himself.

Sol. Gen. Tell my lord what was particularly mentioned in the inventory, what the first, and what the second time.

Turner. The inventory was dated the 23d of October, 1727, for 56*l.* for rent due to John Huggins, esq.

Sol. Gen. Who wrote the title?

Turner. Mr. Bambridge wrote it upon a

loose piece of paper, and said, Let the title be so, and the date be so.

Sol. Gen. When was the first distress made? Distinguish the two times.

Turner. I take it the former distress was about the 27th of October, and the second, the 3d or 4th of November.

L. C. J. Who made the first distress? Who was there?

Turner. The first distress was taken by Pindar, Mr. Bambridge was not there; then I took inventory of the boxes, and set down so many band boxes.

Sol. Gen. Afterwards, you say, a particular inventory was made on the 4th or 5th of November?

Turner. Yes, I believe it might be about that time, but I can't be positive, not thinking it would be called in question.

Sol. Gen. In what manner did you make the inventory?

Turner. I made the inventory as Mr. Bambridge directed.

L. C. J. Give an account what you inserted the first time of taking the inventory.

Turner. A bedstead and sacking-bottom, with China stuff furniture, a feather bed and bolster, a down pillow, two blankets, a calico quilt, two pairs of sheets, two pillow-biers, two cane and two stuff chairs, an easy chair and cushion, two tables, a looking glass, a fire shovel, tongs, poker, and wooden fender, a gridiron, a pair of bellows, a hearth brush, a brass hand candlestick, two tin tinder-boxes, a kettle and two drinking pots ditto, four boxes and two trunks, three pairs of dimity window curtains and vallins, one curtain-rod, two hair-brooms, a large India hand tea-board, eleven printed books, a pewter standish, two knives, three forks, two tin coffee-pots, a sauce-pan and skimmer ditto, a chocolate-mill, one hundred vessels of stone and earthen ware; this was the first inventory.

L. C. J. Was there any valuation of the goods in the inventory?

Turner. Yes, Mr. Bambridge desired me to have a particular valuation of each thing, which I gave to Mr. Bambridge.

Juryman. Have you a copy of that valuation?

Turner. No, I gave it to Mr. Bambridge.

L. C. J. When did you give it to Mr. Bambridge?

Turner. When I finished it; a day or two after the distress.

L. C. J. That was after the 4th of November.

Sol. Gen. Give to my lord, and the jury, the reason for giving the inventory to Mr. Bambridge.

Turner. It was, that Mr. Bambridge might know how to dispose of them.

Sol. Gen. Go on to the second inventory.

Turner. A large silver handle knife and fork, two silver spoons, two tea spoons, strainer and tongs, a bowl, and handle of a spoon ditto, three gilt tea spoons, a strainer and tongs ditto, twenty ounces and a half of gold lace, two cornelian seals set in gold, and a ring I took to be a crystal.

Sol. Gen. Do you know it when you see it?

Turner. No.

Att. Gen. Who directed you to set down a crystal?

Turner. I do not know particularly, every body was of opinion it was a crystal.

Att. Gen. How many rings were there?

Turner. I saw but one ring, the others were loose stones.

Sol. Gen. You may go on with the inventory.

Turner. One small emerald, one small garnet, a seed pearl, five diaper napkins, a stitched top of a toilet, with lace muslin falls, a two pinner head of Mecklin lace, a pair of ruffles, a handkerchief and apron ditto, one Flanders laced cap, worked head, and a pair of three double ruffles, one head of half-breadth lace, and a pair of single ruffles, ten odd pieces of Flanders and Colberteen lace, about four yards of black lace, a furbelowed scarf and hood, trimmed with black lace, one yard of blue lustring, two yards of white sarsenet, blue satin sufficient for a lining, striped dimity sufficient for a gown and petticoat, some old Persian for a lining to ditto.

Sol. Gen. Before you go off from this particular, I must ask you a question or two: these mentioned in the inventory, sufficient for a gown and petticoat, and sufficient for a lining; were these pieces of silk, or were they made up into clothes?

Turner. These were things that had been scowered and rolled up.

Sol. Gen. Was the dimity?

Turner. Yes, it was rolled up as coming from the scowerers.

L. C. J. Was it in the shape of a garment?

Turner. Yes, it had been a garment, but was then rolled up.

Sol. Gen. Was it in regard to the lining the same?—*Turner.* Yes.

Sol. Gen. Be pleased to observe, the blue and white flowered satin, which is set down in the inventory, to be sufficient for a gown and petticoat, was that made up?

Turner. That was made up.

Sol. Gen. How came you to put it down, so much sufficient for a gown and petticoat?

Turner. I observed at that very time to Mr. Bambridge, and told him, we usually did not distrain wearing apparel; upon which he then said, put it down sufficient for wearing apparel.

L. C. J. Give a direct account of that particular again.

Turner. I said to Mr. Bambridge,—Sir, we don't usually set down wearing apparel; then Mr. Bambridge said, Put it down sufficient for such and such a thing, particularly, sarsenet sufficient for the lining of a gown, which was made up; if it was the body of a gown, he bid me put it down sufficient for a body, and the rest, of a lining, sufficient for a lining.

Sol. Gen. The question is, Whether they were actually made up, and set down only sufficient?—*Turner.* Yes.

Sol. Gen. Mention them particularly.

Turner. There was sarsenet, sufficient for a wrapping-gown, that was actually made up.

Sol. Gen. You just now said, that the things you have mentioned you gave a valuation of separately to Mr. Bambridge; was there any valuation on the inventory you kept?

Turner. The total sum agrees with the same as Mr. Bambridge had, 27*l.* 16*s.* 9*d.*

Sol. Gen. Do you remember any discourse you had as to the setting the value?

Turner. Upon a cursory view of taking the inventory, I brought it to 30*l.*, and Mr. Bambridge said, You have over-rated these things; you must consider there is a charge attending this distress, and paying you besides, and that would lessen the value of the things; and bid me consider it again, and upon looking it over again, I brought it to 27*l.* 16*s.* 9*d.*

Sol. Gen. Were you upon oath?

Turner. When I signed the inventory, and finished it, there was a constable, and I did take an oath, and I told Mr. Bambridge there ought to be two persons to make the appraisement; to which Mr. Bambridge said, I might take Pindar; but Pindar refused, so only myself signed it.

Sol. Gen. Pray give an account, if you know, what is become of the goods in the inventory?

Turner. I do not know any thing of them but by rumour.

Sol. Gen. Did you see any of the things carried away by Mr. Bambridge?

Turner. Yes, the wearing apparel and seals; the seals he put into his pockets.

L. C. J. Tell what he put in his pocket.

Turner. The gilt silver tea spoons and rings.

L. C. J. What did he put in the portmanteau?—*Turner.* The clothes.

L. C. J. Were these in the inventory?

Turner. Yes.

Sol. Gen. What became of the portmanteau?

Turner. It was carried out of the room by Mr. Bambridge's servant.

Sol. Gen. Was there any brush, such as is used to clean jewels with?

Turner. Yes; Mr. Bambridge looked very narrowly, and at last a brush appeared: and, upon seeing of that, he said, Certainly there were some diamonds: upon which Mrs. Berkley was very much chagrined; and she said, If you find them, will you take them? And after that he searched, and found the rings and other stones.

Sol. Gen. Was there any discourse about papers?

Turner. There was a large parshment in a case; she said it was a decree: It was in a great round case, which Mr. Bambridge took; upon which Mrs. Berkley said, What, will you rummage my papers? Yes, says he; and if I find any bonds or bills, I will make use of them.

Sol. Gen. What became of her after they entered the room?

Turner. After the first seizure, she was turned out of her room, and put on the common side, and kept there till the second seizure was made, and then she was put into a room without a bed.

Sol. Gen. Was there any furniture left?

Turner. There was earthen ware, and stuff curtains; but no bed.

Sol. Gen. How has she lain since?

Turner. Without a bed.

Sol. Gen. What condition of mind was she in?

Turner. Sometimes she talked very well, and much to the purpose; at other times she would talk wild, and would not believe that lord Harcourt was dead; for she said, he would do her justice upon them (meaning Mr. Bambridge and his accomplice). I said he was dead: She made answer, she would not believe me; for they would find him alive to their costs.

Sol. Gen. How did the woman behave herself?

Turner. The woman was much reserved, and kept herself to herself very much. She talked much to the purpose when she did talk; but it was difficult to get her into it.

Att. Gen. In disposing of the goods in the manner you did, sufficient for such and such a thing, what reason had you to do it?

Turner. It was Mr. Bambridge's positive directions: I should not have thought on it myself.

L. C. J. Who made the difficulty first?

Turner. I did, and said it was not customary to put down wearing apparel in inventories upon seizures; upon which he bid me alter the names: I said it was not proper to alter the names, and they ought not to be mentioned at all.

L. C. J. What did Mr. Bambridge say?

Turner. Mr. Bambridge said, I must have you let them be set down, stuff or silk sufficient to make a gown, or whatever it was.

L. C. J. Did you set them down according to the best of your judgment?

Turner. I did.

Sol. Gen. Was that the real value you set upon them?

Turner. The first valuation was the price I would have given for them; and when Mr. Bambridge said the costs on the distress would come to more, I reduced them three pounds.

Sol. Gen. Would you have given the value first set upon them?—*Turner.* Yes.

L. C. J. Had you any other reason to alter the value, than that Mr. Bambridge bid you?

Turner. No.

Bambridge. I desire, my lord, he may be asked, whether I did not insist upon having every thing particularized in the inventory.

Turner. Yes, you did.

Bambridge. You say, I did demand the keys of Mrs. Berkley, and she refused to let me have them, and then the boxes were opened?

Turner. Yes, I said so.

L. C. J. I thought you did.

Bambridge. My lord, Turner said that there was some gold lace.—Whose was that?

Turner. It was the trimming of the flowered suit of clothes; it was the trimming of the suit of sattin clothes; part of the lace was remaining on them.

Bambridge. Were there not several things unmade?

Turner. I said, that called a striped dimity came from the scowrer's.

L. C. J. As to the dimity, give an account how that was set down.

Turner. That I set down, as it appeared to me coming from the dyer's as a roll of silk.

Bambridge. Were the things taken away, part mentioned in the inventory, or the whole?

Turner. All that I saw taken away was in the inventory.

L. C. J. Is the inventory the same you delivered to Mr. Bambridge?

Turner. He had every article here, with the prices annexed. It is a wonder I had any copy; for I did not apprehend that any person would call upon me about it.

Bambridge. I desire Mr. Turner may acquaint your lordship, as to the conversation that was between me, Mrs. Berkley, and him, at the time of making the distress.

Turner. Mr. Bambridge said, it was a shame she should live so long, and not to pay any rent; for that it amounted to fifty pounds and upwards, and she had money enough to pay it; and said, I am informed you have been abused, and I will enquire into your affairs, and see if I can't extricate you out of your difficulties.

L. C. J. I think there was a demand of 56*l.*; was there not?

Turner. I did not hear of any demand; he only talked of it.

L. C. J. What did Mrs. Berkley say?

Turner. She said, it was the house of the king; and if she was there, the king should find her a house.

Bambridge. I desire he may be asked, whether, when I was in the room, he did conceive what was done was with a felonious intent.

Turner. I did think your power was sufficient to do it.

Bambridge. Have you made any other appraisements?—*Turner.* Yes.

Bambridge. Did you make any alteration in them?—*Turner.* No.

Bambridge. Was the appraisement done in a private manner, or did every body know it?

Turner. Every body did know it.

Bambridge. Were appraisements usually made publicly or privately?

Turner. Pindar used to come and say, there are goods to be distrained; so I did it.

L. C. J. So it was left to you then, to appraise as your discretion should lead you?

Turner. Yes.

L. C. J. Pindar came to you now, in this affair?—*Turner.* Yes.

Bambridge. Pindar, my lord, was indicted, to take off his evidence.

Mr. Just. *Reynolds.* Was there a constable the first time of taking the distress?

Turner. Yes.

Att. Gen. You said, there was a man called a constable: Did you know him to be a constable?

Turner. I believe he was a constable.

Att. Gen. Did you believe the man that came a second time, to be a real constable?

Turner. Yes. It has been enquired into since.

Bambridge. If it was a felony, it was a felony committed in October 1727, and not complained of till February or March last.

L. C. J. You are not come upon your defence yet.

Bambridge. Do you not know the name of the constable?

Turner. I think he was a currier.

Bambridge. Was it the constable that usually attended upon seizures?—*Turner.* Yes.

Mr. *Filmer.* You say, that Pindar was desired by Mr. Bambridge to assist in the appraisement; what business was Pindar of?

Turner. He was a distiller.

Mr. *Filmer.* Did he not undertake the appraising of the goods?

Turner. No, he refused it.

Mr. *Filmer.* Did not Mr. Bambridge press him to it?—*Turner.* Yes.

Mr. *Filmer.* Was there a constable the second time?—*Turner.* Yes, both times.

Turner was going away; but was called back at the request of Mr. Bambridge, he desiring to ask him a question or two more.

L. C. J. Propose your questions to the Court first.

Bambridge. I desire he may acquaint your lordship, whether, at the time when he appraised the goods, I did not recommend it to Mrs. Berkley to pay the rent; and said, I would stay some time, and save the goods from being disposed of.

Turner. Mr. Bambridge did say she was imposed on; and said, he would give her any assistance, and bid her send to her friends to get money to pay the rent.

L. C. J. He said he would stay?

Turner. I did not hear him say it.

Att. Gen. What did he say?

Turner. He said he would assist her, she being imposed on; and did desire her to send for money to pay the rent; but I did not hear him say any words as to his staying for the rent.

Thomas Wilkinson sworn.

Mr. *Willes.* Do you know Elizabeth Berkley?—*Wilkinson.* Yes.

Mr. *Willes.* Did you know her in Oct. 1727?

Wilkinson. Yes.

Bambridge. I desire, my lord, before he is further examined, he may be asked what money he has received, and how long he has been kept to give evidence against me?

L. C. J. That is not a question fit to be asked.

Bambridge. It is true, I am sure.

Mr. Just. *Reynolds.* You must prove that.

L. C. J. You cannot ask a man any thing that tends to accuse himself.

Bambridge. I don't ask to the corruption; but whether he received the money.

Mr. Just. *Reynolds.* It carries an imputation with it.

Mr. *Willes.* He may prove it if he can.

Att. Gen. If Mr. Bambridge prove it, it will go only to the credit of the witness.

Mr. *Willes.* If he don't, it will go as to his own credit. You knew Mrs. Berkley in October, 1727?—*Wilkinson.* Yes.

Mr. *Willes.* Where did she lodge?

Wilkinson. In No. 8, near the front of the yard.

Mr. *Willes.* Where did you lodge?

Wilkinson. On the common side.

Mr. *Willis.* Did you see Mrs. Berkley at her door, when it was broke open?

Wilkinson. Yes.

Mr. *Willis.* What time of the year was it?

Wilkinson. The latter end of October.

Mr. *Willes.* What time of the day?

Wilkinson. At six o'clock at night.

Mr. *Willes.* Was the door locked when she was there?

Wilkinson. It was locked with two padlocks; one Pindar took off.

Mr. *Willes.* Who was there?

Wilkinson. Mr. Bambridge, a constable, and Barnes.

Mr. *Willes.* Did Pindar take off the padlock of his own accord?

Wilkinson. Mr. Bambridge ordered him to take it off. There was another padlock on, and Barnes went to fetch a hammer to break it off.

Mr. *Willes.* Who ordered him to fetch a hammer?—*Wilkinson.* Mr. Bambridge.

Mr. *Willes.* Did they attempt to break off the padlock with that hammer?

Wilkinson. Yes.

Mr. *Willes.* Was Mr. Bambridge by all the time?—*Wilkinson.* Yes.

Mr. *Willes.* Was the door broke open with the hammer?

Wilkinson. Barnes, because the hammer would not do, went and fetched a poker.

Mr. *Willes.* What did he do with the poker?

Wilkinson. He broke open the door with it.

Mr. *Willes.* Who stood by at that time?

Wilkinson. Turner, myself, Barnes, Pindar, and Mr. Bambridge.

Mr. *Willes.* What did Mr. Bambridge order, after the poker was brought?

Wilkinson. After the poker was brought, he ordered him to break open the door, and so he did.

Mr. *Willes.* When the door was broke open, who went in with the constable?

Wilkinson. All went in; Mr. Bambridge, Barnes, Pindar, the constable and myself.

Mr. *Willes.* You mention a constable; do you know him to be a constable?

Wilkinson. Only by his having a staff.

Mr. *Willes.* Was that all the reason you had to believe him to be a constable?

Wilkinson. Yes.

Mr. *Willes.* Have you seen him at any other time?

Wilkinson. I saw him only then, and never since.

Mr. *Willes.* Was Mrs. Berkley there?

Wilkinson. Yes; I went to fetch her up, and Mr. Bambridge insisted upon her opening the door; but she would not open the door herself; so Mr. Bambridge ordered the door to be broke open.

Mr. *Willes.* When he came up, and broke open the door, and came into the room, what did he do?

Wilkinson. Mr. Bambridge desired Mr. Turner to take an inventory.

Mr. *Willes.* Of what?

Wilkinson. Of all the goods in the room.

Mr. *Willes.* Was Mrs. Berkley come into the room?

Wilkinson. Yes, she was there.

Mr. *Willes.* What did Mrs. Berkley say?

Wilkinson. She said, it was a robbery, it was not justice, it was felony; and she did not doubt but he would be brought to account for it in time.

L. C. J. Was she by?

Wilkinson. Yes, and saw the room broke open, and Mr. Bambridge order Mr. Turner to make an inventory.

L. C. J. What did Mr. Bambridge say then?

Wilkinson. Set down such and such things.

L. C. J. What did they take an account of?

Wilkinson. They took an account of some things before they opened the boxes.

L. C. J. Were the boxes locked?

Wilkinson. There were two boxes locked, and one nailed.

L. C. J. Was there any trunk?

Wilkinson. I don't remember that there was a trunk.

Mr. *Willes.* Was she asked to open the boxes?—*Wilkinson.* Yes, but she refused.

Mr. *Willes.* When she refused, who broke them open?

Wilkinson. Mr. Bambridge broke open three with a hammer.

Mr. *Willes.* Was she in or out of the room at the time?

Wilkinson. She was in the room.

Mr. *Willes.* What did she say?

Wilkinson. She said it was a robbery.

Mr. *Willes.* When the boxes were broke open, what was taken out?

Wilkinson. Three suits of clothes.

Mr. *Willes.* Who took them out?

Wilkinson. Some were taken out by Mr. Bambridge, and some by Mr. Turner.

Mr. *Willes.* By whose order?

Wilkinson. By Mr. Bambridge's.

Mr. *Willes.* What was there taken out?

Wilkinson. China, flowered curtains, two gold seals, and two rings.

Mr. *Willes.* Had they any stones in them?

Wilkinson. One had a stone, the other not.

Mr. *Willes.* Were all the things in the boxes carried away?—*Wilkinson.* Yes.

Mr. *Willes.* By whose directions?

Wilkinson. By the direction of Mr. Bambridge.

Mr. *Willes.* Were all of them, or only some?

Wilkinson. Some of them; the bed was carried away.

Mr. *Willes.* Who carried it away?

Wilkinson. I carried it away into a lumber room in the prison.

Mr. *Willes.* What became of it afterwards?

Wilkinson. I saw it carried to Dorset-stairs after.

Mr. *Willes.* By whose order?

Wilkinson. By Mr. Bambridge's: I stood there while it was gone; he gave directions to carry them to the water-side.

Mr. *Willes.* Did he only give directions to carry them to the water-side, or any where else?

Wilkinson. He gave directions to carry them to Wandsworth.

Mr. *Willes.* When did he give these orders?

Wilkinson. When he carried them out.

Mr. *Willes.* What became of the rings?

Wilkinson. I saw them put in his pocket, and he called Savage and Douglas to bear witness.

L. C. J. What was the reason for calling them to witness?

Wilkinson. Mr. Bambridge said, that he put them in his pocket for fear of their being lost.

Mr. *Willes.* What did he order to be put in the portmanteau?—*Wilkinson.* Wearing apparel, and such like things.

Mr. *Willes.* Where was it carried?

Wilkinson. Into the lumber room above stairs.

Mr. *Willes.* Why did he order them to be put into the portmanteau?

Wilkinson. Because, he said, the portmanteau would hold them all.

Mr. *Willes.* The clothes, some of them, were very rich; were they not?

Wilkinson. Yes.

Mr. *Willes.* Were they put in the portmanteau?—*Wilkinson.* Yes.

Mr. *Willes.* Was Mrs. Berkley by when the rings were put in his pocket?

Wilkinson. Yes, and he called Mr. Douglas and other persons as witnesses?

Mr. *Willes.* What did Mrs. Berkley say?

Wilkinson. It was felony and robbery.

Mr. *Willes.* Did he say any thing to Mrs. Berkley, when he put them in his pocket?

Wilkinson. Mr. Bambridge said, he did nothing but according to law, and he would answer it.

Mr. *Willes.* Was there an emerald?

Wilkinson. Yes, I think there was an emerald, and a garnet, out of a ring: he put them in his pocket.

L. C. J. What did he put in his pocket?

Wilkinson. Two gold seals, two gold rings, an emerald, and a garnet.

L. C. J. Were the rings plain?

Wilkinson. One of them I did not see perfectly.

L. C. J. What was the other?

Wilkinson. A stone ring; but the middle stone was wanting.

L. C. J. Were there any things besides?

Wilkinson. There were two silver-handled knifes and forks.

L. C. J. I only ask as to those things he put in his pocket; did you see any other things put in his pocket?—*Wilkinson.* No.

Mr. *Willes.* Did you never see a stone called an emerald afterwards?—*Wilkinson.* No.

Att. Gen. Recollect how many rings there were.

Wilkinson. There were two rings, and two seals.

Att. Gen. Are you sure there were but two?

Wilkinson. Yes.

Att. Gen. Had they stones in them?

Wilkinson. One of them had a stone out in the middle.

Att. Gen. As to the bed and bedding; why did you say they were to go to Wandsworth? Do you remember the particular hands he sent them by, to be put into the boat?

Wilkinson. Tom King was one; as to the others, I did not know.

Att. Gen. What did Mr. Bambridge say in your hearing?

Wilkinson. First, he said, they were going to be sold at a sale.

Mr. *Willes.* Who directed you to go to Dorset-stairs?

Wilkinson. He sent me down to the stairs to the waterman, and bid me tell him to go away, and not stay.

Mr. *Willes.* Who did he bid you ask for?

Wilkinson. He bid me ask for the Wandsworth waterman.

Mr. *Willes.* Where were the rest of the goods carried?

Wilkinson. To Will's coffee-house in Bell-Savage yard.

Mr. *Willes.* How came they to be carried there?

Wilkinson. Mr. Bambridge lodged at Will's coffee-house.

Mr. *Willes.* What were the things that were carried to Will's coffee-house?

Wilkinson. An easy chair was carried there; I carried it myself.

Mr. *Willes.* How long was this after the goods were taken from Mrs. Berkley?

Wilkinson. Some days: it was left with Mr. Turner to clean; and then it was carried to Will's coffee-house.

Mr. *Willes.* By whose order was it carried?

Wilkinson. It was carried by Mr. Bambridge's order.

Mr. *Willes.* Whom was it delivered to?

Wilkinson. It was delivered to the man's wife at Will's coffee-house by Mr. Bambridge's directions: I carried it up one pair of stairs.

Bambridge. I desire he may acquaint your lordship, if he did not fetch Mrs. Berkley to be present at the opening the door.

Wilkinson. I did,

L. C. J. He said so, and that Barnes was ordered to fetch a poker to open the door.—I ask you, whether he talked with Mrs. Berkley for the payment of rent, for which the goods were distrained?

Wilkinson. Mr. Bambridge did say something to her about seizing for rent, and he would stand by it: She said, he could not seize wearing apparel for rent, and told him it was felony, and downright robbery.

Bambridge. I must desire him to acquaint you, whether it was not some days before the goods were removed, after the last distress.

L. C. J. Answer that.

Wilkinson. Five or six days.

Bambridge. Were they carried out publicly?

Wilkinson. Yes.

Bambridge. Were they carried out in the day-time?

Wilkinson. Yes.

Bambridge. Were they not carried out of the lumber room publicly in the day-time?

Wilkinson. Yes.

Bambridge. Was it a public room to put lumber in?

Wilkinson. Yes; but it was always locked.

Bambridge. I think he has acquainted the jury, that she was present all the time.

Wilkinson. I think she was.

L. C. J. Was Mrs. Berkley there during the time Mr. Turner made the inventory?

Wilkinson. I think she was.

Bambridge. He said, that I called Mr. Savage and Mr. Douglas to see that I put the things in my pocket: Mr. Douglas, my lord, has the unhappiness to be charged in the indictment as an accessary, though he only came into the room by chance, and so I am deprived of his evidence: he was put in the indictment to take off his evidence.

L. C. J. He is a principal in the indictment.

Bambridge. He is a gentleman of a very good family; he is the younger son of a man of quality. I desire Mr. Wilkinson may acquaint your lordship, whether Mrs. Berkley was not present when I said to Mr. Douglas, Pray take notice that I put the rings in my pocket.

L. C. J. Was she?

Wilkinson. I can't say positively, because it was just at last: at the latter end, she would not stay in the room.

Bambridge. Was there not a bed ordered for her to lie on?

Wilkinson. There was a bed brought out of the lumber room, a nasty bed; and she said, that if she could not lie on a bed of her own, she would not lie on that; but went away.

L. C. J. You say she went away; you can't say she was there then?

Wilkinson. I can't.

Bambridge. I desire to know, if, when he carried that bed up, he did not bring another down.

Wilkinson. Yes; I said so before, that you did order another bed; but I said it was a nasty one.

L. C. J. Tell us, whether that was a good bed or not?

Wilkinson. I can't say it was, my lord: she had reason enough to complain of it; for I lay upon a better bed myself, and that was not fit for her, who was a gentlewoman.

Bambridge. Was it any other than what was usual for the people in the house?

Wilkinson. I have known some lie on sacks; but because they could get no better.

Bambridge. Were there any better beds there?

Wilkinson. Yes; there were three, and you sent them away with her's: ever since she has lain without a bed, unless she has had one within these ten days.

Bambridge. I desire to know, whether Mrs. Berkley was turned out of her room, or went out of herself, at that time?

Wilkinson. She went out of it herself, when her bed was taken away.

Ambrose Burgess sworn.

Att. Gen. Do you remember any goods taken away in the Fleet prison, and from whom?

Burgess. I was present, not at the breaking open the door, but after.

Att. Gen. When was it?

Burgess. About 14 days after the 23rd of October.

Att. Gen. Go on.

Burgess. I heard, that Mr. Bambridge was going in to look on some affairs of Mrs. Berkley's, and I went into the room a little after the door was broken open.

Att. Gen. Who was there?

Burgess. There were Mr. Bambridge, Turner, Savage, Pindar, Barnes, and Wilkinson, and one or two more that were strangers.

Att. Gen. What did you see done there?

Burgess. I saw the boxes broke open.

Att. Gen. Who broke them open?

Burgess. Mr. Turner and Mr. Bambridge together.

Att. Gen. What was there in them?

Burgess. Twenty ounces of Orrice lace, a great many good clothes, and a great many good things.

Bambridge. I desire he may raise his voice; I cannot hear him.

L. C. J. Raise your voice.

Att. Gen. Did you see the boxes broke open?

Burgess. I was there present, and saw the boxes broke open by Mr. Bambridge and Mr. Turner; and saw the china put into the window, and some Orrice lace; and saw an emerald, or ruby, which he put in his pocket.

Att. Gen. What did you see at that time?

Burgess. I saw the rings taken out.

Att. Gen. What did you see put in his pocket?

Burgess. One was a pearl, the other an emerald.

Att. Gen. Were they set in rings?

Burgess. They were both separate.

Att. Gen. What is the colour of an emerald?

Burgess. It is of a greenish colour.

Att. Gen. These then were separate stones?

Burgess. Yes.

Att. Gen. Were there any rings?

Burgess. I can't say.

Att. Gen. What did he do with these stones?

Burgess. Mr. Bambridge put them into his pocket, and said they might be lost if put in the portmanteau; and afterwards, as he was drinking punch, he took them out of his pocket.

Att. Gen. Had she any gold lace there?

Burgess. There was gold lace: Mr. Turner went and weighed the lace, and brought it back again; and said, it weighed twenty ounces and an half.

Att. Gen. Who took it away?

Burgess. I don't remember.

Att. Gen. You were in company; did you not observe who took it, or whether Turner carried it away?

Burgess. I did not, upon my word, observe it.

Att. Gen. Were you present at the time of breaking open the boxes, and taking out the goods?

Burgess. I was present when three boxes were broke open.

Att. Gen. How long did Mrs. Berkley stay in the room?

Burgess. To the best of my remembrance, the whole time.

Att. Gen. You say you were present when the boxes were broke open; was Mrs. Berkley there the whole time?

Burgess. I do not know whether she went away before or not.

Att. Gen. I think you said, you did not come till after the door was opened?

Burgess. Yes.

Bambridge. I think you have acquainted my lord and the jury, that there were some stones; I desire you will inform him, and as to the size of them, if they were small.

Burgess. Yes, they were.

Bambridge. Was Mrs. Berkley there all the time?—*Burgess.* I think she was.

L. C. J. What did you ask him?

Bambridge. What size the stones were of; whether they were small?

Burgess. Yes, they were.

Burgess was going away, and at Bambridge's desire called back again.

Bambridge. Mr. Burgess declared, that he heard me declare, that I desired them to take notice, that I put them in my pocket: Please to tell my lord, and the jury, what I said when I put the stones in my pocket.

Burgess. Mr. Bambridge shewed them in his hand, and said, for fear they should be lost, they should be put in his pocket.

L. C. J. Did he desire Savage and Douglas to remember that he put them in his pocket?

Burgess. I believe he said so to all.

Savage was sworn.

Sol. Gen. Were you present at the time when the goods were seized?

Savage. I was going by the end of the gallery, and, hearing a bustle, went up.

Sol. Gen. Mention the time.

Savage. At the time when the last inventory was taken.

Sol. Gen. What time of the year?

Savage. The latter end of October, 1727.

Sol. Gen. Give an account of what you know of this matter.

Savage. I was going by the end of the gallery, and observed a number of people at Mrs. Berkley's door, and I went out of curiosity to see what was the matter, where I found Bambridge, Mrs. Berkley, Pindar, Barnes, Douglas, and Wilkinson, and after I had been there a very little time, Bambridge asked Mrs. Berkley for trunks and boxes; I went into the room to them, and Bambridge asked her for the keys of her trunks and boxes; she said, I will give you none; to which he made answer, If you won't, I have sufficient authority of my own to open them, and I will do it; and ordered the trunks and boxes, upon her refusal to deliver the keys, to be broke open; and Bambridge broke open some of them himself.

Sol. Gen. What was there found there?

Savage. On examination of the trunks and boxes, there were found wearing apparel, gold seals, thread, and gold lace, clothes very good of the kind, fit for any gentlewoman to wear.

Sol. Gen. Were there any other things?

Savage. Yes, there were; for Bambridge found, in a drawer of a table, a box, where there were rings and seals, and loose stones.

Sol. Gen. How many rings were there?

Savage. I think there were four; one was red, it was either a garnet or a ruby; one of them was whitish, with a cast of yellow, they called it a crystal, I took it to be a topaz.

Sol. Gen. Were there any other stones?

Savage. Yes, I think there were; one was a blue or green, another was a ring, where the middle stone was out, and two diamonds on the side, two seals set in gold, which I took to be cornelian, one white and the other red; there was also a loose stone, and a pearl.

Sol. Gen. What was the loose stone?

Savage. I can't say whether a garnet or not.

Sol. Gen. What did he do with them?

Savage. After he had shewn them, he put them in his pocket.

Sol. Gen. Were there any other things?

Savage. There was a silver spoon, knife, and fork.

Sol. Gen. What did he do with that?

Savage. That was put in his pocket, to the best of my remembrance.

L. C. J. What became of the seals and rings?

Savage. He put them into his pocket.

L. C. J. Did he bid you at that time take notice that he put them in his pocket?

Savage. I do not remember that he said so.

Sol. Gen. What became of them after he put them in his pocket?

Savage. I do not know.

Sol. Gen. Did he take them out of his pocket there?

Savage. No, but he did in the coffee-room afterwards.

Sol. Gen. What became of the other goods?

Savage. The most valuable part of the goods was packed up, and put into a portmanteau trunk.

Sol. Gen. You do not know what became of the other goods?

Savage. I do not know of their being carried away, but there was some white china carried out of the room.

Mr. *Willes.* Had not Bambridge a house at Wandsworth?

Savage. He had lodgings there.

Mr. *Willes.* Were the goods carried there?

Savage. I don't know otherwise than by hearsay.

Att. Gen. Were you by when Mr. Turner made the inventory?—*Savage.* Yes.

Att. Gen. Do you know of clothes being put down sufficient for a gown, or whatever it was?

Savage. Yes, all the clothes were put down so.

Att. Gen. Do you know how they came to be put down so?

Savage. Bambridge ordered it.

Att. Gen. Did it arise from Mr. Bambridge or Turner?

Savage. Turner did object to it, and said it was not usual to put down wearing apparel.

L. C. J. Pray give an account whether Bambridge gave any reason for putting the things in his pocket?

Savage. I do not know he did.

L. C. J. Where they inventoried?

Savage. I was not privy to the inventory.

Bambridge. How long were you in the room?

Savage. I believe I was there soon after you.

Bambridge. Did you continue there all the time?

Savage. I believe I was there most of the time.

Bambridge. Did you see any of the goods appraised?

Savage. I saw Turner write; but I do not know what he wrote.

Bambridge. Was it done in a clandestine manner?—*Savage.* I cannot say.

Bambridge. What conversation was there between Mrs. Berkley and me?

Savage. What passed was in relation to the chamber rent.

Bambridge. Did not I say for what I seized them?

Savage. You pretended to seize them for chamber rent.

Bambridge. Did I shew the rings, or put them in my pocket secretly?

Savage. They were shewn to every body in the room.

Bambridge. Were the rings shewn in the coffee-room?—*Savage.* Yes.

Bambridge. Where is the coffee-room?

Savage. In the Fleet prison.

Bambridge. Was it a public place?

Savage. Yes, but it was in a private room where you shewed the rings, in which was only your own company.

Jacob Mendez Solas was set up to be examined.

Mr. *Filmer.* Mr. Matthews, let him be sworn upon the Old Testament, he is a Jew.

Mr. *Kettleby.* I must object as such, to his being sworn at all.

Mr. Just. *Reynolds.* I remember a great cause upon an indictment, for the stealing of snuff from some Jews, and I remember they were admitted to give evidence.

Solas. I am a Christian.

Att. Gen. The objection is at an end, he is a Christian.

L. C. J. Are you a Jew or a Christian?

Solas. I am by extract a Portuguese Jew, but am a Christian now.

L. C. J. Have you been baptized?

Solas. Yes, my lord.

Then he was sworn.

Mr. *Filmer.* What do you know as to any diamonds or jewels that were brought to you?

Solas. One captain Douglas brought a ring to me, to have the stone pulled out, that I might see how much the gold weighed.

Mr. *Filmer.* What sort of a stone was it?

Solas. It was an amethist, but Douglas said it was a crystal.

L. C. J. Who did he tell you he had it from?

Solas. From Bambridge. Douglas, after I told him it was an amethist, and the value of it, went and told Mr. Bambridge the value; then Bambridge came to me.

L. C. J. What did Mr. Bambridge say?

Solas. He asked, whether I was sure it was an amethist; I told him yes, I was sure, though it was paler and appeared clumsy; and then Bambridge said he was glad of it, and asked me whether it was not worth while to put it in a ring.

L. C. J. Did you tell Mr. Bambridge of the value of it?

Solas. I cannot be certain of that.

Mr. *Filmer.* Did he say any thing of the ring; whose ring did he say it was?

Solas. Captain Douglas said it was sent from a merchant.

Mr. *Filmer.* But did Bambridge?

Solas. Not at that time.

Mr. *Filmer.* Did he any time after say whose ring it was?

Solas. Yes, he said it was a ring of Mrs. Berkley's.

Sol. Gen. You say you took the stone out?

Solas. Yes.

Sol. Gen. Did you set it in again, after you had taken it out?—*Solas.* Yes.

Sol. Gen. Should you know your own setting, if you should see it?—*Solas.* Yes.

Then the ring being produced, and shewn to him.

Sol. Gen. Look upon it, is that your own setting?—*Solas.* I am positive it is my setting.

Then another ring was produced, and shewn to him.

Sol. Gen. Do you take that to be the same stone you then set?

Solas. It is one I set for Mr. Bambridge in this ring, but not the same stone he then brought, or I suppose it might be new polished.

Sol. Gen. How many rings did you set for Mr. Bambridge?—*Solas.* Two.

Sol. Gen. What were the value of them?

Solas. I set one for Mr. Bambridge worth fifty shillings, and another worth twenty shillings.

Sol. Gen. What might be the price of that you set for him, he told you he had from Mrs. Berkley?—*Solas.* About twenty shillings.

Sol. Gen. Had you no other ring brought you?

Solas. I had one brought from Mr. Bambridge by doctor Coltheart.

Sol. Gen. What was it?

Solas. It was a garnet, with a brilliant in the middle.

Sol. Gen. Whom did you say it was brought from?

Solas. From Bambridge, by doctor Coltheart.

Sol. Gen. How do you know that?

Solas. He sent his service. Doctor Coltheart and one Will that keeps a coffee-house came to me, and desired to know the value of a ring with a garnet, and a brilliant in the middle. I sent him word it was worth fourteen pounds; then Bambridge sent for me to the coffee-room, and desired to know the value of it; I said it was worth fourteen pounds.

Sol. Gen. What did he say?

Solas. He said, he thought I had valued it for more than it was worth.

Sol. Gen. Did he tell you whom he had the ring of?—*Solas.* No.

Bambridge. My lord, I am so unhappy, though so much concerned in this affair, as to be at so great a distance, that I don't know one word the witness has said, so don't know what questions to ask him.

Solas. If you have any questions to ask me, I am ready to answer.

Mr. *Kettleby.* You need not ask any.

Bambridge. Do you know the ring that was brought to you by doctor Coltheart, when you see it?

Solas. Yes, I am sure I should know it; I have had it three times in my hand; one time you shewed it me, with Mr. Burgess, and asked me the value.

L. C. J. You say that Bambridge had the ring, what use do you make of enquiring into the value of the ring, as to the one of them being worth fourteen pounds, and the other twenty shillings?

Att. Gen. The statute requires a particular value; besides, we make use of it to shew that Bambridge was endeavouring to sell them by a private sale.

Mr. Just. *Reynolds.* Were these offered on the behalf of Bambridge to be sold, or to know the value only?

Solas. Only to know the value; he sent to know the value, afterwards he came to me himself to value them, having sent them before by Coltheart and Will at the coffee-house.

Mr. *Willes.* The use that we make of this is, to shew that the ring with the brilliant in the middle was worth fourteen pounds, and only valued as a crystal, and not mentioned in the inventory at all.

L. C. J. I thought it was; give me up the inventory, (Which was done;) and looking upon the inventory, there are two cornelian seals set in gold, a crystal stone, a gold ring with one small emerald, and another with a small garnet.

Mr. Just. *Reynolds.* This is the ring called a crystal ring, which Solas says, when brought to him, he thought to be a garnet.

Turner being set up again.

L. C. J. Was that small garnet mentioned in the inventory as a ring?

Turner. No, my lord, it was a loose stone, otherwise, after mentioning that crystal stone ring, if the garnet had been a ring, I should have said ditto.

Jacob Mendez Solas being set up again.

L. C. J. This garnet was brought to you, Mr. Solas, set in a ring, with a brilliant in the middle, Was it not?

Solas. Yes, my lord.

L. C. J. Was there any other garnet with a diamond in the middle?

Turner. My lord, I saw no such ring.

Mr. *Howard* sworn.

Att. Gen. Did Bambridge lodge at your house?—*Howard.* Yes.

Att. Gen. Where do you live?

Howard. In Bell Savage Yard.

Att. Gen. What do you call the house?

Howard. Will's coffee-house.

Att. Gen. When did Bambridge lodge there?—*Howard.* Twelve months ago.

Att. Gen. How long before the seizure was made?—*Howard.* I can't tell.

Att. Gen. How long did he lodge there together?—*Howard.* About twelve months.

Att. Gen. Did he lodge there in October 1727?—*Howard.* Yes.

Att. Gen. Do you remember the bringing any goods to your house?—*Howard.* Yes.

Att. Gen. What were they?

Howard. I can't tell.

Att. Gen. Were they household goods or wearing-apparel?

Howard. I do not know any goods that were brought in but his own.

Att. Gen. I ask you if any goods were brought to the house?

Howard. They were.

Att. Gen. Do you know what they were?

Howard. I did not see them, they were brought in trunks.

Att. Gen. Did you know of any thing sold to one Mr. West?—*Howard.* Yes.

Att. Gen. Recollect what they were.

Howard. There was a gown and petticoat.

Att. Gen. Was there one or two?

Howard. I cannot tell.

Att. Gen. What were they made of?

Howard. I cannot tell.

Att. Gen. Did you see them?

Howard. I just looked at them.

Att. Gen. Did you know what sort of clothes?—*Howard.* I did not look at them.

Att. Gen. What were they sold for?

Howard. I heard Mr. West say, Mr. Bambridge had a gold watch for them.

Att. Gen. What were they sold for?

Howard. They said they were sold for fourteen or fifteen pounds.

Att. Gen. How do you know they were sold?—*Howard.* I heard West say so.

Att. Gen. Do you know nothing but what West told you?—*Howard.* No.

Att. Gen. I ask you if you were present when Mr. Bambridge, or any body for him, made any bargain as to the selling any clothes?

Howard. I was not at the making the bargain.

Att. Gen. Were you present at the time when the goods were delivered to Mr. West?

Howard. I know nothing further, than that I saw Mr. West have them.

Att. Gen. Have you heard Mr. Bambridge talk of selling the goods, and what he had for them?—*Howard.* No.

Att. Gen. Do you know of any gold lace?

Howard. I saw some gold lace that Bambridge had.

Att. Gen. At what time was this?

Howard. About October, 1727.

Att. Gen. Was it brought into your house?

Howard. Yes.

Att. Gen. You saw Bambridge have it?

Howard. Yes.

Att. Gen. Who was that sold to?

Howard. To one Mr. Harris.

Att. Gen. How much was that sold for?

Howard. I don't know.

Att. Gen. How do you know it was sold?

Howard. I know Mr. Harris bought it by his bringing money and paying it to Mr. Bambridge.

Att. Gen. How much was it?

Howard. I don't know the sum.

Att. Gen. Whereabouts was it?

Howard. I don't know.

Att. Gen. Did you see the money paid?

Howard. I saw it lie on the table.

Att. Gen. Was it gold or silver?

Howard. It was both.

Att. Gen. Was it ten or twenty pounds?

Howard. I don't think it was so much as ten or twenty pounds.

Att. Gen. You saw the money paid?

Howard. Yes.

Att. Gen. What was the money paid for?

Howard. It was paid for the lace.

Att. Gen. Why did you say for the lace?

Howard. Because Bambridge sold him the lace.

Att. Gen. Do you know from whom that lace was brought?—*Howard.* I don't know.

Att. Gen. What time was it, was it about October or November?—*Howard.* Yes.

Att. Gen. Did you see any tea-spoons?

Howard. Yes.

Att. Gen. Were they gilt?—*Howard.* Yes.

Att. Gen. Whose possession did you see them in?—*Howard.* Bambridge's.

Att. Gen. How many were they?

Howard. Three or four.

Att. Gen. Were there half a dozen?

Howard. There were not so many.

Att. Gen. Do you remember Mrs. Corbett's buying any thing?—*Howard.* No.

Mrs. *Howard* sworn.

Sol. Gen. Are you the wife of the last witness?—Mrs. *Howard.* Yes.

Sol. Gen. When did Mr. Bambridge live at your house?

Mrs. *Howard.* I can't tell directly.

Sol. Gen. Was it in October 1727?

Mrs. *Howard.* It was thereabouts.

Sol. Gen. Do you remember any women's clothes that were brought to your house?

Mrs. *Howard.* Yes.

Sol. Gen. Do you know whose they were?

Mrs. *Howard.* No.

Sol. Gen. Who brought them into your house?—Mrs. *Howard.* I don't know.

Sol. Gen. By whose order were they brought?

Mrs. *Howard.* I don't know.

L. C. J. Who brought the clothes in, to whose use were they delivered?

Mrs. *Howard.* To Bambridge's.

L. C. J. Who were they sold to?

Mrs. *Howard.* They were sold to one Thomas West, by Mr. Bambridge.

Sol. Gen. What was paid for them?

Mrs. *Howard.* I can't tell exactly the sum, but a gold watch was given for them, which Mr. Bambridge had.

Sol. Gen. Do you know the goods, can you describe them?

Mrs. *Howard.* Yes, one was a blue and white sattin gown, made up; another was a worked gown, lined with a cherry-coloured lining.

Sol. Gen. What was it worked upon?

Mrs. *Howard.* I can't say whether it was holland or silk.

Sol. Gen. Do you remember any other particulars?

Mrs. *Howard.* There were a black hood and a scarf, with black lace round them; there was also a tippet.

Sol. Gen. What was the tippet?

Mrs. *Howard.* Sable.

Mr. Just. *Reynolds.* There is some stitched embroidery, part of a gown, taken notice of in the indictment.

Sol. Gen. They were all sold to West, were they not?—Mrs. *Howard.* Yes.

L. C. J. Did you see them sold?

Mrs. *Howard.* Yes.

L. C. J. Did West pay for them?

Mrs. *Howard.* Yes, he gave a gold watch for them.

L. C. J. Was there any thing else, had Bambridge any money beside?

Mrs. *Howard.* I cannot tell of any thing but the gold watch.

Sol. Gen. Were there no other things?

Mrs. *Howard.* There were tea spoons.

L. C. J. Had they any mark upon them?

Mrs. *Howard.* I can't tell.

Sol. Gen. Were they sold?

Mrs. *Howard.* Bambridge offered to sell them to me.

Sol. Gen. Do you remember any gold lace?

Mrs. *Howard.* No, but I remember some silver lace taken off the blue sattin.

Sol. Gen. Was that sold?

Mrs. *Howard.* Yes.

Sol. Gen. For how much?

Mrs. *Howard.* For 4*l.* 10*s.*

Sol. Gen. Who received the money?

Mrs. *Howard.* Bambridge received the money of Harris.

Sol. Gen. At what time were these goods sold?

Mrs. *Howard.* West bought them all at one time.

Sol. Gen. Do you know the time?

Mrs. *Howard.* I cannot justly tell the time.

Sol. Gen. Do you remember the month or year?

Mrs. *Howard.* I do not.

Mr. *Willes.* Did Bambridge tell you whose the lace was?

Mrs. *Howard.* He sold them as his wife's.

Sol. Gen. We must submit it to your lordship here.

L. C. J. The king's counsel have now done, what have you to say?

Bambridge. I did not hear what the last witness said.

L. C. J. She says, you sold a gown of blue sattin, flowered, to one West, as your wife's; she says, that one Harris bought the silver lace; that the tea spoons were offered to be sold, but she does not know whose they were. Now they have done, what have you to say?

Bambridge. As to my defence, I shall give your lordship but little trouble. After the general accusation brought against me; and the clamour it has made in the world, I don't find that there is any thing answerable to it, or any thing brought to the point; the gentlemen have not proved any felonious act against me, any thing fraudulent, or any misbehaviour whatsoever. If there was any thing necessary to justify myself in, by giving an account of my conduct in my office, I might do it fully; I have the proper officer here ready to do it; but as I see no necessity for it, I will not trouble your lordship, but submit it to your lordship and the jury.

L. C. J. Then you will rest it here.—Gentlemen of the jury,—

Bambridge. I must desire one favour of your lordship, that if any matter of law should arise, you will let that be reserved.

L. C. J. What the king's counsel say is very right, whether it was a fair distress, or whether it was only the colour of a distress, with any felonious intent: the attorney-general has stated that very clearly, that a man may do a lawful act feloniously. If this was done with a felonious intent, then this will be felony; yet if it was not done with a felonious intent, this will not be felony. This was the grand point laid down by the gentlemen, that the jury are to judge with what design these things were taken away.

Gentlemen, the first witness for the king, who was John Turner, says, that the time of taking those goods was whilst Bambridge was warden, and that Pindar was chamberlain; and that Bambridge ordered this Pindar to distrain the goods of Mrs. Berkley; and that the time of distraining these goods was between the 23d and 27th of October, 1727. He says, gentlemen, that Bambridge was not then there present; and that she, Mrs. Berkley, was put out of her room. After this, Bambridge came to enquire into this affair, to see what was done, Mrs. Berkley being then on the common side; and he sent down somebody to call her up, she having locked the door. The goods, gentlemen, were as much under her key as Bambridge's: Bambridge, I must tell you, put on one padlock, and she locked the door, and put on another; and when she refused to open the door, he caused it to be broke open, and entered the room. There was, gentlemen, an inventory made by one Turner, who had formerly inventoried goods, and was usually sent to for such purposes: he says, gentlemen, he had no orders to undervalue the goods: Turner was sent for by Pindar: he valued all the goods, as the bed, bedding, &c. and as to the boxes, they were not then opened: he did not see what there was in them; but put them in gross in the inventory. Bambridge, gentlemen, coming to look after this affair, on the 3d or 4th of November, sent for Mrs. Berkley to come up; and Mrs. Berkley came up accordingly; and he desired to have the use of her key, which she refused, and said, I think you are going to rob me. Upon that, Bambridge, before her, sent Barnes for the hammer, to have it to open the door, but it would not do; and then he sent down for the poker, and Barnes forced open the door, and in they went, Mrs. Berkley along with them. Bambridge asked her for the keys of her boxes: she said, he should have no keys; and asked him, by what authority he did it: he said by authority of warden; and Bambridge then ordered the boxes to be broke open. When he had opened the boxes, Turner was sent for; he was to perfect the inventory, that was in part before made. It was opened by the counsel for the king, that it was a fraudulent inventory; and they, to make this appear clearly to be fraudulent, told you the goods were set down otherwise then they really were. There was put down, they said, dimity or silk sufficient for a gown, or what it was: they said, there was a flowered blue and white sattin,

that was actually made up, put down only as sufficient: as to the dimity and silk, that had been dyed, and Turner said, that it was rolled up; for these had been at the dyer's, and were not put down as a gown; but that he had set them down properly, as he thought: but when he came to the flowered gown, which was made up, he made some difficulty in putting that in the inventory, and said, that it was not usual to put them in distresses; for this was wearing apparel. And it was proved, gentlemen, by one of the witnesses, that Mrs. Berkley said, it was felony: this, gentlemen, might caution Turner; he said it was not usual to put such things into an inventory for a distress. Then Bambridge said, if he would not put it in so, he must put it down so many yards of flowered silk, sufficient to make a gown and petticoat. The difficulty arose from himself, and not from the defendant. He should not have mentioned it silk sufficient for a gown; he was asked two or three times, and Mr. Bambridge said, it must all be in the inventory; so accordingly it was put in, in this manner. This is offered to you as evidence of the affair: you will consider whether it is so or not. Then these things were all looked over; and Turner says, they were all put into the inventory, and the greatest part put into a portmanteau; but there were some few things, as tea-spoons, seals, and rings, that were put into Bambridge's pocket; but though he put them into his pocket, they were in the inventory; and this inventory, in the whole, came to 30*l.* and at last were brought down to 27*l.* He says, gentlemen, that there was a brush that was discovered; and Bambridge, upon seeing it, said, Surely there must be some diamonds; and so he searched for them, and, in making such search, he found a piece of paper: the witness says, gentlemen, it was some decree, which Bambridge took in his hand. She said to Bambridge, You won't take the papers too? Yes, said he, I will; and if I find any bonds or bills, I will make bold with them. He says, gentlemen, that Bambridge took the bed and bedding away, and offered her another bed; but she said, she would not lie on it; then she went down to the common side. He says, that she talked very much; that she was disordered in her mind, and talked of lord Harcourt. This is the account given of her. He says, gentlemen, that Bambridge sent for her when the inventory was taken; and he says, that she was there during all the time: though he took these little things, yet she could not be defrauded in that manner, because they were put in that inventory. I must give you an account of the evidence of the people, as they are examined. Turner, gentlemen, says, that Bambridge expostulated with her about the chamber rent that was due, which was 56*l.* and said, Why do you not pay it? I am informed that you are very capable: the woman said, the house was the king's, and the king should find her a house; and Bambridge said, he would do her what service he could. Gentlemen, it was said by Turner, that he did appraise these goods; that he did appraise them fairly; and that he was employed by Pindar, who was used to employ him. He said, gentlemen, that the first time a real constable was there; and the second time the constable was a real constable, and he swore him: now there was, indeed, Pindar pressed by Bambridge to assist in the appraisement, who did not at all understand it: he was a distiller, of a quite different trade. He says, gentlemen, that Bambridge did desire Mrs. Berkley to send to her friends to pay the rent. This, gentlemen, is the evidence given by this man. Another witness, gentlemen, is one Wilkinson: he gives an account that he knew Mrs. Berkley, and where she lodged, and that he was a prisoner there himself: he spoke of Pindar and Barnes, who were there the last time of his coming. He says, that the door was broke open, and that the padlock was forced off by Bambridge's order: he says, that Pindar fetched the poker, and Bambridge ordered Barnes to break open the door. He says, gentlemen, he was sent to call Mrs. Berkley from the common side before this was done: when she came up, she was asked to part with her keys; but she refused; and then the door was broken open. He says, gentlemen, there were two boxes locked, and one nailed; and Bambridge asked her for the keys of her boxes; but she refused to deliver them to him; upon which Bambridge broke them open; and that Mrs. Berkley was all the time there, and called it a robbery. He says, that the things were taken away by Bambridge's directions; and that she, Mrs. Berkley, said, that the taking away her wearing apparel was felony. He says, gentlemen, he was ordered to take the bed and bedding, and carry it into the lumber-room; that afterwards it was taken from thence, and carried to the water-side, to be sent to Wandsworth. There were several small things, as an emerald and garnet, and some other rings, one of them a stone ring; all these Mr. Bambridge put in his pocket, he said for fear of losing them; and at the same time he called to Savage and Douglas, to see that he put them into his pocket, for fear they should be lost. Now, gentlemen, he says further, the wearing apparel (which was rich,) and such things, the prisoner put into the portmanteau, and ordered it to be carried into the lumber-room; and other things were carried to Will's coffee-house; and the prisoner said, he seized for rent, and would stand by it. What he says farther, in relation to Mrs. Berkley, was, that she was there all the time, and frequently complained it was felony, and a robbery; and says, that the goods were removed, some at one time, and some at another, in the day time, not concealedly. This, gentlemen, is the substance of his evidence: but he says something further, that her bed being gone, she would not continue in the room.

Burgess, he says, they had called her up: he spoke to the last time of their being in the room, about fourteen days after the 23d of October. He says, he went up soon after the

door was broke open, and gives much the same account as the former witnesses have done; and that Bambridge put some small stones in his pocket: he says, that the putting these things in his pocket, was for fear they should be lost, and that he told Douglas so.

Savage says, that, hearing a noise, he went to the room, and found Mrs. Berkley there. He says, that Bambridge asked her for the key; Mrs. Berkley said, he should have none, for that he came to rob her; upon which he broke the boxes open: he says, that there were several good things in them; there was a garnet, and a little stone ring, two cornelian seals, and a loose stone: these things Bambridge put in his pocket; but he does not remember that Bambridge said, he put them in his pocket for fear of their being lost; nor did he say, that Bambridge bid Douglas, or any one else, take notice, he put them there for fear of being lost. He says, that the bed was sent down to Wandsworth. He spoke to the matter of the fraud, as to the having the wearing apparel set down for so much silk as would be sufficient for such a purpose; and he was asked, gentlemen, by Mr. Bambridge, whether any thing clandestine was done in breaking open the boxes, and he said not. He says, that Bambridge pretended he seized the goods for rent, and that the rings were shewn in the coffee-house.

Solas, he said, the rings were shewed to him, not to be sold, but to know the value of them. He spoke as to that ring that was brought to him by Coltheart, with a diamond in the middle of it, worth 14*l*. Gentlemen, there does not appear to be any such ring in the inventory, or the lady's boxes; but let that be as it will, it was only sent for him to value it.

The next witnesses are Howard and his wife: he says, there were several things disposed of by Mr. Bambridge: it seems he lodged at their house. She says, this flowered sattin gown was carried to their house, and there disposed of: he swapt it for a gold watch. There was some gold and silver lace mentioned in the inventory, which, she says, was sold to one Mr. Harris, who brought the money, which was not quite 10*l*. She says, that he did not say, that it was Mrs. Berkley's, but his wife's. This, gentlemen, is all the evidence given by the witnesses, from the one side, or the other. If there is any thing else, that I have omitted, I hope you will put me in mind of it. Now, gentlemen, what you have to consider is, whether Bambridge did feloniously steal these goods.

This, gentlemen, is an indictment founded upon the statute of the 12th of the late queen, the words are, If any person shall feloniously steal any goods worth 40*s*. out of a dwelling-house, he shall suffer death without the benefit of his clergy. Now the question is, gentlemen, whether he did steal, or take them away with a felonious intent, to make it felony; or whether he took them as a distress for rent? Whether the distress was regular or not, is not the matter; if the distress was irregular, he is liable to an action; if he took them with any view of committing any theft or felony, you will find him guilty of felony; but if that was his real intention, to levy rent by distress, and that he had no intention to steal the goods, then he is not guilty of this felony; but if he made use of this intent of distraining, with a view of stealing these goods, and to make them his own, and this was only a colour, or mere pretence of his wicked intention, and that he had it in his view to steal these goods, though this is a legal remedy, yet it will not excuse it; for if a man make use of a legal process with a felonious intent, it will be felony in him; for if a man gets a horse that was not his own by replevin, it is theft; if a man gets another's property into his possession with a felonious intent, it is felony, but if not with a felonious intent, it is not felony; if he makes it only a pretence to get goods, and then dispose of them, and does this with a felonious intention, and an intention to steal them, then he will be guilty of felony. Gentlemen, you will consider what was his intention, and consider the circumstances that have happened, which are fresh in your memories. If these goods were taken with a felonious intent; then you will find him guilty; but if he only took them as a distress for rent, and with no felonious intent, then you will acquit him.

Mr. *Matthews.* (Speaking to the officer.) Will the jury withdraw?

Mr. *Kettleby.* What have you to do with their withdrawing? Let them give their verdict in court if they will.

Mr. *Matthews.* They are at a distance now, they must either withdraw to consult, or consult together in court.

Mr. *Kettleby.* You and the prosecution are of a piece; you just now read part of the indictment, and left out the other part.

Mr. *Matthews.* Officer, clear the Court.

L. C. J. If you please to withdraw, and consider of the verdict.

Then an Officer was sworn to keep the Jury, and they withdrew, and returned in a very short time.

L. C. J. (The jury being returned.) Call over the jury. Answer to your names. (Which they did.)

Mr. *Matthews.* (After he had called them over.) Are you all agreed in your verdict?

Omnes. Yes.

Mr. *Matthews.* Who shall say for you?

Omnes. Foreman.

Mr. *Matthews.* Thomas Bambridge, hold up your hand. (Which he did.) Then, speaking to the jury, Look upon the prisoner at the bar, how say you, Is he Guilty of the felony whereof he stands indicted, or Not Guilty?

Foreman. Not Guilty.

It is remarkable, that though the prosecutions against Mr. Huggins, Mr. Bambridge, &c. were ordered by his majesty, on an Address from the House of Commons, and con-

ducted by some of the greatest men at the bar, yet they got off—all being acquitted. *Former Edition.*

The preceding Trials and the proceedings in Parliament (as to which see 8 New Parl. Hist. 706. 731. 753. 803). appear to have originated with the excellent Oglethorpe, of whom some particulars are inserted in the same volume of the New Parliamentary History. He died in the year 1785, about the age of 87, and has an article in several of the modern Biographical Collections. See, also, 10 New Parl. Hist. 428.

Since the time in which these trials were had, the management of prisons has been regulated by numerous statutes, some of general, some of local operation; nor indeed can too great vigilance be exercised over the government of such places. To harden the heart is the natural tendency of all power, particularly of that which has among its objects the outcasts of society, the profligate and the knavish, the highwayman, the housebreaker, and the murderer. Blackstone accordingly tells us that jailors are too frequently a merciless race of men, and by being conversant in scenes of misery, steeled against any tender sensation. Among the numerous improvements which, since Blackstone wrote, have been effected in the economy of prisons, one of the most important is the attention which is now generally paid to the character and conduct of the officers employed in those receptacles of vice and misery. The exertions of Howard to produce these improvements constitute a splendid history of modest, disinterested, and unwearied benevolence, to the fame of which no efforts of praise here could hope to add.

With respect to the confinement of debtors the practice of our legislation during a considerable portion of the last century seems to have been to huddle into promiscuous imprisonment, with no classification and little distinction, characters of all descriptions, the great defaulter and the small, the dissolute and the industrious, the unprincipled spendthrift or impostor and the innocent victim of uncontroulable calamity, until the full crammed jails could hold no more: and then to discharge upon society their various contents with nearly equal indiscrimination. Of this disgraceful policy the folly and the wickedness have called forth the indignant animadversions of the humane, the eloquent, and the learned; and the meritorious perseverance of one distinguished member of the House of Lords to prevail on the legislature to reform the system, has been indefatigable. Of late some correctives have been applied; which it may gratify humanity to contemplate, not as an evasive compromise with absurdity and cruelty, but as the foundation of a happier structure of justice, wisdom, and beneficence.

To the references to lord Coke in the preceding Cases, may be here added from his third Institute, chap. 2, pp. 34, 35.

"It is now necessary to be known how prisoners (to speak once for all) committed for treason or any other offence, ought to be demeaned in prison. Bracton saith, 'solent 'præsides in carcere continendos damnare ut 'in vinculis contineantur sed hujusmodi inter- 'dicta sunt a lege quia carcer ad continendos 'non ad puniendos haberi debeat.' And in another place he saith, 'Cum autem taliter 'captus coram justiciariis est producendus pro- 'duci non debet ligatis manibus (quamvis in- 'terdum gestans compedes propter evasionis 'periculum) et hoc ideo ne videatur coactus ad 'aliquam purgationem suscipiendam.'

"If felons come in judgment to answer, &c. they shall be out of irons and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer but at their free-will." And in another place he saith, "and of prisoners we will that none shall be put in irons but those which shall be taken for felony, or trespass in parks or vivaries, or which be found in arrearages upon account; and we defend that otherwise they shall not be punished nor tormented. 'Omnes 'autem attachiabiles licet vicecomiti in prisona 'custodire, &c. non tamen ad puniend' sed ad 'custodiend', &c. It is an abuse that prisoners be charged with irons, or put to any pain before they be attainted.

"'Quidam sacerdos arraniatus de felonia 'posuit se super patriam, et stetit ad barram in 'ferris, sed per præceptum justic. liberatur à 'ferris.' And there is no difference in law, as to a priest and a layman, as to irons.

"'Presentat quod ubi quidam Robertus Bay- 'hens de Tanesby captus fuit, et in prisona 'castri Lincoln detentus pro quodam debito 'statut. mercatorii in custodia Tho. Boteler 'constabularii castri de Lincoln ibi præd. Tho. 'le Boteler posuit ipsum Robertum in profundo 'gaole inter lenones in vili prisonâ contra for- 'mam statut. &c. et eodem profundo detinuit, 'quousque idem Robertus fecit finem cum eo 'de 40s. quos ei solvit per extorsionem.'

"So as hereby it appeareth, that where the law requireth that a prisoner should be 'kept in salva et arcta custodia,' yet that that must be without pain or torment to the prisoner."

"If a prisoner by the duress of the gaoler cometh to untimely death, this is murder in the gaoler; and the law implieth malicè in respect of the cruelty. And this is the cause, that if any man dieth in prison the coroner ought to sit upon his body, to the end it may be enquired of, whether he came to his death by the duress of the gaoler or otherwise." 3 Inst. ch. 7, p. 52. See, too, cap. 29, p. 91.

As to the use of irons during trial or arraignment, see vol. 16, p. 99, Layer's Case; and vol. 5 (pp. 979, not 379 as erroneously printed, et seq.) there referred to.

488. Minutes of the Proceedings of the Committee, appointed to enquire into the State of the Gaols of this Kingdom, touching a Charge against Sir ROBERT EYRE, knt. Lord Chief Justice of his Majesty's Court of Common Pleas, for personally visiting Thomas Bambridge, late Warden of the Fleet, whilst he was a Prisoner in Newgate, under a Commitment of the House of Commons, &c. &c.*: 4 GEORGE II. A. D. 1730.

At the Speaker's Chamber at the House of Commons, at the Committee appointed to enquire into the State of the Gaols of this Kingdom.

Edward Hughes, Esq. in the Chair.

Saturday, April 25, 1730.

THE Committee having received several Letters and Informations relating to the foregoing Charge, proceeded to examine a great number of witnesses in the most solemn manner relating thereto; when the several following Letters (except No. 5, directed to Francis Harbin,) were sent under cover to Edward Hughes, esq. and being produced by him to the Committee, were read; which Letters, as they seem intended for an introduction to the Charge, and as they relate to some of the foregoing Trials, are here inserted.†

The several following Letters (except that directed to Francis Harbin) were sent under cover to Edward Hughes, esq. and produced by him to the Committee.

N°. I.

"Sir; my supposed attachment to the interest of Mr. Bambridge, cannot, I am sensible, but have prejudiced me in the opinion of all good men, and therefore, before, Sir, I offer my service to you, and to my country, it may not be amiss to say something of the motives that at first induced me to fall in with his party, and also of those which have since determined me to quit it.

"After the Report of the late Committee, I will not presume to say, I thought Mr. Bambridge innocent; but, I confess, I looked upon him to be far less guilty, than since, by examining his own side only of the question, I find he is; the atrociousness of his crimes took off to me much of the probability of his committing them; and it was hard for a man who had any virtue himself, to believe there was another so perfectly abandoned.

"Mr. Bambridge took all the opportunities he could, of gaining those he thought might be of use to his party; amongst the rest, he applied himself to me. I confess, at first, the art with which he palliated his offences, deceived me; I went heartily into his concerns, and did all for him in my power, as for a man struggling against the current of the times; but as I grew into his confidence, the mask was taken off, and I found the use he intended to make of me, was not to assist an oppressed man in his defence, but to screen a guilty person from his just punishment. As to the personal injuries I have received, (and surely nobody has received more) I forbear to mention them, since my private pique shall never add an edge to any informations I may hereafter give you. I am weary of the part, Sir, which hitherto I have acted in this affair; it is with pleasure I quit the side of artifice and dissimulation, and with joy I enter into the service of truth, and of my country. I heartily beg pardon for any faults I may already have committed, and assure you, Sir, it shall always be my study for the future, to testify by my actions, as well as words, how much I am, Sir, your faithful and devoted humble servant."

"*Oct.* 29, 1729."

N°. II.

"Sir; the last time I did myself the honour of writing to you, I promised to give you all the informations in my power, that might any ways tend towards carrying on, with effect, that generous enquiry made by the late Committee of the House of Commons. In pursuance of which promise, give me leave, Sir, to lay before you certain observations, which, though at present little more than conjecture, yet are such as I despair not, by time and application, to produce the strongest evidence of their truth.

"The late warden, Mr. Bambridge, notwithstanding all his vanity and rashness, could never have been capable of so much folly, as to have committed so many notorious offences in

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* See the preceding Cases.

† "These Letters, &c. are taken from the Proceedings, &c. in this affair, as drawn up by Mr. Luke Kenn, to be laid before the House of Commons. The whole proceedings are long, being about 142 folio pages, wrote close, in a small round hand; so we have taken only so much, as may give some light into the Charge relating to the foregoing Trial, &c."—*Former Edition.*

his office, if he had not presumed on the interest of some superior power, which (at least as he fancied,) might be able to prevent any enquiry into his conduct; or if that by no arts were to be evaded, would at last screen him from punishment. That this presumption of his was but too well founded, I am apt to believe is pretty apparent; the behaviour of a certain Court, when complaints were made against him; the difficulties there were in procuring rules, on the plainest proofs of the most flagrant oppressions; the ambiguous terms in which such rules were generally drawn up; the little regard he paid those orders, when served upon him, and his impunity, notwithstanding such disrespect, are arguments which amount almost to a demonstration of his being in confederacy with a certain person, who, no doubt, took care to receive from him an adequate satisfaction for such favours.

"But as a correspondence of this nature was equally criminal in the receiver and giver, it cannot but be supposed, that the utmost caution was used, in order to the carrying it on with impenetrable secrecy. But when the House of Commons thought fit to imprison Bambridge, a third hand became absolutely necessary towards that purpose; and from thence so much light has been let into that dark affair, that by degrees I no way doubt, but that a perfect discovery may be effected. I will only beg leave to add one thing to this long letter, and that is, that although vice be contagious in its nature, and that I have long conversed in intimacy with Mr. Bambridge, yet, if I know my own heart, I will venture, Sir, to assure you, there is nothing I so much hate as disingenuity; and that, for the future, I shall let slip no opportunity of shewing with how much sincerity, I am, Sir, your faithful and devoted humble servant."

"*Nov.* 12, 1729."

N°. III.

"Sir; having, in my former, laid before you those reasons which induced me to believe a correspondence between Bambridge and a certain great man, at whom I have already pointed; I now beg leave to add such facts, as have at any time come to my knowledge, and which seem to confirm it. First, Sir, give me leave to observe, that Bambridge, in regard to his expences in private life, has, since his imprisonment, been very much straitened; but where counsel, or any thing else that was necessary towards his defence, was wanting, money has not only been expended, but lavished. I lay the more stress on this, because in some respect, it falls within the circle of your own observance. When Mr. Bambridge attended last at the House of Commons, his counsel was pleased to say for him, that the present narrowness of his circumstances obliged him to appear with but one counsel; but since that fruitless negociation, in which through his arts I was so unlucky to become an agent, we have seen a very different turn. The Courts of Chancery, King's-bench, Common Pleas, and Old Bailey, have all in their turns been crowded with orators in his favour.

"The lowness of his fortune at the time of his coming to his office at the Fleet, is notorious to the world; and though I believe, as to getting of money, he can by no means be charged with being idle; yet, (if even the most extravagant calculation should be admitted) the shortness of his stay there could not but prevent his acquiring half that sum of money, which has been already expended in defence of these prosecutions; add to this, that his own creatures have imprudence enough to mention this, as the strongest part of what they call a formidable interest, and that I myself have seen his clerk deliver a letter to that great man, in Westminster-hall; to which his lordship said, I thank you, Sir, I am obliged to you, Sir, or words to that purpose.

"But that which has given me the strongest assurances, and such as I hope, will one day terminate in the clearest evidence, is the conversation I have had with one Mr. B. who is himself perfectly intimate with Bambridge, and whose wife has given very extraordinary instances of her attachment to his interest. This gentleman, though he still owns the greatest friendship to him, yet has confessed to me, that to his own knowledge, Bambridge had it in his power to —— that great man, (that was his expression,) not only in respect to things done as to the office of the Fleet, but in other respects also; and that he was sorry Bambridge was not to be persuaded to give him up to justice, which might be a means, not only of saving himself, but would also make some atonement for his faults. He promised me also to make so strict an enquiry into this affair, as to furnish me with a clue, by which might be unravelled this whole work of darkness. For this purpose I was to have met on Friday, but something having intervened, he has put it off till Tuesday next, till when I should have delayed this letter, but that I was impatient of giving you some further proof of that sincerity with which, I am, Sir, your faithful and devoted humble servant."

"*Nov.* 13, 1729."

N° IV.

"Sir;—Mr. Harbin having acquainted me, that he intended to make you a visit, I was unwilling he should go without carrying with him this, as a mark of my duty and respect, especially so remarkable an event (I speak with regard to the prosecution) as the acquittal of Mr. Bambridge having happened since your going down into the country. I do not pretend, Sir, to give you an exact detail of that extraordinary affair, the public prints having doubtless, and probably a manuscript copy of his trial, may long ere now have reached your hands; all I shall endeavour, will be by a short observation or two upon it, to give you some light into the means by which that unexpected event was brought about.

"It is agreed, on all hands, that a legal distress for rent is a very innocent as well as a lawful action; but if, under colour of such distress a person comes, and, with a felonious intent, steals and carries away goods, the pretence of a distress will be so far from extenuating, that it will heighten the offence, since it is done *in fraudem legis;* and the law, which is intended to preserve and to protect the property of the subject, is thereby made a means to destroy it.

"A felonious intent is only to be proved from the actions of him who commits the fact; and that such an intention actuated Mr. Bambridge in this extraordinary seizure, is pretty apparent, from the two following circumstances which attend it.

"Turner, the person employed by Mr. Bambridge as an appraiser (though a prisoner and a creature of his own), yet thought fit humbly to represent to him, that he had never seen necessary wearing apparel distrained before (as indeed by law it cannot); upon which Mr. Bambridge ordered him, in taking the inventory, instead of setting down a gown and petticoat, as the thing really was, to set down silk sufficient for a gown and petticoat; and made use, in several instances, of the same artifice: A thing in itself so plain and flagrant, that even Mr. Bambridge could not find out an evasion; but in that he was kindly helped out by the bench; from whence in summing up the evidence, it was declared that the appraiser's was only an idle objection, to which Mr. Bambridge gave way, merely because he would have nothing left out of the inventory.

"The other was this: It was fully proved, that Mr. Bambridge carried away four rings in his pocket, though but one is mentioned in the inventory, and that too is called a crystal, though it was indeed an amethyst. To us, who were spectators, this appeared to have a very great weight; but it seems it appeared in a very different light to the gentleman who tried him, since it escaped both his memory and his notes.

"Having twice mentioned that gentleman, I cannot help doing him justice, on this occasion, by observing, that (however in other respects his enemies may asperse his character) there is one part of the judge, in which I believe no man ever came up to him; I mean, in being counsel for the prisoner. I am afraid I have been already too prolix, and will therefore lengthen this letter no further, than to assure you, Sir, of my being, with the utmost deference and respect, your obedient and devoted humble servant."

"*Dec.* 20, 1729."

N° V.

"Dear Frank;—I find that Mr. Bambridge, however unlikely he is in succeeding, will undoubtedly move the Court of King's bench for judgment and damages upon the writ of appeal; and hopes great advantages from the favour of the gentleman who tried him, on the first indictment, for the murder. I do not find, from Codpor, that he has any affidavits to support this motion; or at least, if he has any, he has not trusted him with them: However, am to see Codnor this evening; and if any thing material should occur, shall leave a line, so that you may have it very early in the morning. I find he and all his party are very alert at present; and are so far from being apprehensive, from the present temper of the House of Commons, that they, on all occasions, treat the late Committee with the utmost insolence and contempt. However, as there is little likelihood that his assurance will be able to defeat the united endeavours of those gentlemen for the relief of the unhappy, I please myself with hoping that all will at last go right,—I am, yours, &c.

"*Feb.* 2, 1729-30."

"To Mr. Harbin."

N°. VI.

"Sir; Mr. Harbin having informed me, that you have been so good as to enquire after me, I thought it necessary for me to excuse myself for not attending you, by acquainting you with the reason; which is, that my being seen at the Horse-guards, as things stand at present, might be some hindrance to my entering into the knowledge of some things, about which it is at present my duty to enquire.

"There is another motive which induced me to give you this trouble; and that is, that you would be so good as to mention it to the chairman, that as my time (the only thing valuable that is left me in my misfortunes) is almost wholly taken up in endeavouring to do service to the present enquiry; and as it has involved me in the hatred of a party of the worst of men, who let slip no opportunity of making me uneasy; I hope it may not be thought unreasonable to give some directions for my receiving a moderate subsistence.

"I confess Mr. Harbin has been, in this respect, very kind; but as I have been hitherto unused to ask any body for every shilling and sixpence that is necessary to be laid out, I conceive it would be for both our advantages to have it put into another channel.

"Before my engaging in this affair, I confess, I used sometimes to prepare some little labours for the press; but as these are the employments of a mind at ease, in my present circumstances, it is no way in my power to compose them. As this is a subject on which I should never have prevailed on myself to speak, and on which I write with the greatest reluctancy, I hope you will forgive this trouble from your obliged and obedient servant."

"*Thursday Morning.*"

The Committee thought it their duty to examine strictly into an affair of so extraordinary a nature, when several persons appeared before them, and endeavoured to make good their several informations.

Which persons, having been examined be-

fore the Committee in the most solemn manner, relating to the foregoing charge, grossly prevaricated in their examinations, contradicted one another in several material circumstances, and, as to the facts, were falsified by persons to whom they referred for the truth of what they had declared.

It likewise appeared to the Committee, that divers of the said persons were prisoners in Newgate, or the Fleet; some of them of vile and infamous characters; others actuated by a spirit of resentment, on account of causes determined against them before the said Lord Chief Justice; and all of them tampered with, and influenced. It further appeared to the Committee, that several of the said persons had had meetings and consultations amongst themselves; and had been guilty of divers evil practices, in order to set on foot and support the said charge against the said Lord Chief Justice, and the matters contained in their said informations.

After the Committee had spent several days upon the said enquiry, and had examined all the witnesses that appeared before them, the principal persons concerned in the conspiracy having reason to apprehend, that the evidence given by them to support the said charge, would not be sufficient to impose upon the Committee, and to obtain credit to the said informations, did consult with a person to fix a new charge upon the said Lord Chief Justice, not mentioned before in any of their examinations, by giving evidence of certain circumstances, to induce a belief, that about three days before the time appointed for the trial of the said Thomas Bambridge for felony, in the last long vacation, the said Thomas Bambridge did send a letter to the said Lord Chief Justice for money; and that, in consequence thereof, he received one hundred guineas.

Whereupon the Committee thought fit to re-examine the said principal persons, who before had been examined as to the former charge, who were not able to give the least colour of evidence to support the said new charge, and were flatly contradicted by the evidence to whom they referred; and on their examinations the Committee, being convinced that the said new charge was only a continuation of the former conspiracy, on considering the whole matter came to the following Resolutions:

Resolved, That it appears to the Committee, That there hath been a wicked conspiracy carried on by certain infamous and profligate persons, to vilify and asperse the character of the right honourable sir Robert Eyre, knight, Lord Chief Justice of his majesty's court of Common Pleas;

Resolved, That it appears to this Committee, That the informations given to this Committee against the said Lord Chief Justice Eyre, are false, malicious, scandalous, and utterly groundless.

Then resolved, That Roger Johnson, and a great number of low, ordinary people (there named), were the persons concerned in the said conspiracy.—To which the House agreed.

Thus this great man had justice done him, in as honourable a manner as possibly could be, and was cleared of so scandalous and infamous a charge. *Former Edition.*

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489. The Trial* of Mr. Richard Francklin,† for printing and publishing "A Letter from the Hague," in the Country-Journal, or Craftsman, of Saturday, the 2d of January, 1731, at the Sittings of the Court of King's-Bench, Westminster, on Friday, December the 3d, before the Right Hon. Lord Chief-Justice Raymond:‡ 5 George II. A. D. 1731.

Jury.

Tho. Milner, esq.	Wm. Tilliard, esq.
Geo. Short, esq.	Tho. Moore, esq.
Tho. Allen, esq.	Philip Baker, esq.
Jacob Harvy, esq.	Joshua Jackson, esq.
Hen. Norris, esq.	William Turner, esq.
Samuel Tyssou, esq.	John Wilson, esq.

Mr. Parker. MY lord, in this cause, his majesty is plaintiff, and Richard Francklin, defendant. The information sets forth, that before the demise of the late king, divers differences and controversies arose between his said late majesty and divers princes and foreign states, being his allies, and the king of Spain, concerning the public safety and commerce of this kingdom, and the peace and tranquillity of Europe; and that, pending such differences, to wit, the 30th September, 1725, a certain treaty, betwixt the said late king, Lewis the

* "Taken down in short hand, and transcribed into long hand, by Mr. J. Weston."—*Former Edition.*

† See Fitz-Gib. 5.

‡ That great anxiety was excited by the prosecution of Francklin, may be inferred from the following passage in Boyer's Political State of Europe:

"July 12, 1731, was to have come on the trial of Mr. Francklin, the bookseller, for printing the Craftsman of the 22nd of Jan. last. A vast crowd of spectators of all ranks and condi-

French king, and the king of Prussia, was concluded and made at Hanover; and that afterwards, to wit, the 9th of November, 1729, in order to compromise such differences, and to establish peace in Europe, a certain treaty of peace, union, amity, and mutual defence, was concluded and made, betwixt his majesty king George the 2nd, and the said Lewis the French king, and Philip king of Spain, at the city of Seville, in the said kingdom of Spain. The information also sets forth that Richard Francklin, well knowing the premisses, but being a malicious, seditious, and ill-disposed person, and a perpetual and diligent publisher and seller of seditious and scandalous libels, and disaffected to his present majesty and his government; and wickedly, maliciously, and seditiously contriving and intending to disturb and disquiet the happy state of the public peace and tranquillity of this kingdom; and to bring his present majesty's treaty of peace (which, with great affection towards his subjects, and for the advantage of this kingdom, was concluded) into contempt and disgrace among all his liege subjects of this kingdom; and also to detract, scandalize, traduce, and vilify the administration of his present majesty's government of this kingdom, and his principal officers and ministers of state; and to represent his said officers and ministers of state as persons of no integrity and ability, and as enemies to the public good of this kingdom; and to cause it to be believed, that his said present majesty, by the advice of his said principal officers and ministers, intended to break and violate the said treaty last mentioned; and thereby to raise and sow differences and discords betwixt his said present majesty and the said French king, and king of Spain; and also to spread false news and rumours concerning the state of the public affairs of this kingdom; and to bring his said present majesty and his administration of the government of this kingdom, into suspicion and ill opinion of his said liege subjects, on the 2d of January, in the 4th year of his present majesty's reign, at the parish of St. Paul's, Covent-garden, in the county of Middlesex, a certain false, scandalous, and seditious libel, [intitled, No. 235, The Country-Journal; or, the Craftsman. By Caleb D'Anvers, of Gray's-inn, esq. Saturday, January 2d, 1730,] wickedly and maliciously did print and publish, and caused to be printed and published. In which libel, of and concerning his said present majesty king George the 2nd, now king of Great-Britain, &c. and his administration of the government of this kingdom, and state of the public affairs of this kingdom; and of and concerning his said principal officers and ministers of state; and of and concerning the said treaty, made betwixt his said present majesty and the said French king, and the said king of Spain; and also of and concerning the said French king, the said king of Spain, and the most serene prince Charles, emperor of Germany; are contained (among other things) divers false, feigned, scandalous, seditious, and malicious matters, according to the tenor following, to wit; "Extract of a private letter from the Hague. A rumour hath been for some time privately spread about, and begins to gain credit here, that a misunderstanding will soon discover itself between the allies of Seville;" (meaning his said present majesty, the said French king, and the said king of Spain) "and

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tions, were gathered about the court to hear the said trial, and the court was crowded with noblemen and gentlemen, particularly my lord Winchelsea, my lord Bathurst, Mr. Pulteney, sir William Wyndham, sir William Young, &c. but when the jury came to be called, there were but 11 of the 24 appeared; whereupon some debates ensued about adding one to the jury, or calling a new jury; [See Perry and Lambert's Case, A. D. 1795.] at last the trial was put off till next term. It was remarkable that Mr. Pulteney, who is presumed to be one of the patrons of that weekly paper, was loudly huzza'd by the populace as he went out of Westminster-hall. Which shews the fondness of the people of England for the liberty of the press."

The prosecution gave rise to much controversy in the periodical publications of the time, and in occasional pamphlets. The publications of Francklin on other occasions involved him in troubles. In the year 1729, he was tried for publishing "The Alcayde of Seville's Speech:" but upon that trial he was acquitted.

In the Commons' Journal of February 18, 1732-3, is the following entry:

"Mr. Yonge, from the Committee appointed to enquire into the printer and publishers of the printed pamphlet, entitled, 'The Report of 'the Committee appointed to examine into the 'Project, commonly called the Harburg Lot-'tery,' acquainted the House, That Richard Francklin, bookseller, in Fleet-street, who, in his examination before the said Committee on Saturday last, had owned, that the said Report was printed by his direction, having been since summoned to attend the said Committee, in order to his being further examined this morning, had sent a letter to the chairman of the said Committee, acquainting him, that he would not obey the said summons.

"Resolved, That Richard Francklin, bookseller, having refused, when duly summoned, to attend a Committee of this House, is guilty of a notorious contempt of the authority, and of a breach of the privilege of this House.

"Ordered, That the said Richard Francklin be, for his said contempt, and breach of privilege, taken into the custody of the serjeant at arms attending this House."

From what occurs in the Journal, I conjecture that this Richard Francklin was accordingly taken into custody on or before the 23rd of the month, and that he remained in such custody until the parliament was prorogued on the 27th of May following.

that certain ministers" (meaning the said principal officers and ministers of his said majesty, employed and intrusted in the difficult affairs of state) "having at length found out, that too close an union with France, and a war upon the foot of the treaty of Seville, is quite against the grain of the people, are endeavouring to bring about an accommodation with the emperor, and to undo every thing they have been doing for these five years past. If this should prove true, it will certainly redound very much to the honour of those gentlemen, who have so vigorously opposed the late measures; and the ministers, who have not only concerted and pursued these measures, but loaded all opposition to them with the foulest imputations, will be obliged to take a great deal of shame to themselves; for what can be a stronger condemnation of their own past conduct, or the conduct of those whom they have employed to write in their cause, than to see them wheel about all on a sudden, and pursue measures directly opposite, which have been pointed out to them, for several years together, by their adversaries; and for which they have represented those gentlemen, in the most opprobrious colours, as factious incendiaries, Germanized patriots, and enemies to their country? What can be more ridiculous than to see them desert one ally, whose good faith, sincerity, and even cordiality of friendship, they have so often extolled, and at last run into the arms of another, whom they have so industriously set forth as the most dishonourable, ungrateful, and perfidious prince? They must have altered their opinion of this prince very much (if this report is true), and seem to rely upon his goodnature, putting themselves thus absolutely in his power; for if he should refuse to deal with them, after the usage he hath received they will be broke with all the courts of Europe; and he cannot be insensible of their perfidy to others, at the same time that he is treating with them. How will they be able to justify those vast expences which they have already brought upon their country, by an obstinate perseverance in other measures, till the last extremity, as well as those farther expences and hazards, in which such a precipitate alteration of counsels, in the present circumstances of Europe, will certainly involve it? For though the measure, which is now said to be secretly carrying on, was certainly the most eligible, whilst they remained unembarrassed with engagements of another kind; and though it must be confessed to be very desirable at present; yet it seems to be attended with very fatal consequences, and almost insuperable difficulties. The people, of whom I am speaking, had their hands at liberty five years ago, and might have entered into what measures they pleased with the emperor, without giving umbrage, or any just reason of complaint, to other courts; but at present they cannot do it, without an infraction of solemn treaties, and drawing upon their country the resentments which usually attend violations of faith. One immediate effect of this resentment may be the interruption of trade and the seizure of that vast pledge, which Spain hath at this time in her hands; so that the only pretended good effect of their former conduct, may be absolutely defeated by their present scheme. Another necessary effect (for so I think I may call it) of such a measure, at present, will be a conjunction of France and Spain; and a certain court may have the mortification to see those two crowns united against them more strongly than ever, by their extraordinary management, after they have spent so many millions to prevent it. I am far from designing to insinuate from hence, that an accommodation with the emperor is a wrong measure: On the contrary, I wish it had been thought a right measure long ago. My own intention is to shew how difficult, in my apprehension, the conduct of some ministers hath rendered it to their country, as well as dishonourable to themselves, by carrying along with it the severest censure of their own conduct, and the strongest justification of their adversaries, against all the aspersions which have been cast upon them." In contempt of his said present majesty, and his laws; and to the great disgrace, scandal, and infamy of his said present majesty, and his administration of the government of this kingdom; to the disturbance of the public peace and tranquillity of this kingdom; to the evil example of all others, offending in the like case; and against the peace of our said lord the king, his crown and dignity.

Attorney General. (Sir Philip Yorke.) My lord, and gentlemen of the jury, I am counsel for the king. This is a prosecution against the defendant, Mr. Francklin, for printing and publishing a scandalous and seditious libel; an offence (however it hath been treated of late days) which the law considers as a very heinous crime, as it tends to disturb the peace of the kingdom, and to bring into contempt the king's administration of the government; and as it tends to create great jealousy and dissatisfaction in the minds of his majesty's subjects against his government; and, indeed, this is the use you find made of it. The present libel, for and upon which the defendant is to be tried, will appear to be a libel of that nature, and attended with the most aggravating circumstances of any ever yet published.

To explain the nature of this prosecution and libel, and to shew the connexion and tendency thereof, it is necessary to open a little to you the several parts of it, in order to apply it to the description of the persons and things spoken of. It is described to be a libel concerning his present majesty, and his majesty's government of the kingdom, and concerning the public affairs thereof, and concerning his ministers; and it is expressed to relate to a treaty concluded betwixt his present majesty, and the French king, and the king of Spain, at Seville, in November, 1729. The liberty that the defendant, Mr. Francklin, has taken is

from things done by the princes in that treaty, upon a pretension, that it is an extract of a private letter from the Hague: he says, "A rumour hath been for some time privately spread about, and begins to gain credit here, that a misunderstanding will soon discover itself between the allies of Seville." Now the allies of Seville are well known to be his present majesty, the king of France, and the king of Spain. Again, the writer goes on to say, "That certain ministers" (whom the information explains to be the ministers of his present majesty) "having at length found out, that too close an union with France, and a war upon the foot of the treaty of Seville, is quite against the grain of the people, are endeavouring to bring about an accommodation with the emperor, and to undo every thing they have been doing for these five years past," which will carry the calculation back to the 30th September 1725, when the treaty of Hanover was made. And then afterwards he says, "If this should prove true, it will certainly redound very much to the honour of those gentlemen, who have so vigorously opposed the late measures; and the ministers, who have not only concerted and pursued these measures, but loaded all opposition to them with the foulest imputations, will be obliged to take a great deal of shame to themselves." And then he asks the question, "For what can be a stronger condemnation of their own past conduct, than to see them wheel about all on a sudden, and pursue measures directly opposite? And what can be more ridiculous than to see them desert one ally, whose good faith, sincerity, and even cordiality of friendship, they have so often extolled?" Here is a plain charge of perfidy, or breaking of faith. Again, the ministers are represented as running into the arms of another ally, whom those ministers have set forth as the most dishonourable, ungrateful, and perfidious prince. Next, these ministers are represented as putting themselves in the power of that prince; and says, "If this prince should refuse to deal with them, after the usage he hath received, they will be broke with all the courts of Europe; and he cannot be insensible of their perfidy to others," (that is to say, the former allies) "at the same time that he is treating with them." Gentlemen, you may plainly observe here, that this is a positive charge of perfidy and breach of faith on these ministers. Again, the libel, or pretended letter, charges them with bringing on their country vast expences, not to be justified, and a further expence and hazard, which their precipitate alteration of counsels will certainly involve it in. And then he proceeds to represent, that they cannot, at present, treat with the emperor, without infraction of solemn treaties, and violation of faith. Gentlemen, this is a direct charge of perfidy, in the strongest terms. In the next place, he represents the effects of the resentment that they will draw on their country by their violation of faith: one immediate effect, he says, "may be the interruption of trade, and the seizure of that vast pledge which Spain hath at this time in her hands." Another necessary effect (for so he thinks he may call it) will be a conjunction of France and Spain; and a certain court (these are his words) may have the mortification to see those two crowns united against them more strongly than ever, by their extraordinary management, after they have spent so many millions to prevent it. Gentlemen, this is the nature and import of the libel; and whoever it is that is charged with these things, it is plain, that there cannot be a more evident charge of perfidiousness, and pursuing measures destructive to their country. The reason of my opening thus, is to shew and make way for the application of the libel to the persons and things mentioned in it. And in order to shew that the libel is applied to his present majesty and his ministers, and the administration of the government of this kingdom, and cannot be applied to any other, it will be necessary for you, gentlemen, to consider who are the ministers thus charged. The description is, that a misunderstanding will soon discover itself between the allies of Seville; and that certain ministers having at length found out, that too close an union with France, and so on. Gentlemen, who are the allies of Seville? They are the king of Great Britain, the French king, and the king of Spain. Now, the ministers here spoken of are charged with perfidiousness in breaking that treaty, who, to be sure, must be meant of those ministers that were empowered to make that treaty; for no other could be guilty of breaking it: and, indeed, the author himself hath, in this very pretended Hague letter, fully explained his meaning; and that it is not France or Spain, or their ministers, that he thus charges with perfidy; for he tells us, that one necessary effect of such violation of faith, will be the conjunction of France and Spain; and that a certain court would have the mortification to see those two crowns united against them more strongly than ever. This amounts to a demonstration, that neither France nor Spain, nor their ministers, are charged with breaking this treaty; for they are plainly excluded: if so, then there is but one party left, to wit, the king of Great Britain and his ministers; and it is plain, as if the ministers of Great Britain had been in express words. I am almost ashamed to explain what is so plain; though I thought it proper to set forth thus at first. And, gentlemen, if more circumstances are wanting to confirm this further, they may be added afterwards; such as these, to wit, the persons who opposed them were stiled Germanized patriots: another expression is, the seizure of that vast pledge, which Spain hath at this time in her hands. Besides, it is incumbent on them to shew what other court or ministers these things can be applied to. There is another observation, which I hinted at before, which is, that these ministers are endeavouring to undo every thing they have been doing for these five years past; which carries it back to

the time of completing the treaty of Hanover, which was in September, 1725. Gentlemen, it is far from our desire, that a forced construction should be made or drawn from this paper; but such a one only, as every understanding person, that takes it up and reads it, would put upon it: but I would not be thought to mean, that every reader understands it as a libel, or a scandalous libel, as courts and juries do: No, the law is not so absurd to suppose such a thing. Besides, it is very well known, that there have been several cases of this nature, that have been understood by the Court and jury as such, I mean as a libel, before this time; and it is necessary to mention to you, that a picture may be drawn very lively, and construed so; and that a libel may be written under feigned names, and yet plainly understood; as in the case of Mr. Mist's journal in 1728, wherein the fictitious names of Esreff and Sophy of Persia were inserted; yet, notwithstanding these assumed names, when it came to be tried by a jury, they understood it, as every honest man would, to be a scandalous libel. I shall not take up now any more time upon this head. The next thing is, whether the defendant, Mr. Francklin, is guilty or not of the facts charged in the information? And now, gentlemen, we shall give you the strongest and clearest proof in the world: we shall prove, by a witness who bought six of these journals, wherein the pretended Hague letter is inserted, of the defendant himself, at his shop; and that the defendant ordered his servant to give him them; and it will appear to you, that the person who bought them, sold them also himself; and, if that wants further confirmation, we can prove, that the defendant publishes seditious papers or journals every week. These things being laid before you, we expect you will do justice betwixt the king and the defendant; and that is all which is desired of you.

Solicitor General, (Charles Talbot, esq.) My lord and gentlemen, I am on the same side; and as the case is so plain, I would not take up much of your time. The libel is against his majesty, and his principal officers and ministers of state, under the colour of "An Extract of a private Letter from the Hague;" and though it is said so, yet whoever considers it, and attends to the frame and stile of it, and tendency of the whole, will plainly be convinced, that it is of an English breed: but let it be real or fictitious, it is the same thing, if it is a libel, and the subject-matter thereof is against the government; nor is it material, whether the matters or things published therein are either true or false, if the publication thereof is detrimental to the government, and of a malicious, injurious, and seditious design, to create a misunderstanding and discord between his majesty and his allies; and to raise jealousies in the minds of his subjects: and, indeed, for what other purposes can it be supposed to have been published, but for these very things, of sowing sedition and jealousy, and disturbing the public peace? Again, the libel is not only against his present majesty, but also against his ministers; that they were about to make a treaty with the emperor, which would be undoing every thing that they had been doing for these five years past, which would occasion them to take a great deal of shame to themselves. The next thing he charges the ministers with is the deserting of one ally, and in consequence of that, the flying into the arms of another; and that, if he thought fit not to deal with them, then they would be broke with all the courts of Europe; and that he could not be insensible of their perfidy to others, at the same time that he was treating with them. In the next part of the libel, he accuses them of having brought a vast expence on their country by their former measures; and that their present measures will certainly involve it in a further expence and hazard. In the next place, he points out to the people the consequences and difficulties attending these measures; the first of which, he says, in his apprehension, are very fatal; and the second, almost insuperable: he says, that one of the consequences will be the infraction of solemn treaties, and drawing on their country the resentments which usually attend violation of faith: another consequence, he says, will be the interruption of trade; and that another consequence will be the seizure of that vast pledge which Spain hath in her hands; and the last consequence, which he mentions, of such measures, (and which he thinks he may call a necessary consequence) is the conjunction of France and Spain; and that a certain court (which, as hath been already mentioned, can only be applied to Great Britain) may have the mortification to see these two crowns united against them more strongly than ever, after they have spent so many millions to prevent it. Gentlemen, I hope it now plainly appears to you, that this pretended Hague Letter is a libel, and, I may say, a very malicious and seditious one too. If any thing may be called a libel, surely ministers of state undoing what they have been doing for five years past, and deserting allies, perfidiously exposing their country to hazards and vast expences, seizing their effects, and occasioning other courts to be united against their own country, may well be called a libel; especially when the libel also carries in it the highest charge against his majesty's government, and tending to sow sedition, and jealousy, and discords, between his majesty and his allies, as well as between his own subjects, and thereby disturbing the public peace. That which remains is, of whom are these defamatory things said, and what court and ministers are meant, or to whom these expressions are applicable? The expressions are, "Certain ministers are endeavouring, and a certain court may have the mortification to see," &c. I think every common reader will presently understand them to be the court and ministers of Great Britain: and I believe I may venture to say, that the gentlemen on the other

side cannot point out what court and ministers are meant by these expressions, if it is not the court and ministers of Great Britain. Gentlemen, the whole connection of the pretended Hague Letter, taking it all together, plainly points out to be meant of his present majesty and his ministers; and there is no part thereof that can be applied, with any propriety, to any other court or person whatsoever. In the beginning of the libel, we are told, that a misunderstanding will soon discover itself between the allies of Seville; and then immediately follows the charge on certain ministers, that they were undoing every thing that they had been doing five years past. These words "Certain ministers," must have a reference either to the ministers of Spain, France, or Great Britain. With regard to Spain, you have been already told, that it cannot have any reference to them, because one effect of this alteration of affairs or measures, is, that Spain would seize that vast pledge which she hath at this time in her hands: is this a libel on the ministers of Spain, and can this give an occasion to Spain to lay hold on their own effects, and seize their own treasure? No, it is nonsense; so that the ministers of Spain cannot be meant; besides, it is notorious to every body that knows any thing of the South Sea Company, that that Company always have, and will have, while it is a Company, effects and treasures in their hands liable to be laid hold on and seized; so that as the ministers of Spain are not the ministers here meant, so likewise it shews that it cannot be meant of the ministers of France; for they are plainly excluded as well as the ministers of Spain: the words are, "That certain ministers having at length found out, that too close an union with France, and a war upon the foot of the treaty of Seville, is quite against the grain of the people." Is this applicable to ministers of France? No; it is not sense to apply it to the ministers of any other court than Great Britain; but applying it so, it is good sense, and very proper: so that as the ministers of Spain and France are both excluded, it is plain to a demonstration, that it must be meant of the ministers of Great Britain: and seeing every part of the libel is applicable thereto, and cannot agree with any other court than the court of Great Britain, I apprehend, it will appear plain to you to be a libel, and that the expressions are meant of his majesty and his ministers; and if so, then there remains only one thing, and that is, to fix it on the defendant; and this we will make appear beyond all contradiction, not only as being the printer of that weekly paper, but as having sold them himself. And, gentlemen, when this appears plain to you, after the Attorney General hath done his duty, by laying a full proof before you, it is hoped you will do yours.

Att. Gen. I do not know whether they will deny the defendant to be the author or publisher of the paper; if they do, I shall prove it.

Mr. Fazakerley. We do deny it.

Att. Gen. Call Mr. Jenkins.

Mr. *Jenkins* appeared.

Att. Gen. Mr. Jenkins, look out the copies of his majesty's Speech, the 20th of January, 1725.

Here it was produced.

Att. Gen. Did you examine it?

Jenkins. Yes.

Att. Gen. Where?

Jenkins. At the parliament office.

Mr. *Jenkins* cross-examined.

Mr. *Fazakerley.* Hath it been in your custody ever since?—*Jenkins.* No.

Mr. *Fazakerley.* How know you that to be the very same that you examined?

Jenkins. Because I marked it.

Mr. *Fazakerley.* When, before or after you first parted with it?—*Jenkins.* Before.

Mr. *Fazakerley.* What mark? Did you put your name to it?

Jenkins. I put the two initial letters of my name, which I will shew you.

Mr. *Fazakerley.* Are you sure that it hath not been altered since?

Jenkins. Yes, I am very sure.

Here his majesty's Speech to the House of Lords was read, beginning thus: "My lords and gentlemen, I have had such frequent experience," &c. Also his majesty's Speech to the House of Commons.

Att. Gen. This Speech of the king is general; but I shall be more particular, and shall shew you a copy of the Address of the House of Lords, when the treaty of Hanover was laid before them, wherein they express their satisfaction, and mention the king of Spain particularly.

Mr. *Fazakerley.* Though I have all the honour imaginable for the House of Lords, yet I question whether their addresses are to be taken as evidence.

Att. Gen. We shall read a copy of the Journal of the House of Lords.

Mr. *Fazakerley.* Originals are the best evidence of fact; and whatever addresses or proceedings might have been made in the House of Lords, I think they cannot be proper evidence here.*

Att. Gen. What I produce is a copy of the Lords' Journal concerning the treaty of Vienna, that the secretaries of state laid before them.

Mr. *Fazakerley.* I own it is a Journal of the House of Lords, but it is not a proper evidence of the facts therein mentioned.

Mr. *Bootle.* My lord, I apprehend, that the evidence Mr. Attorney General is now pursuing, in the course of evidence, is irregular, and on that the objection doth arise. He says, he will prove the facts by the Journal of the House of Lords: suppose the secretaries of state have failed in the copy laid before them: I offer this to your lordship's consideration.

* See 5 Term Rep. 445.

L. C. J. I find, Mr. Bootle, that all manner of objections will be raised to serve your client; but I shall not pass away the time, because you have redress another way; you shall have my opinion about it.

Mr. Strange. Will you produce that copy?

Att. Gen. We will do it. Mr. Jenkins, produce the orders of the House of Lords, the 10th of February, 1725. (Here it was produced.)

Mr. Strange. Is it a true copy?

Jenkins. Yes.

Mr. Strange. Have you had it ever since it was given in?—*Jenkins.* Yes.

Here the copy of the Journal was read; the purport was a copy of the Treaty of Peace made at Vienna, 3d April, 1725, a copy of the Treaty of Commerce made at Vienna, 1st of May, 1725, and a copy of the Treaty of Hanover, 30th of September, 1725.

Att. Gen. It is proper to see these copies.

Mr. Strange. Mr. Jenkins, What is this?

Jenkins. The Treaty of Peace.

Mr. Strange. Where had you it?

Jenkins. From the parliament office.

Mr. Strange. Have you the Treaty of Commerce made at Vienna?

Jenkins. Yes, (Here the title of it was read thus: Treaty between Charles emperor of Germany, &c. and Philip the 5th, &c. dated 1st May, 1725.)

Att. Gen. Read the 2d and 3d Articles thereof. (Here they were read.)

Read the 36th Article. (Here it was read.)

Read the 47th Article. (Here it was read.)

"The purport of these Articles was, (as I thought) that they were of great prejudice to his majesty's subjects, and consequently was an occasion of difference."

I beg that the Address of the House of Lords to his majesty may be read, and his majesty's Answer on the 17th of February, 1725.

Mr. Fazakerley. For what purpose would you read them?

Att. Gen. You will understand that immediately.

[Here the Address was first read, and then his majesty's Answer; the purport was to shew, that there were differences between his late majesty and the king of Spain, &c.]

Mr. Fazakerley. Mr. Jenkins, by what did you examine these?

Jenkins. By the original Journal.

Att. Gen. I shall prove in the next place, that the king of Spain, 13th July, 1725, (which was about two months before the treaty of Hanover) made an express demand of Gibraltar.

Mr. Fazakerley. I do not rightly see through, or understand this evidence; I suppose it is to make up some defects.

Att. Gen. Call Mr. Tilson. Mr. Tilson, have you any papers with you?

Tilson. Yes, a letter.

Att. Gen. Be pleased to give my lord and jury an account how you received that letter.

Tilson. My lord, this is a letter from the marquis of Grameldo, secretary to the king of Spain.

L. C. J. Where received you this letter?

Tilson. I received it at Hanover.

L. C. J. When received you it?

Tilson. On the 1st of August New Stile, 1725.

Att. Gen. From whom received you it, and in what manner?

Tilson. By a messenger that came from Sycovy from Mr. Stanhope.

Att. Gen. What was the messenger's name?

Tilson. One Walton, the king's messenger.

Att. Gen. How received you it?

Tilson. In a packet made up with his dispatches.

Att. Gen. Where hath the letter been kept ever since?

Tilson. In the secretary of state's office of the lord Townshend.

Att. Gen. Where took you it from?

Tilson. From the book.

Att. Gen. What were you?

Tilson. Under-secretary to my lord Townshend.

Att. Gen. Can you interpret it immediately?

[No answer was given.]

Mr. Taylor. I object against this evidence, by reason it is not the best evidence, because my lord Harrington is here in England himself.

Att. Gen. I apprehend it is sufficient, and it is impossible to prove it otherwise; the lord Harrington transmits it to his master.

Mr. Taylor. If my lord Harrington were here, he could give evidence himself.

Att. Gen. My lord, we have found an interpreter, and he will interpret the Spanish. Call Mr. Bocking.

L. C. J. What read you it for?

Att. Gen. For a proof of the demand of Gibraltar, by virtue of the treaty at Vienna.

Here Mr. *Bocking* was called.

Att. Gen. Mr. Bocking, Do you understand the Spanish tongue?—*Bocking.* Yes.

Att. Gen. Have you compared it with the original letter?—*Bocking.* Yes.

Att. Gen. Is it truly translated?

Bocking. Yes.

[Here the Letter was read subscribed Grameldo.] The purport of it was demanding up Gibraltar.

Att. Gen. The next thing is the treaty of Hanover, which we have upon record.

Mr. Fazakerley. I do not think this evidence full; for the allegation is, that there were certain differences and controversies between his late majesty and divers princes and foreign states, being his allies, and the king of Spain. I do not find that this evidence shews any thing of it; the difference that the evidence shews, is only between the late king and the king of Spain. I apprehend they ought to make the evidence agree with the information;

if it varies from that, it is as no evidence at all.

Att. Gen. I apprehend this is no objection at all.

Mr. *Fazakerley.* The information is, that before the demise of the late king, divers differences and controversies arose between his said late majesty and divers princes and foreign states, being his allies, and the king of Spain. Now, the objection is, that the evidence they have produced, shews that there were only differences between Spain and Great Britain.

Att. Gen. There is no weight in that objection; for if it were so, as they suppose, I apprehend this is not material to the information; for it is well known, that there is a distinction between an action and an indictment. Every thing in an action, in case of contradiction, ought to be proved; but if there be an allegation in an indictment, and that the crime may remain without it, it is well known that that allegation is not necessary to be proved; and it is sufficient enough to prove him guilty of the crime that he is indicted for. But what I have proved, shews the difference and disputes between his late majesty and his allies, and the king of Spain, for the stipulation relating to the Ostend company; particularly by the 36th Article, is, that all the subjects of the emperor shall enjoy the same privileges as the United Provinces, &c. so likewise by the 47th Article, which expressly refers to Spain and Great Britain; and that is the express declaration made to the House of Lords, and was the foundation of the troubles in Europe, which obliged the late king, without loss of time, to enter into the treaty of Hanover; namely, with the consideration to the trade and commerce of Vienna. And now, all these taken together, I submit it to your lordship, whether there is not a sufficient proof, that there were differences subsisting between his majesty and his allies, and the king of Spain.

Sol. Gen. This allegation is not material; for whether there were differences or not subsisting, we shall fix it by evidence that Mr. Francklin is equally guilty, and that it will not alter the nature of the offence: besides, it is admitted by the gentleman that made the objection, that the evidence amounted so far as to prove that there were differences between the late king and the king of Spain; and we have pointed out two things which shew there were differences; the one relating to the Ostend company, and the other to the demand of Gibraltar. I agree with that gentleman, that Great Britain was concerned in it; but to say that they were alone concerned in it, and that by the Address of the House of Lords the Dutch were not concerned, is a plain mistake, for they claimed a right to trade also; yea, they were more immediately concerned than Great Britain; and therefore it is rightly stated by the House of Lords Address; though, as I said before, it is not material whether there were differences subsisting or not.

Mr. *Fazakerley.* I thought, while the thing was fresh in memory, it would have been explained; but since they have gone so far, it will be better to make an end. I shall only say, that as to what they say is immaterial, if they are willing to have that matter immaterial, I am willing it should be struck out; and if there is a crime described in the indictment or information, I agree it is not necessary to prove every allegation, if the crime remains without it; so that, if they will wave it, I am satisfied: let me get rid of one thing at a time. I say, if there be enough left, properly charged on the defendant, then, my lord, this ought to be dropt; for they have produced nothing that proves that allegation: and whatever differences there might be between the late king and Spain, or any powers whatsoever, not properly described in this information, I apprehend, they are not to be taken as a part of the charge in this information. Now the main thing is, whether they have laid it so, and made out these differences. They say, that the differences were between the late king, and divers princes and foreign states, being his allies, and the king of Spain. I think the letter produced from the marquis of Grameldo, or take it what way you please, it only refers to differences between the king of Great Britain and Spain. I own there were grants of commerce to the emperor, which might be of injury to other states; but though they think that there is a foundation for differences, yet, if there is none, there is no reason to say that there was an actual difference: they have laid it so, my lord; and as for that other part of the evidence of the House of Lords, that is not sufficient, for it is mentioned there as an infraction of their treaty; but whatever infraction it is, yet, I humbly apprehend, that is not a reason that there were differences on that account, for if other states think otherwise, or acquiesce to it, then it cannot be called a difference; besides, that Address of the House of Lords was only the sentiments of that great body; and though a regard ought to be had to them, yet it is not any evidence of the fact, unless transacted in a judicial way. They made a collection or construction from it; but I think, in my opinion, it is possible they might make a mistake: we are now upon evidence, and it ought to be established by a proper legal evidence; for that (as I said before) is only an evidence that thereby their treaty was broken, but no evidence that there was a difference arising from it.

Mr. *Bootle.* Mr. Attorney is pleased to make that a criminal information, of which a part may be evidenced, and a part overlooked.

L. C. J. Is this essential or not?

Att. Gen. No.

L. C. J. Why hath there been then almost two hours spent about it?

Att. Gen. This is not between Great Britain and Spain, but other states; and it is to shew, that by the Articles of the Treaty of Vienna, there were some of them inconsistent with those relating to the foreign powers.

Mr. *Noel.* As they cannot prove this allega-

tion an offence, or part of the crime, it is proper to strike it out.

Mr. *Bootle.* Our objection is on what is alleged; we are not entering into the consideration of the fact, or how far it is capable of being proved: No; but sure I am they have not proved the allegation.

L. C. J. This is not indeed a positive proof, I think.

Att. Gen. The next thing is the Treaty of Hanover, I have a copy of it translated.

Mr. *Bootle.* It is admitted that there were differences.

Att. Gen. Call Mr. Snow. [Who appears.] What officer are you?

Snow. Prothonotary of the Chancery.

Att. Gen. What have you in your hand?

Snow. The Treaty of Hanover, dated the 30th of September, 1725.

Att. Gen. Read it.

Snow. It is in French.

Att. Gen. Have you a translation of it?

Snow. Yes.

Att. Gen. Let it be read. Mr. Buck [or Bocking] what is that paper?

Snow. It is the translation of the Treaty of Hanover.

[Here the Treaty was read.] It is between the late king of Great Britain, the king of France, and the king of Prussia.

Att. Gen. The next thing is the Treaty of Seville. Mr. Snow, What is that?

Snow. The Treaty of Seville.

Att. Gen. In what language?

Snow. In the Spanish. I have a translation of it.

Att. Gen. Mr. Buck, did you translate it?

Buck. Yes.

[Here they read a part of it.] It is between the present king of Great Britain, the French king, and the king of Spain, dated at Seville, 9th of November, 1729.

Att. Gen. I shall now go on to prove that part of the libel which relates to Mr. Francklin's publishing the Craftsman, the 2d of January last. Call John Smith. (Who appears.) Look on that paper, is that your hand-writing?

[Here was shewn one of the Craftsman, 2d of January marked by Smith.]

Smith. Yes.

Att. Gen. Where had you it?

Smith. In Mr. Francklin's own house.

Att. Gen. In what part of it?

Smith. In his shop.

Att. Gen. Do you remember the time?

Smith. Yes, it was on Saturday the 2d of January last.

Att. Gen. How came you to have that paper?

Smith. On the 9th of January, I went into his shop, where Mr. Francklin himself was standing by the counter, and I asked him for half a dozen of his Journals of that day, and two of the Saturday before; he asked me whom they were for; I told him for myself? then he asked me if I sold them; I said, Yes; then he pointed to his man to look them out.

Att. Gen. Who delivered them to you?

Smith. His man.

Att. Gen. Whom paid you for them?

Smith. His man.

Att. Gen. Was he present himself then?

Smith. No.

Att. Gen. But did not he order his servant to give you them?—*Smith.* Yes.

Mr. *Smith* cross-examined.

Mr. *Fazakerley.* What asked you for?

Smith. I asked for half a dozen of his Journals of that day, and two of the Saturday before.

Mr. *Fazakerley.* Do you sell them?

Smith. Yes.

Mr. *Fazakerley.* How came you by this when you had sold it?

Smith. I sold it to a person that desired me to get it for him.

Mr. *Fazakerley.* To whom sold you it?

Smith. To Mr. Ibbot.

Mr. *Fazakerley.* How soon after you bought it did you sell it him?

Smith. As soon as I could drink two quarts of beer, at the Six Can alehouse in Holborn.

Mr. *Fazakerley.* Are you sure that this is one of the 2d of January, that you had at Mr. Francklin's?

Smith. Yes, because I marked it.

Mr. *Fazakerley.* Are you sure that he had it not in his custody before you marked it?

Smith. He had it not.

L. C. J. Who gave you them?

Smith. His man.

L. C. J. What said he to his man?

Smith. Look out these Journals.

L. C. J. You asked for two of the Saturday before?—*Smith.* Yes.

L. C. J. What was Mr. Francklin doing?

Smith. There was a man with him, who was paying him ten or a dozen guineas; while I was speaking he had told part of them: When I came and asked for the Journals, he asked me what I wanted; I said, Six of his Journals of that day, and two of the week before.

L. C. J. To whom paid you the money?

Smith. To his man; I gave him half-a-crown, and he returned me what was over, as my change.

[Here the title of it was read, "No. 235; The Country Journal; or the Craftsman, by Caleb Danvers, of Gray's-inn, esq. Saturday, January 2d, 1730;" then the Hague Letter was read thus, "Extract of a private Letter from the Hague: A rumour hath been for some time privately," &c. as in the information.]

Att. Gen. I shall call a witness or two to support his evidence, to shew that a great many of them came from the defendant's shop. Call John Ibbot. (John Ibbot appears.)

Att. Gen. Look on that paper, where bought you that?

Ibbot. I bought it at Mrs. Dodd's.

Att. Gen. Where lives she?

Ibbot. At the sign of the Peacock, without Temple-bar.

Att. Gen. When bought you it?

Ibbot. On the 2d of January last.

Att. Gen. Did you buy it of her, or her servant?—*Ibbot.* Of her servant.

Att. Gen. What is the servant's name?

Ibbot. Mary Dewy.

Att. Gen. Call Mrs. Ann Dodd. [Who appears.] Had you at any time, from Mr. Franckin's, the paper called the Craftsman, or Country Journal?

Mrs. *Dodd.* I never had any myself.

Att. Gen. Have you ever disposed of any of them?—Mrs. *Dodd.* Yes.

Att. Gen. Who had them for you?

Mrs. *Dodd.* My man.

Att. Gen. What is his name?

Mrs. *Dodd.* Henry Goram (or Boram).

Att. Gen. Had you any more of them in your shop, beside what Henry Goram fetched for you?

Mrs. *Dodd.* None, that I know of.

Att. Gen. Had you any of the Craftsman the 2d of January last?—Mrs. *Dodd.* Yes.

Att. Gen. Whom sent you for them?

Mrs. *Dodd.* Henry Goram.

Att. Gen. Had you any other Craftsman besides these?—Mrs. *Dodd.* No.

Att. Gen. Whom paid you for them?

Mrs. *Dodd.* I did not pay him myself; but they were paid for by another of my servants, Mary Dewy.

Att. Gen. Did not you order it to be paid to Mr. Francklin?—Mrs. *Dodd.* Yes.

Mrs. *Dodd* cross-examined.

Mr. *Fazakerley.* Can you take upon you to swear, that all the Country Journals you had came from Mr. Francklin's?

Mrs. *Dodd.* No: They might fetch them from other places.

Mr. *Fazakerley.* Where sent you for them?

Mrs. *Dodd.* To Covent-garden, to Mr. Francklin's house.

Mr. *Fazakerley.* Will you venture to say, on your oath, that you sent your servant to Mr. Francklin's for the Craftsman of the 2d of January last?—Mrs. *Dodd.* I think so.

Mr. *Fazakerley.* Can you be positive, or not, that you sent for this particular Journal of Saturday the 2d of January last?

Mrs. *Dodd.* I cannot be positive as to that; but I used to give orders to fetch in these Journals every week.

Mr. *Fazakerley.* What were the orders you gave them; were they general orders every week? Do not they sometimes fetch them without orders?—Mrs. *Dodd.* Yes.

Mr. *Fazakerley.* You do not know from whence they fetch those without orders?

Mrs. *Dodd.* No.

Mr. *Fazakerley.* Did you ever send for any of them to any other place than to Mr. Francklin's?—Mrs. *Dodd.* No.

Att. Gen. Call Henry Goram. [Who appears.] Whom live you with?

Goram. With Mrs. Dodd.

Att. Gen. Do you fetch news-papers for her?

Goram. I have lately fetched for her the Country Journal, or Craftsman.

Att. Gen. Where?

Goram. From Russel-street, in Covent-garden, from Mr. Francklin's.

Att. Gen. How long have you continued to do it?

Goram. Above a year and a half.

Att. Gen. How often in the week?

Goram. Once every Friday evening, when it is late.

Att. Gen. Have you gone every Friday evening to fetch them, all that time?

Goram. No, I cannot say, for I have sometimes missed.

Att. Gen. Do you remember going the first day of January being New Year's day, for the Craftsman, the 2d of January last?

Goram. Yes.

Att. Gen. From what place?

Goram. From Mr. Francklin's in Covent-garden.

Att. Gen. What day did you fetch them on?

Goram. I told you on the Friday night before, which was New Year's day.

Att. Gen. To what place did you bring them?—*Goram.* To Mrs. Dodd's.

Att. Gen Were they put into her shop?

Goram. Yes.

Att. Gen. Did you fetch any Country Journals of that day, from any other place?

Goram. No.

Att. Gen. What quantity, think you, had you at Mr. Francklin's?

Goram. About threescore quires a week.

[Cross-examined.]

Mr. *Fazakerley.* You said, you cannot say that you fetched every week the Craftsman from Mr. Francklin's; how comes it that you can be particular as to this Craftsman of the 2d of January last? Have you any thing particular to make you remember that day?

Goram. Yes; for a day or two after I heard that paper had given offence, my mistress desired me to recollect when I had them; which I did.

Mr. *Fazakerley.* Here your mistress knows nothing about that of the 2d of January; probably it might have been something else that your mistress desired you to recollect; Do you know of never another paper that gave offence, besides that? Therefore, I say, can you be positive that you fetched all the Craftsman of that day on Friday evening?

Goram. Yes.

Mr. *Fazakerley.* Did you know of any other Craftsman besides Mr. Francklin's? Or did you ever know that your mistress bought any Craftsman, but from Mr. Francklin?

Goram. No.

Mr. *Fazakerley.* Is Mary Dewy servant to Mrs. Dodd?

Goram. Yes.

Mr. *Fazakerley*. Did not she send her for the Craftsman?—*Goram*. No.

Att. Gen. Call John Smith (aforesaid) who appears. Look on that paper. [Here another of the Craftsman, of the 2d of January, was produced.] Where bought you that paper?

Smith. At Mrs. Smith's under the piazzas, at the Royal Exchange.

Att. Gen. Do you remember when?

Smith. The 9th of January, the same morning that I bought at Mr. Francklin's.

Att. Gen. Of whom bought you it?

Smith. Of her servant.

Att. Gen. What is her name?

Smith. I know not.

Att. Gen. Are you sure that is the same paper?—*Smith*. Yes.

Att. Gen. Did you mark it?—*Smith*. Yes.

Att. Gen. Call Mrs. Ann Pierce. (Who appears.) Did you keep a shop formerly?

Mrs. *Pierce*. Yes, though not now.

Att. Gen. How long ago is it since you kept it?

Mrs. *Pierce*. About three or four months.

Att. Gen. During the time of your keeping a shop, did you sell the Country Journal?

Mrs. *Pierce*. Yes.

Att. Gen. Where bought you them?

Mrs. *Pierce*. I never went myself.

Att. Gen. Whom sent you?

Mrs. *Pierce*. One David Davies.

Att. Gen. To whom sent you for them?

Mrs. *Pierce*. To Mr. Francklin.

Att. Gen. Can you remember you had any Craftsman of the 2d of January last?

Mrs. *Pierce*. To be sure I had.

Att. Gen. Who went for them?

Mrs. *Pierce*. My man.

Att. Gen. Did you ever send any body else?

Mrs. *Pierce*. I cannot tell.

Att. Gen. I would desire you to recollect who fetched those of the 2d of January.

Mrs. *Pierce*. He always fetched them.

Att. Gen. What number had you the 2d of January?

Mrs. *Pierce*. I cannot tell exactly the number; but I have generally about 7*l*. a week to pay for the Craftsman.

Att. Gen. Did you pay for them of the 2d of January?

Mrs. *Pierce*. He had always about 7*l*. a week, or upwards.

Att. Gen. But do you remember that you paid for them of the 2d of January?

Mrs. *Pierce*. I do not remember that in particular; for it was about that time I was married.

Att. Gen. Did you pay for them yourself?

Mrs. *Pierce*. No: but my servant, David Davies, did.

[Cross-examined.]

Mr. *Bootle*. You said, you did not always send your man, David Davies, for them?

Mrs. *Pierce*. You are mistaken; for I said I did.

Mr. *Bootle*. Can you say, on your oath, mistress, that you paid for these Craftsman the 2nd of January in particular?

Mrs. *Pierce*. I shall not answer you.

Mr. *Bootle*. Who bid you not to answer me? You shall do it.

Mrs. *Pierce*. I don't know you. [Here the Judges reprimanded her, and desired her to give an answer, which she did thus.] I believe I paid him the money for the Craftsman of that day, as well as for those of other days.

Mr. *Bootle*. Don't these papers pay duty?

Mrs. *Pierce*. I do not know.

Mr. *Willes*. Call David Davies. (Who appears.) Were you employed by Mrs. Pierce, before January the 2d, to fetch in her Journals?

Davies. Yes.

Mr. *Willes*. Did you fetch in the Craftsman among the rest?—*Davies*. Yes.

Mr. *Willes*. Where did you go for these Craftsmen?—*Davies*. To Mr. Francklin's.

Mr. *Willes*. Did you go any where else for them?—*Davies*. No.

Mr. *Willes*. Can you remember that you fetched the Craftsman the 2d of January last?

Davies. Yes.

Mr. *Willes*. You did buy all the Craftsmen of that month at Mr. Francklin's—I mean, all that you bought?

Davies. Yes.

Mr. *Willes*. When you carried the money for them, to whom paid you it?

Davies. Sometimes to Mr. Francklin, and sometimes to his servants.

Mr. *Willes*. Can you say, particularly for the month of January last, that you paid the money to his servants?—*Davies*. Yes.

Mr. *Willes*. Did you continue to pay weekly, all the month of January last, for what you bought of these papers?—*Davies*. Yes.

Mr. *Willes*. Had you any of these Craftsman any where else that month?

Davies. No.

Mr. *Willes*. Can you remember how many you bought of the 2d of January last?

Davies. No.

Mr. *Willes*. How much paid you a week?

Davies. About 7*l*. a week; because I fetched between 40 and 50 quires weekly.

[Cross-examined.]

Mr. *Strange*. Can you recollect so exactly, as to tell that you fetched and paid for the Craftsman the 2d of January, and for all that month?—*Davies*. Yes.

Mr. *Strange*. How can you be so particular as to that month?

Davies. Because I did it weekly before that time.

Att. Gen. There is another thing, which I shall name, which will likewise prove, that the defendant published the Craftsman of that day; and that is the stamp-duty, which is one shilling, paid for every advertisement; and here I shall shew to your lordship, that he paid for the duties of that day, and for 38 advertisements of the same day, which is exactly the number contained in that day's Craftsman. Call Mr.

Lunnis. (Who appears.) What officer are you?

Lunnis. An assistant to the Register of the Stamp-office.

Att. Gen. Do you know any thing of the account of the stamp-duties at the office?

Lunnis. Yes.

Att. Gen. Have you the book?

Lunnis. Yes.

Att. Gen. Produce it. (Here it was produced.) What is that book?

Lunnis. An account of the advertisements in every paper.

Att. Gen. Is that the original of the Stamp-office book?—*Lunnis.* Yes.

Att. Gen. You know what entries there are in it concerning Mr. Francklin?

Lunnis. Yes.

Att. Gen. What are these entries?

Lunnis. They are from about 13th of May, 1727, to this time, weekly and monthly.

Att. Gen. Who paid for them?

Lunnis. Sometimes Mr. Francklin, and sometimes his servants.

Att. Gen. Was the payment made in his own name always?

Lunnis. Yes, in his own name.

Att. Gen. Are there any advertisements that relate to the 2d of January last?

Lunnis. Yes, 38.

Att. Gen. Were they paid for?

Lunnis. Yes, in Mr. Francklin's name.

Att. Gen. Read the entry. [Here it was read. The purport was, Received the 29th of July, for the duty of 38 advertisements, &c. for the 2d of January last.]

Att. Gen. That is the exact number in the Craftsman of that day.

[Cross-examined.]

Mr. *Strange.* Do you receive the money?

Lunnis. No.

Mr. *Strange.* How can you tell that he pays it then?

Lunnis. Because I make it up to his account.

Mr. *Strange.* Do you know it yourself?

Lunnis. No.

Mr. *Strange.* Are the papers brought to the office, and are you the person that receives them?

Lunnis. I am the person that takes in and registers the number of the advertisements, and gives a note or an account thereof, to himself, or the person that brings the papers.

Mr. *Strange.* What time does the act relate to the advertisements being paid?

Lunnis. I don't know.

Mr. *Strange.* As you make out the warrants, and keep account of the advertisements, explain it; what is its nature? Does your warrant express the number of the advertisements, and the sum to be paid for them?

Lunnis. Yes.

Mr. *Strange.* For what purpose do you make it out?

Lunnis. After I have made it out, I give it into the Receiver's office, and then into the Comptroller's, which is a check on the Receiver's office; and then Mr. Francklin hath a receipt for it.

Mr. *Strange.* Who receives the money for these advertisements, which you make out the warrant for?

Lunnis. They at the Receiver's office?

Att. Gen. Call Mr. Webb. (Who appears.) What place are you in, in the Stamp-office?

Webb. A clerk in the Receiver's office.

Att. Gen. Are you a sworn clerk?

Webb. Yes.

Att. Gen. Can you give an account of any receipts had of Mr. Francklin, on account of his advertisements the 2d of January last?

Webb. He had one in July last.

Att. Gen. Do you know if the advertisements of the 2d of January were included in the money?—*Webb.* I cannot tell.

Att. Gen. In whose name received you it?

Webb. In the name of Mr. Francklin.

Att. Gen. Whether or not did you receive any money, on the account of his advertisements, before that time?

Webb. Yes, I received something on that account.

Att. Gen. Was it a long time before July?

Webb. I cannot justly remember.

Att. Gen. How much was it you received the 29th July?—*Webb.* About 10*l.* 18*s.*

Att. Gen. Where goes that receipt?

Webb. To the Comptroller's office.

Att. Gen. Call Mr. Scot. (Who appears.) What is your office?

Scot. I am in the Comptroller's office.

Att. Gen. Have you an account of any money paid on account of advertisements in the Craftsman the 2nd January last?

Scot. I have them for the whole month; but not the day.

Att. Gen. What come they to?

Scot. Ten pounds eighteen shillings.

Att. Gen. In whose name was it paid?

Scot. In the name of Mr. Francklin.

Att. Gen. Were there any more payments before?—*Scot.* Yes.

Att. Gen. Who paid them?

Scot. I cannot tell.

Att. Gen. On whose account were they paid?—*Scot.* On Mr. Francklin's.

Att. Gen. Have you got any warrants?

Scot. Yes.

Att. Gen. Have you got a particular warrant for every month?—*Scot.* Yes

Att. Gen. Look out the warrant for the month of January.

Here it was read. The purport was, That there was received 10*l.* 18*s.* on Mr. Francklin's account.

L. C. J. What is the nature of that warrant?

Scot. It is a warrant given from one office to another, containing the number of the advertisements, and sum for the duty.

Att. Gen. My lord, the other side have owned, that there were differences between his

late majesty and the king of Spain, because we have fully proved it; but they say we have shewn no evidence of any difference between his late majesty and his allies, and the king of Spain, which I apprehend we have; though, as I said before, it is not material: but, if they please, I shall call other witnesses to prove it further; particularly differences relating to the Dutch, who claimed the sole trade to the East Indies, exclusive of all the subjects of the emperor, &c. and yet, my lord, by the 36th Article, Spain stipulates to let all the subjects of the emperor enjoy the same privileges as the United Provinces; which is an infraction of the treaty of Munster, 1648. Call Mr. Paysant.

Mr. *Paysant* appears.

Att. Gen. Mr. Paysant, give an account of these papers.

Paysant. I brought them from my lord Harrington's office.

Att. Gen. What is their import?

Paysant. They contain the accession of the States General to the treaty of Hanover.

Att. Gen. Are they kept there?

Paysant. Yes.

Att. Gen. Is the Act of Accession enrolled?

Paysant. Yes; but this is the original one.

Mr. *Fazakerley.* My lord, I apprehend the enrolment is a proper evidence.

Here that part of it was read and interpreted, (it being in French) which complained of the infraction of the treaty of Munster, made in 1648.

Att. Gen. By this Act of Accession, which was about a few months after the treaty, the Dutch insist, that it is wholly their right to enjoy the sole privileges of trading to the East Indies, exclusive of all the subjects of the emperor, &c. and accordingly they enter into, or accede to the treaty of Hanover; which, I think, is a sufficient evidence of differences subsisting between his late majesty and his allies, and the king of Spain. We shall not take up any more time in examining other witnesses, for a further proof of the information against the defendant; having, as we apprehend, sufficiently proved it already.

Mr. *Fazakerley.* My lord, and gentlemen of the jury, I am counsel for the defendant. As the king's counsel have been very long, and thought nothing unnecessary; and, indeed, I cannot help saying, that I think a great deal of labour and pains have been made use of, to shew that the defendant is guilty of the fact of publication; and I believe it was only to give a reasonable suspicion thereof, because it was not sufficiently proved by the first witness, and they have spent about one hour and a half since, to support that: so, gentlemen, I hope that you will not think that they have sufficiently proved the information; and that you will not rest on what the first witness says as a full proof, who is as liable to a prosecution as the defendant. But I apprehend, that of a printer is different from a publisher; and that a printer's business relates to all the subjects of the kingdom, and he may easily be imposed upon. As to their evidence, you will find that they entirely seem to rely on the first witness, who says, he went to Mr. Francklin's shop, and that he was busy, and that he interrupted him by asking him for some of the Journals of that day, and that he did not deliver them himself. Now, as he asked for Journals in general, and did not tell whose; and that he was busy, and did not deliver any to that witness, nor receive any money from him; and how he came by these Journals, it is not known; he might have some in his pocket that he got elsewhere, and by mistake put his mark to them: besides, there were only two of these Journals produced. As to the rest of the witnesses, they are only brought in, in order to endeavour to support this first witness's evidence, and to prove that they received Journals from the defendant's servants only, and paid the money to them. As to the Stamp-office accounts or books, I suppose they only shew what money is raised to the crown: so, gentlemen, I believe it will depend chiefly on the evidence of the first witness; and the defendant is punishable for none but these two Journals produced (if he is guilty of that;) for if he had sold a thousand more, it signifies nothing to this information. I shall not trouble you with other observations on it; but only take notice of the great conveniency of publishing letters of this kind, and other news. Gentlemen, it is well known that newspapers are allowed not only in this, but in other nations; and, indeed, it is reasonable that private people should know these news as well as others: and therefore, when we are under a case of this kind, we ought not to be strict in scanning things that come from foreign parts; for to do so, may put many under great difficulties; and, indeed, if men were to be punished therefore, it would be a great means to have no news at all published; for it is an easy thing to scan them amiss: and therefore, gentlemen, when you are in a case of this kind, consider how many witnesses they have produced against the defendant, and that none of them proves any thing but the first, on whom (as I said before) they seem entirely to rely: I hope they are persons of veracity, or else they would not have produced them. Next, do you think that the defendant did it out of a criminal design? And I think it is pretty hard, unless this seem extremely plain, and unless he was offending in his mind, as the counsel on the other side have alleged, and endeavoured to make out (though, I think, they have not proved it.) Next, I would have you take notice of this information in the general: he is indicted of two offences; the one is only to support the other: the second he is not guilty of, because they have produced no evidence. Again, the next thing they have proved is only, that he is guilty of the publication (let me get free of as much as I can,) though I think he is

innocent. Gentlemen, you cannot but consider the evidence that hath been given you; and therefore I hope you will not think that he is guilty of any thing further, I mean the act of publication. Next, take notice, that there are a great many aggravations in the information; so that if you find the verdict general, then these aggravations must be published on record, and be punished for them. For, first, in the information it is laid, "That there were several differences and controversies between his late majesty and divers princes and foreign states, being his allies, and the king of Spain." I shall not trouble you with any thing concerning this; but only name the last, to wit, the accession of the Dutch, which leaves it where we found it; for the time laid in the information was, that the differences were antecedent to the treaty of Hanover, which was made the 30th of September, 1725. But the evidence they have produced is about a year after that, to wit, about August, 1726; and probably there might have been no difference at all then. I shall go on to make a few observations on the rest of the matter charged; to wit, "That he intended to disturb and disquiet the happy state of the public peace and tranquillity of this kingdom, and likewise to traduce and vilify the administration, and his present majesty's principal officers and ministers of state; and to represent them as persons of no integrity and ability, and as enemies to the public good of this kingdom; and likewise to reflect on the king:" Far be it from me to think that his majesty ought, in any wise, to be reflected on; and I think my client is of the same opinion, and that he would abhor any thing to the contrary; and therefore I apprehend, that there is nothing in this paper (take it in the strongest sense) that shews any design of reflecting on his majesty; and suppose it does on his ministers, yet not one of his ministers have been yet mentioned, on whom the reflection is said to be made. Sometimes it is said, that a reflection against the ministers is one against the king: but, with submission, I think it is not; for princes may sometimes have the misfortune of bad ministers, as well as private persons have the misfortune of bad servants; but I believe that nobody can imagine, that his majesty hath any such ministers. And then observe, what have the king's counsel opened, with respect to the present ministers of his majesty? What evidence have they given of the defendant's reflecting on these ministers in the Hague letter? I apprehend, there hath none at all been given, but what intirely depends upon the construction of that paper itself; and therefore, in cases of this kind, the question is, How you are to construe that paper, especially when there is an information thereon against any person supposed to be the publisher thereof? The gentlemen of the other side have told you, that you are to understand it in the same sense as any other person does; but I apprehend you are not to judge so, because here is a prosecution against a person, wherein facts are undertaken to be proved, which if done, will subject the person to punishment; and that you are to find a verdict according to the evidence laid before you; for there is a great difference between one person's reading, understanding, and judging of it, for his own information, and another's doing it, on a prosecution, in order to convict or acquit the person charged: so that the question here is, Whether you think that the defendant is guilty of reflecting upon the present ministers of Great Britain, or not, upon the construction of that paper, and upon due consideration of what follows? Though I think he is not: for you have heard mentioned to you, from the several treaties opened, as well as from the Hague letter itself, that there are several courts mentioned as well as Great Britain; to wit, Prussia, France, Spain, and Germany; and that the words "certain ministers" may have a reference to the ministers of one of those courts, and not to the court of Great Britain: and I hope you have a better opinion of his majesty's present ministers of state, than to think that the expressions are applicable to them; and, indeed, when you are to make a construction on that paper, you must consider, and judge for yourselves, Whether these ministers deserve such things to be said of them, or not? And I hope you will be of the same opinion as I am of; which is, that they deserve them not. In the beginning of that Hague letter the words are, "A rumour hath been for some time privately spread about, that a misunderstanding will soon discover itself between the allies of Seville; and that certain ministers are endeavouring," &c. The gentlemen on the other side are pleased to say, that these words "certain ministers" must be understood of the ministers either of Great Britain, or France, or Spain; but I beg leave to say, that no such inference can be naturally drawn, or that no other ministers of any other court can be intended but one of these three. Then the letter goes on, and says, "that certain ministers having at length found out, that too close an union with France, and a war upon the foot of the treaty of Seville, is quite against the grain of the people, are endeavouring to bring about an accommodation with the emperor." The gentlemen say, that this must be applied to the ministers of Great Britain only. Gentlemen, I believe any minister of any court whatsoever must be of that opinion, and that it is not fitting that there should be a war on the foot of any treaty; and I hope that all the ministers of these three courts are of the same opinion; though the gentlemen would fix it only upon the ministers of Great Britain: nor can I see how it can be said or applied to our ministers, when the following words are mentioned, to wit, "that certain ministers having at length found out, that too close an union with France." Why should this be mentioned as a reason of its being applicable to the ministers of Great Britain? Have not we had all this time an alliance, a close alliance, with France? And can

it be strengthened by a further or closer alliance? So that, I think, it is more applicable to the ministers of other courts. Gentlemen, I will take a little notice of what the king's counsel said, with respect to these words "certain ministers." They told you, that they could not be understood to refer to the ministers of *France*, because that these words "certain ministers having at length found out, that too close an union with France, and a war," &c. excluded the ministers of France; though I apprehend, as I have said already, that, from thence, they are more applicable to the ministers of other courts than our's. Then they told you, that these words "certain ministers" could not refer to the ministers of Spain, because of the ill effects which, the letter mentions, would follow, on endeavouring to bring about an accommodation with the emperor, one of which is called a necessary effect: "Another necessary effect (for so I think I may call it) of such a measure, at present, will be a conjunction of France and Spain; and a certain court may have the mortification to see those two courts united against them more strongly than ever, by their extraordinary management," &c. Gentlemen, how is it possible to apply this to the court of Great Britain, or its ministers, when we were, at the same time, in amity and alliance with France; and likewise when there was an alliance or treaty entered into between Great Britain, France, and Spain? Was there any likelihood for us to see such a conjunction? Again, the king's counsel said, that it would be hard for us to tell what ministers were meant by these expressions: to this I must answer, that I think it will be very hard, indeed, to make a publisher liable to be punished, because he cannot explain or make out a piece of foreign news sent him; especially when the other side hath got all the treaties of the public affairs in their own custody: for my part, I know nothing about them, and I am sure that my client knows as little; and therefore I don't think that this piece of news is any reflection on our present ministers; especially if you compare it with their actions and merits; and consequently you would not, I hope, make a person guilty of that, when you cannot say, that that charge is the least applicable to them; and I hope that you, and every person here, have a better opinion of our present ministers; and therefore hope, that you will put such a construction on it, as that it is not a reflection on them, and consequently that you will not find the defendant guilty of publishing any libel against them, though he cannot explain that piece of foreign news. The gentlemen of the other side say, that there are other parts or expressions in the paper that give a light to it, such as Germanized patriots: I don't pretend to understand the meaning thereof, and I hope you will as little pretend thereto: they said, they who were enemies to the ministry were called so; but as they have given no evidence thereof, you are not to take notice of it. Again, they say, that these words; "one immediate effect may be the seizure of that vast pledge which Spain hath at this time in her hands" serve to explain and refer to the court of Great Britain, though they have given no evidence thereof; nor do I see why this should be applied to Great-Britain only, because there are other courts or states that have considerable stocks and effects, that may be applicable thereto. And then they mentioned another thing, which they wanted to make the expression refer to Great Britain, which is, "that the ministers had been undoing what they had been doing for five years past;" which they say carries it back to the treaty of Hanover, entered into in September, 1725: but I think it proper to remark to you, that the gentlemen themselves have acquainted you, that, about that time, the Dutch were as much dissatisfied as we were; and therefore I think it is hard to conjecture whose ministers are meant by that expression. Gentlemen, I shall not trouble you with further observations on that paper; but leave it to your own consideration: only observe, though the king's counsel were pleased to say, that the Hague letter was of an English growth, yet they have not proved it to be so, nor have they told you who is the author of it; though I think, from the import of it, it plainly appears to be of a foreign growth, and is placed under the article of foreign news: and we can prove, that (if we had not been deprived of the means of doing it) the letter came from abroad as a piece of foreign news: for you are to consider, that when the defendant was seized upon that account, the persons employed therein broke open his scrutore, and searched his pockets, and took away, in a most unwarrantable manner, his papers and letters, and other things, which they still retain; and amongst the rest, this Hague letter, which has deprived him of some part of his defence, by disabling him to produce that letter, though he is expected to produce that original letter still, which is impossible to be done now; therefore we expect, when you consider these circumstances, that you will, in point of evidence, expect less from us, and more from them. I shall not trouble you, at present, any further. My lord, I apprehend they have failed in the description of their pretended libel: they have stiled it a certain false, scandalous, and seditious libel, (intituled, N° 235, The Country Journal; or, the Craftsman, by Caleb D'Anvers, &c.) I apprehend that this number 235, being at the end of the paper, cannot be the title, or any part of it; I believe there have been some precedents to the contrary.

L. C. J. I don't know how you, or any other person, can distinguish one Journal from another after a better manner; I shall not go contrary to my own conscience, nor overturn the opinion of those before me: if you think otherwise, you know where to apply to.

Mr. *Bootle*. My lord, and gentlemen, I am also counsel for the defendant: and though he

is the person that is now more immediately standing before you, and concerned in this prosecution; yet I think it is not confined to him only, but will extend to things of a more public nature, and consequently to the public in general; I mean the suppression of the liberty of the press, which liberty hath been always esteemed as a great privilege, and of great advantage to this nation: that this prosecution is of such extent, will appear from the paper itself complained of, and the evidence relating thereto. The case hath been fully opened by the gentlemen on the other side, with many aggravations pretended to be attending it; and these aggravations are not confined to this paper only, but extend to all the other newspapers in general: and should I have the liberty to mention the common opinion of mankind, with relation to this weekly Journal, I believe that assertion of its being a false, scandalous, and seditious paper, would be thought groundless; but that it hath tended very much to their satisfaction, in foreign and home affairs. But we are now confined to this paper, which is dated the 2d of January, 1730. Gentlemen, this paper contains a paragraph of foreign news, or intelligence; for such are oftentimes of use to those who deal in foreign trade: now, this foreign intelligence complained of, and for which the defendant is prosecuted, is not positively asserted as a truth, but only as a saying; "A rumour hath been for some time spread about privately," &c. Besides, it is added in the conclusion thereof, "I cannot take upon me to justify the truth of this report: but, as it hath been pretty confidently buzzed about, I thought proper to let you know what is said upon it; and if it should appear to have any foundation, you may expect to hear further from me on the subject." Gentlemen, the information contains two charges, with regard to this paper: the first is, for spreading false news; and the second is, for publishing a false, scandalous, and seditious libel against his majesty's administration of the government, and against his principal officers and ministers of state, and also against the Treaty of Seville. Gentlemen, as these things are only asserted and averred in the information, by innuendoes, it is incumbent on them to prove them: and, in order to this, they have produced this newspaper, which is published for the entertainment and use of the public, containing foreign and home news, or affairs; among which there is a paragraph which says, (as from the Hague) "A rumour hath been for some time privately spread about, and begins to gain credit here, that a misunderstanding will soon discover itself between the allies of Seville; and that certain ministers are endeavouring to bring about an accommodation with the emperor." This is all that is asserted; for all the rest of the letter are only as an induction, or inferences drawn from the supposition that such a piece of intelligence is true; and if so, then it says, that the conduct of these certain ministers hath been wrong before, and hath occasioned unnecessary expences to be laid out, and will occasion further expences to be laid out; and adds, "I am far from designing to insinuate from hence, that an accommodation with the emperor is a wrong measure; on the contrary, I wish it had been thought a right measure long ago." And in another part of it he says, "and though it must be confessed to be very desirable at present; yet it seems to be attended with very fatal consequences, and almost insuperable difficulties." And then he mentions the consequences; as the interruption of trade, and the conjunction of France and Spain against a certain court, in general, without naming it; and adds some other effects or consequences; but then these effects or consequences are all upon this supposition, that these certain ministers do bring about an accommodation with the emperor; though he adds, at the conclusion of the letter (as I said before) "that I cannot take upon me to justify the truth of this report; but as it hath been pretty confidently buzzed about, I thought proper to let you know what is said upon it; and if it should appear to have any foundation, you may expect to hear further from me on the subject." Now, gentlemen, the question is, who are meant by these words "certain ministers?" And by the way, though it is said in the information, that this piece of foreign news was a high reflection on his present majesty, yet I cannot see any thing therein that hath the least tendency to such a reflection; nor is there indeed so much as the word "majesty", or "king of Great-Britain," or even the word "Britain" itself, in any part of that letter; nor hath there been the least evidence offered to you, that it does any ways reflect on his majesty; so that this does not fall under your consideration: and this being laid aside, the next thing to be known is, what ministers these are that are meant by these words, "and that certain ministers having at length found out, that too close an union with France, and a war upon the foot of the Treaty of Seville, is quite against the grain of the people, are endeavouring to bring about an accommodation with the emperor." The information hath averred, that by these words, "certain ministers," are implied and meant, the principal officers and ministers employed and entrusted by his present majesty; but who are they then? To be sure it will not be said, that the paper does in the least mention them to be our present ministers; or that any of you; I hope, hath such thoughts concerning them, as to believe that they are guilty of that which is charged on them by the information: nor do I think that they are meant by other parts of the paper; because you have heard already, that these things may be applied to the ministers of other courts and countries, as well as England or Great-Britain. The paper hath left the meaning very much in the dark, and to a conjecture only; for it may refer to one set of ministers as well as another. I say, gentlemen, that the pretending to ascertain or determine whose ministers are meant by these

general and indefinite words, is at the best only a conjecture. And with submission to my lord's directions and judgment, I must tell you, that with relation to scandal or slander, the law lays it down as a rule to be observed, that there are two things necessary: the first is, that the person of whom the slander is used or spoke, ought to be certain, and ought not to be left to people's imagination or conjecture: and the next thing is, that the slander shall be evident and plain from the words themselves, and not supported by any innuendo; I say, they must be plain, positive, and direct. You have been told, that you are to understand this paper, as every common reader in a coffee-house; but I beg leave to say that you are not; for when you are in a coffee-house, you have the liberty to conjecture and guess at the meaning of a piece of news, as well as any other person there; and nobody can be subjected to any punishment, if you are mistaken therein: but when you are here, in a court of judicature, you must consider that you are upon your oath, and that you are not to take that liberty to conjecture or guess at the meaning of things; because if you happen to be mistaken in your conjecture, you will make him guilty of the criminal charge which he is accused of, and subject him to the punishment inflicted thereon; and you are likewise to consider, as I hinted before, that, in scandal, the law requires that both the person slandered, and the scandalous words themselves, ought to be certain, and not want innuendoes to make them out; and that an innuendo ought neither to alter, enlarge, or supply the sense of the words, when doubtful or defective, because it would be unjust: And, indeed, whenever an innuendo is allowed, in other cases, to explain a doubtful matter, it should be rather in favour of the person accused than against him, especially where the words spoken may be applied and referred more ways than one: So here in fixing a meaning on the words "certain ministers," which the information, by an innuendo, explains to be the principal officers and ministers employed by his present majesty, you are to consider whether these words may not be applied to the ministers of other courts and countries; and likewise to consider, whether these words "certain ministers," (so understood by the information to be his majesty's) are to be understood or meant by those officers or ministers employed by his majesty at sea or land? Or are they his ministers at home or abroad; or whether they are his officers civil or military? Now, I say, suppose you should find this paragraph of foreign news to be a libel, or a scandal thrown upon his majesty's officers and ministers (as I hope you will not), can you say or declare on oath, who are the particular persons thus slandered or defamed? Have you any certain rule, by this paper to guide your judgments? Can you say, on your oath with any certainty, whether these officers or ministers, so defamed, are those at home or abroad, or civil or military? Again, I suppose, for argument sake, that though you should be of opinion, that this piece of foreign news is a libel or scandal upon his majesty's officers or ministers; yet I submit it to you, whether you can say, on your oaths, that that piece of news, contained in this Journal, does amount to a false, scandalous, and seditious libel, as it is asserted and averred, by an innuendo's in the information? And I submit it to you, with all deference to my lord's judgment and directions, whether it is not incumbent on them to prove, that that piece of foreign news is false, scandalous, and seditious, before you can find it, by your verdict, to be so? And, indeed, the chief thing in this paper, or letter, that the defendant is charged with in the information, is, "That a rumour hath been for some time privately spread about, that certain ministers are endeavouring to bring about an accommodation with the emperor." I say, this is the chief thing that is mentioned in the Hague letter; though, in the conclusion of it, it is said, "I cannot take upon me to justify the truth of this report." For all the rest of that letter (as I said before) are mentioned, or set down, only by way of conclusion or inference, that such and such things will be the effect or consequence, if these "certain ministers" can bring about that accommodation with the emperor. Now, let us take it either way; suppose that, at the time of the publication of this Hague letter, that this accommodation or treaty with the emperor had not been brought about; how can it be said to be false, and so on, when the letter does not affirm it for a truth; but only says, "that a rumour hath been for some time privately spread about, that certain ministers are endeavouring to bring about an accommodation with the emperor;" and adds, in the conclusion of it, "that he cannot take upon him to justify the truth of this report." And then let us suppose, that they were endeavouring to bring about that accommodation or treaty with the emperor; and that it was actually brought about and concluded about the time of the publication of that letter, which was in the year 1730; then, to be sure, the allegation was true, and therefore could not be false and scandalous, or seditious. As to that accommodation or treaty with the emperor's being true, I hope we shall give you full satisfaction, notwithstanding the great difficulties that the defendant at present labours under: We shall give you the best evidence that the nature of things will admit of, and which is always allowed to be sufficient; for there are some things which are self-evident, and there are some things that carry in them what every body knows.

L. C. J. I don't altogether know what you aim at: I should be glad to know how you would really understand these expressions. And as for your saying, that you can prove what is charged on the defendant to be true, it is my opinion, that it is not material whether

the facts charged in a libel be true or false, if the prosecution is by indictment or information; and that writing or printing may be libellous, though the scandal is not charged in direct terms, but only ironically; or although there be only the initial letters of the name, or even a fictitious name, if the jury plainly perceives it to point at a particular person; and that not only the contriver and procurer, but even the publisher of a a libel, are punishable; and that even a private man's character is not to be scandalized, either directly or indirectly; because there are remedies appointed by the law in case he has injured any person, without maliciously scandalizing him in his character: And much less is a magistrate's, minister of state, or other public person's character to be stained either directly or indirectly; because the law hath pointed out another remedy than publishing libels, if they have injured any person, either in a public or private capacity; and the law always punishes libels, even among private persons, because they flow from malice, and tend to create disturbance, quarrels, and revenge between them, their families and kindred, and disturb the public peace: And the law reckons it a greater offence when the libel is pointed at persons in a public capacity, as it is a reproach to the government to have corrupt magistrates, &c. substituted by his majesty, and tends to sow sedition, and disturb the peace of the kingdom: Therefore, I shall not here allow of any evidence to prove that the matters charged in the libel are true; for I am only abiding by what have been formerly done, in other cases of the like nature. If you think it wrong, apply to the Court, and they will do you justice.

Mr. *Bootle.* My lord, then I must submit it to your lordship, whether this will not tend to the utter suppression of the liberty of the press, which hath been so beneficial to the nation in general. And, my lord, I humbly apprehend, though a publisher of news happens to be mistaken in what he publishes, it cannot be called malicious nor seditious, especially when no particular person is mentioned; but only an error, committed through ignorance, or misrepresentation of his correspondents. Again, my lord, if the defendant is not allowed to bring in his evidence that some parts of his news are true; then, if he is found guilty, he is found guilty of all that is charged on him in the information, though he is only guilty of part thereof. I think this evidence will be allowed between particular persons, with relation to their private affairs; for they will not be found guilty of the whole, when they are only guilty of a part; and why should not the same be allowed with respect to public affairs? As the Star Chamber is now abolished, I don't know how far that doctrine may be adhered to. I should be glad to have one instance or authority of this, and of there being no need to prove news to be true: and also where a publisher of news is not allowed to say that this piece of news is true, because it relates to the public affairs of the nation. Is there no distinction to be made between false news and true news; and cannot we now animadvert, or take notice of public affairs, and insert them in the papers, as well as formerly? If this is the case, it will be of dangerous and fatal consequence indeed, if matters of state, or public affairs, are not to be meddled with, or inserted in the news-papers, notwithstanding they are true, but at the peril of him that does it? They may as well, at once, take away the liberty of the press; and then we shall all live in darkness and ignorance, which may occasion disorders enough in the nation. Therefore, I submit it to your lordship, whether this will not be of dangerous consequence, to punish a person for publishing true news as well as false; and whether it can be justly said in the information, that the defendant intended to publish false news?

Mr. *Strange.* My lord, I beg leave to call a witness or two. It was insinuated, by the gentlemen on the other side, that the extract of the Hague letter was of the growth of our own country; and put it upon us to prove that it came from the Hague, by producing the letter itself. My lord, in order to take off that imputation, it will be necessary to shew, that they have put it out of our power to do so; therefore our evidence will be, in the first place, to shew, that when the defendant, Mr. Francklin, was taken into custody by the messengers, they broke open the defendant's scrutoire; and, I think, they also searched his pockets, and took away his papers, and among which were letters, and this amongst the rest. The next part of our evidence shall be to prove, as have been opened, that we have published true news, and not false, as is charged in the information; and, indeed, the information ought rather to have been for forestalling true news, and not for publishing false news; for the endeavouring to bring about that accommodation with the emperor took effect: for, my lord, we will shew, that we applied in a public manner, that the defendant might be at liberty to take copies of the treaties of Hanover, Seville, and Vienna, in order to make use of them at his trial; and when we had taken all proper methods to have copies of them, we were told that the treaty of Vienna was a secret one, and not yet made public, and consequently not enrolled in any of the public offices; and that no copy could be given of it, to produce in court: when we have proved this, we hope it will be sufficient to shew, that we have not published false news, as charged in the information; especially as we have done all that can be done, in order to produce a copy thereof.

Call *William Ayers.* (Who appears.)

Mr. *Strange.* Do you know the defendant, Mr. Francklin?—*Ayers.* Yes.

Mr. *Strange.* Were you present when he was taken into custody, for publishing the Craftsman the 2d of January, 1730?

Ayers. Yes.

Mr. *Strange.* Will you give an account of what happened?

Ayers. The messengers came to my house, for I was a constable, and desired my assistance, to go with them to Mr. Francklin's, which I did; and they searched for papers in his house and shop, and they broke open his scrutoire, and took away what papers they could find; and Mr. Francklin desired them to leave some of the papers, because they would be of service to him, but not to them; but they would not, but took them away.

Mr. *Strange.* Did he endeavour to save his papers as much as he could?

Ayers. He did not; but his wife endeavoured to do it, by snatching at them, though to no purpose.

Mr. *Strange.* Did they search his pockets?

Ayers. I did not observe them do that.

Mr. *Strange.* Did they suffer him to take an account of these papers, in order to know what they were?—*Ayers.* No.

Mr. *Strange.* Do you know what they did with these papers?—*Ayers.* No.

Mr. *Strange.* Did you go along with them?

Ayers. Yes.

Mr. *Strange.* Did you know they were messengers?

Ayers. Yes; he shewed me his authority, and told me that he was the king's messenger.

Mr. *Strange.* Hath Mr. Francklin had them again?—*Ayers.* I believe not.

Mr. *Strange.* Hath he asked for them?

Ayers. I know not.

Mr. *Strange.* Were they sealed up or not?

Ayers. I cannot remember that.

Mr. *Strange.* Was Mr. Francklin desired to set his seal to them?

Ayers. I cannot be sure; but I believe he was not desired to do so.

Mr. *Strange.* Where were these papers found?

Ayers. I think they were in the one end of the shop; they were wrapped up in a bundle.

Mr. *Strange.* Was the inside of them printed?—*Ayers.* I know not.

Mr. *Strange.* Call Thomas Rawlins. (Who appears.)

Att. Gen. My lord, I find that they are to call this witness to prove that they desired copies of the Treaties; which is to no purpose, and cannot be allowed.

L. C. J. I am very well satisfied, that I cannot admit it.

Mr. *Strange.* My lord, it is only to shew, that the Hague letter was not a piece of false news.

Att. Gen. My lord, did ever any man think it necessary to prove every part of the libel, when it is not material whether the matter, or scandalous words, or news in the libel, be true or false, or charged in direct terms or not; or whether the persons be named or only pointed at, as have been already hinted; though Mr. Bootle has called on me to shew some authority or precedent for some of these things? I do say, that on the cases mentioned in the 5th of Coke's Reports, p. 125, and also in Hobart's Reports, p. 215, and 5th of Modern Reports, p. 167, and 9th of Coke's Reports, p. 59. The first says, That every libel is made either against a private man or against a magistrate, or public person: if it be made against a private person, it deserves a severe punishment; and if it be made against a magistrate, or other public person, that is still a greater offence, and deserves a greater punishment; because this concerns not only the breach of the peace, but is a scandal to the government. The other Reports take notice of the other points which I have mentioned: and I must say, that it would be the most absurd thing in the world to imagine, that the law had taken a better care of the character of a private person, than of a magistrate, or public person, employed and entrusted by his majesty in the affairs of state. Therefore, I submit it to your lordship, whether such an evidence, to prove that the news published is true, ought to be admitted.

L. C. J. I have given Mr. Bootle my opinion already about it; and if it is not according to their liking, they know where to apply to have it rectified.

Mr. *Bootle.* My lord, in effect it hath been called an absurdity to think, that speaking the truth of any magistrate, or other public person, in the news, can go unpunished; because if that magistrate or public person have done any injury, then it was said, that there is a remedy provided another way than by publicly exposing him, and defaming his character; as well as there is a remedy provided for having satisfaction of a private person for any injury done by him, without scandalizing him, directly or indirectly, in any public paper. But I should be glad to know how it must be gone about: for example, here is a principal minister of state, that hath injured a person that is a publisher of a paper; where can he have redress, supposing the parliament not sitting?

L. C. J. I am of the same opinion as before.

Sol. Gen. I thought, that really such a thing as that would not have been taken notice of; because it is plain to every person, that we have a remedy against a minister of state, as well as against any other man, without defaming him publicly; and likewise any author, printer, or publisher, or other person, may apply to a proper place for a remedy against him, if they think, that any court or jury, have not done them justice.

Mr. *Noel.* My lord, I beg leave to say a few words on the defendant's behalf. It is well known, that the design of this paper of the Craftsman, which is published weekly, is to entertain and benefit the public, and I believe it has answered these ends: And I hope the jury will consider the intention thereof, with the circumstances and inconveniences that the printer or publisher of newspapers lie under; and I hope you will consider the defendant only as a collector of news from all parts of the country, and likewise from foreign parts, for the advantage of those people here that trade to and

from those parts; and that it is possible for the defendant's correspondents, after all the care they have taken, sometimes to be a little mistaken in their intelligence, or not so correct in wording them as they ought or might be, without any intention or malicious design of injury to any person; and therefore, if such things were to be always punctually and precisely scanned, and the printers and publishers thereof prosecuted, and subjected to punishment, it will be of very dangerous consequence; because we should not have any intelligence or newspapers at all, and consequently be ignorant of what happens daily at home or abroad, and thereby occasion an interruption, in trade so beneficial to this nation. Besides, it is hoped that you will consider, that this piece of news, in the Hague letter, is not laid down as a truth to be depended upon, but only as a rumour that had been spread about in that place: And the writer of the letter adds, in the conclusion thereof, that he does not take upon him to justify this report; and that if it should appear to have any foundation, he should hear further from him. Again you will consider, as have been already mentioned to you, that the parts of the same are applicable to other courts, and that it cannot be applicable to Great-Britain, or its ministers, without innuendoes, which are not to be used in prosecutions for slander or scandalous words. Also consider, that they could not draw an innuendo in the information to include his present majesty; nor have his counsel pretended to shew any evidence, that the Hague letter had any tendency to reflect that way; and, indeed, the innuendo to include his ministers is very far fetched, and very much forced. Besides, the writer of that letter does seem to approve of these certain ministers measures of endeavouring to bring about an accommodation with the emperor, by saying, "That it must be confessed, that these measures are very desirable at present." So that, upon the whole, I cannot see that the letter is applicable to our ministers, or that it contains a libel upon them, or that it any ways answers their character; and I hope, gentlemen, that you will be of the same opinion in your verdict.

Mr. *Taylor.* My lord, I hope your lordship will likewise indulge me with a very few words on the behalf of the defendant: As the government is concerned in this cause, so the liberty of the subject is also greatly concerned therein. The facts which you, gentlemen, are to try, are, whether the defendant, Mr. Francklin, printed and published this paper; and whether you can, upon your oath, say, that it is a false, scandalous, and seditious libel; and, for that end, it will be necessary that you take the paper into your serious consideration, not as it is inserted in the information, with al great number of innuendos, but as it was originally; and see if it contains any scandalous reflections on our present ministers particularly. Gentlemen, it is not sufficient to say, that the information is a libel; but you are to judge of its being one by the words themselves, and as they stand in the paper abstracted from the innuendos; and I do say, that it will be impossible to find it a libel on our present ministers, if you judge of it so; for there are no such words therein as the ministers of Great-Britain; I believe there are no less than thirty seven innuendos in this information, and you cannot find it a libel when stuffed with these innuendos. Gentlemen, in the former part of it, you will be pleased to observe, that they say, that the defendant is a constant publisher of these libels; and yet they have not proved that so much as one of them was ever sold by the defendant himself. And, gentlemen, with respect to the innuendos, it is to be observed, that there was a famous cause in king Charles the second's time. In the 14th May, 1669, there was a Writ of Error, and the judgment or sentence reversed; and their lordships declared, that innuendos ought not to be allowed. Nor are you to understand it here, on oath, as you may do in a coffee-house by conjectures; therefore I hope, upon consideration of these things, that you will not find this piece of news a libel.

Att. Gen. My lord, I beg leave to make a short reply, not for what they have said, nor for our want of proof; but I think some things very strange which they have insisted on. One of them is, that there is not sufficient proof of the publication of this paper. As to that, I beg leave to say, that I never saw the publication of a paper more clearly proved; and I believe they never saw it themselves in any instance whatsoever; for your lordship may remember, that Mr. Smith, the first witness, swears, that he applied to the defendant, Mr. Francklin himself, when he was in his shop, and asked for six Journals of that day, the 9th of January, 1730, and two of the Saturday before; and that the defendant ordered his servant, then in the shop, to deliver them to Mr. Smith, which he did; and the servant received the money for them; and therefore his ordering his servant to deliver them, is the same as if he had delivered them himself; there cannot be a clearer proof. They make a scruple, because he did not ask particularly by name for such a Journal, though I think he asked to the same effect, by asking for six of his Journals of that day; for the word "his" may take in the words "Country Journal, or Craftsman" because that is the Journal which he prints and sells; besides, have they done any thing on their part to prove that other persons sold other Journals of that name or otherwise? or have they offered any thing to contradict or weaken his evidence? Therefore I think that our witness is the strongest for the king that can be. It was said that great inconveniences and dangers might happen to publishers, if news were so scanned or sifted. As to that I think every publisher ought to be careful of what he publishes; for it is no part of the printer or publisher's trade to scandalize whom they please, for that would be turning printing and book-

selling into libelling; nor is the liberty of the press, which they so much cry up, and say is in danger of being utterly suppressed, to be turned into a licentious and disorderly abuse of the press. Again, it hath appeared before your lordship, with respect to the proof of the defendant's being the publisher, that there is not only this witness's evidence thereof, (against the credit of which no evidence hath been offered) but there are other witnesses who confirm his evidence, such as Mrs. Dodd and her servants, and Mrs. Pierce and hers, who had great numbers at his shop weekly, and paid for them; and that Mrs. Pierce used to have about *7l.* worth weekly; it is likewise confirmed by the collectors and servants at the Stamp-office. After all this, can it be doubted that the defendant is guilty of the publication of this paper, especially when the defendant's counsel have not contradicted them, or offered any thing to invalidate or weaken their evidence? I take the publication to be undeniably proved; and it would be but mis-spending of time to say any more on that head. The next thing is, whether we have sufficiently proved that the pretended Hague letter inserted in that paper is a libel as charged in the information; as to that, I may say that there hath not been so much as one single objection offered against the construction we put upon it, I mean of its being all applicable to his present majesty, and his principal officers and ministers of state; I mean not one of any weight, or which has the least colour of being applicable to any other court, country, or person whatsoever. The words are "certain ministers." These are the persons that the pretended Hague letter charges with perfidy, ruining their country, &c. and want to have a meaning put upon them; that is to say, to what court or country are they applicable. Now, consider what is said of these certain ministers. The letter says, "A rumour hath been for some time spread abroad, that a misunderstanding will soon discover itself between the allies of Seville; and that certain ministers having at length found out, that too close an union with France, and a war upon the foot of the treaty of Seville, is quite against the grain of the people, are endeavouring to bring about an accommodation with the emperor." Now, gentlemen, you know that the allies of Seville are the king of Great-Britain and the French king, and the king of Spain. And then consider, that these certain ministers are charged with perfidy in breaking that treaty, who, to be sure, must be one of these three courts, Great-Britain, France, or Spain, who were empowered to make it; for no other could be guilty of breaking it, but one of these three who made it: Now the letter writer tells us plainly, that it is neither the ministers of France, nor the ministers of Spain, that he thus charged with perfidy in breaking that treaty; for he tells us, that one necessary effect of such perfidy will be the conjunction of France and Spain; and that a certain court would have the mortification to see these two crowns united against them more strongly than ever; This, as I said before, amounts to a demonstration that neither the ministers of France nor Spain are charged with that perfidy in breaking that treaty: If so, then there is but the ministers of one party left, to wit, of Great-Britain; and I must say, that it is as plain as if the ministers of Great Britain had been in express words. Gentlemen, this is no forced nor strained innuendo; but an innuendo that naturally and necessarily flows of itself, and which you all cannot but presently draw. Gentlemen, there are other parts of the letter, which serve to support and confirm this construction, which I mentioned in the opening; such as these, to wit, that another effect of that perfidy would be the seizure of that vast pledge, which Spain hath at this time in her hands; and that these ministers were undoing every thing they had been doing for five years past; which carries it back to September, 1725, when the treaty of Hanover was concluded. It was said, that you must not understand it as you would do in a coffee-house, because of its dangerous consequences. To which I answer, That there is no more danger in understanding things here than there, if they are plain (as this is), and do but exercise their sense and reason in both places. Gentlemen, if you acquit the defendant, you must say on your oath, that the letter-writer did not mean the ministers of Great Britain; and can you say that he did not, and that it is not applicable to them? I told you in the opening to this or the like effect: that writing or printing may be a libel, though the persons are not particularly named therein; and that it is no hard matter to scandalize any person by circumlocution, fictitious names, &c. as plainly to be understood as if their names were particularly mentioned; and that the law construes them accordingly, by innuendos, because they cannot be otherwise construed; and this hath been the practice of the law for some hundreds of years; and therefore the defendant's counsel telling you that it is doing people harm to bring things in by innuendos, is only amusing you with words; for it is a plain and a just law, and the law would be defective, if it were otherwise, and people would be always defaming one another by the like methods. I told you of the case of Mr. Mist's Journal, in 1728: it was a scandalous libel, under the fictitious names of Esreff and Sophi; which the jury understood plainly to be so, and brought in their verdict accordingly against the printer and publisher thereof.* I

* "This letter, dated Aug. 24, 1728, signed Amos Dudge, was supposed to be written by the late Philip duke of Wharton; wherein were contained, under the characters of Mireweis, Esreff, and Sophi, many scandalous reflections and odious comparisons, between his late majesty king George 2, of glorious memory, and the Pretender. It was so virulent a letter, that it was presented by the grand juries of

shall mention another case, of Mr. Matthews the printer, for high-treason: this was a very notorious and public case, relating to a certain person called the Chevalier de St. George: there are a thousand chevaliers in the world, and yet the meaning was plainly understood to be the Pretender; no less a crime than high-treason. There were eleven judges, I think that sat on the bench, and the present lord chancellor (King) presided; and they understood the queries published as every common reader would; and the jury, being convinced in their own conscience understood it in the same manner; I mean no less a crime than high-treason, and he was executed for the same. And, indeed, any man may write treason at his pleasure, after that manner, if there was not this way of construing it. Again, *it is said*, that this cannot be a libel, though the words were understood to be applicable to the persons mentioned in the information; because what is affirmed in the letter, about the accommodation or treaty with the emperor, can be proved to be true: as to that, I must say, that it is no matter whether the words be true or false, if it is published as a libel, and the prosecution be by indictment or information. Then it hath been said, that the defendant is a publisher of news, and that this letter was sent to him from the Hague, and that he inserted it as such in his Journal: as to that, I do say, that if this letter had been really sent to him from the Hague, it would be still a libel; because it is not in his power to publish what he pleases, or what may

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Middlesex, Westminster, and the city of Bristol; and the printers, publishers, press-men, &c. concerned in printing it were all taken into custody by messengers.

"On Feb. 25, 1729, at the sittings of the Court of King's-Bench, at Guildhall, John Clarke, the pressman, was tried upon an information filed against him by the attorney-general, for printing and publishing a libel, entitled, 'Mist's Weekly Journal,' N° 175, dated August 24, 1728, "containing false, scandalous, and seditious reflections on his late and present majesty, by drawing odious parallels, and thereby maliciously and falsely insinuating our government to be tyrannical, and our ministry corrupt and abominable." To support the charge, there were called James Ford and Thomas Randal, two boys concerned in the printing-office, who proved that the said Clarke worked upon the said Journal, and assisted in printing 9,000 at Mr. Wolfe's, in Carter-lane; that from thence (for fear of messengers) the forms were carried to Mr. Burton's, a printer, where the said Clarke assisted in working off 1750 more; and that the said Clarke ordered, that nobody should see or have any of them, till all were printed off, and published together. It appeared also, that Clarke owned, in his examination before Mr. Delafay, that he assisted in working off the said Journal. His publishing it was proved by Mr. Maskall, who bought half a quire, which was delivered out to him by Clarke himself. The counsel for the defendant alleged, that the characters of Mireweis and Ezreff did not in the least correspond with his late or present majesty: upon which the Court said, the crime was the greater in making the parallel. The defendant's counsel further alleged, that Clarke being a poor ignorant workman, he could not be supposed to understand the comparisons, or to know the characters; nor could have any malicious intention against the government: to which the Court answered, it was the facts of printing and publishing *only* that lay in issue; which the jury considering, they brought him in guilty of both.

"Robert Knell was also tried upon an information filed against him, for printing and publishing the same libel. It was proved, that he assisted in composing it; and said, as he was about it, 'Mr. Wolfe and I, and the rest 'of us, will all be taken up for this journal.' The defendant's counsel insisted that composing was not printing; to which the attorney-general answered, that though, abstractly considered, it was not the very act, yet it was an act preparatory to it; and Mr. Roberts, a printer, being examined, declared, it was not only part, but the principal part of printing; upon which the objection was over-ruled. Another point was also objected to; that as there were two compositors, each having a separate form allotted to compose, one of them could not be charged with the whole libel, as laid in the information: to which the Court answered, that when a crime is perpetrated by more than one, and by joint consent, any one of them, being guilty of part, is guilty of the whole. The defendant was therefore found guilty of printing the said libel; but not of publishing it.

"Joseph Carter (Wolfe's apprentice) was also tried on the said information; and the evidence against him being the same as before, he was found guilty of printing only.

"May 19th following, being the last day of the term, the following persons, for being concerned in printing and publishing Mist's Journal of August 24th, received judgment as follows:

"John Clarke, the pressman, for printing and publishing the said libel, to stand thrice in the pillory; once at the Royal Exchange, once at Temple-bar, and once at Charing-Cross; to be committed to Bridewell for six months, and there kept to hard labour.

"Robert Knell, the compositor, for printing the said libel, to stand twice in the pillory, once at the Royal Exchange, and once at Charing-Cross; and to be committed to Bridewell for six months, and there to be kept to hard labour.

"Joseph Carter, the apprentice, for printing the said libel, to go round the four courts in Westminster-Hall, on the first day of next term, with a paper fixed upon his head, denoting his offence; to be sent to Bridewell for one month, and kept to hard labour." Monthly Chronicle for 1728, 1729. *Former Edition.*

be construed defamatory, let it come from what quarter it will, whether from abroad or at home; for, as I said before, it is no part of his trade to scandalize whom he pleases. But they have not even proved, that that letter was sent to him from the Hague: all that they have done it, that they have called a constable, who says, that the messengers searched for papers, and took away some; but does not say that they were written papers, or that this Hague letter was among them; no, the papers he means were only some criminal Craftsman. Besides, if any other thing had been seized, such as that pretended Hague letter, upon application made to his majesty, or the secretaries, he might have had them returned; but the gentlemen do not pretend that they made any such application. Then they say, if this piece of news is deemed as a libel, it will have a bad consequence; for no person will print any news at all, and then the people will not know how things or affairs go: this is very extraordinary, indeed; for the defendant is not charged in the information for publishing the piece of pretended news to wit, "That a rumour hath for some time privately been spread about," &c. No; but he is charged for making an application, and saying, that the ministers are guilty of perfidy, and ruining their country, &c. Next, gentlemen, I would have you to observe, that it is no part of your office to consider or determine, whether this Hague letter is a libel or not (though the defendant's counsel insinuated that it was a part thereof): you are only to consider, whether the expressions therein are meant to refer to the present king and his ministers, and are properly applicable to them. But whether this amounts to a libel or crime, is only the office of the Court to determine: for, suppose a man was accused of felony, the Court will determine whether it amounts to it, or not. It is so in high-treason, and all misdemeanours, in which the jury is to determine the facts, and the judges are to determine the crime and punishment, as being matters of law: and it is confounding the office of the Court, and of the jury, to pretend to do otherwise; and it is likewise a perverting of the law: this I say, with great submission to your lordship. Then it was said, that there was nothing in that Hague letter, that did relate to or imply any reflection upon his present majesty: but, gentlemen, that you may not be led into any error by such an assertion, and distinction between the king and his ministers, I would have you to consider, that here is a charge on the king's ministers for mal-administration, and for carrying on a treaty, which occasions perfidy, &c. Now, I would ask you, can treaties be carried on without his majesty's direction? And therefore I say, that such a charge as that is a libel on the king himself, as well as on his ministers, who are empowered and directed by him. The same may be said with respect to magistrates and judges; for they are originally of his appointment, and the courts are the king's, and he makes them, and is at the head of them, and without him they cannot subsist: so that I say, that a reflection on the king's ministers, officers, magistrates, &c. is a high reflection on the king himself. There have been several other things mentioned, which I shall not touch at, because I think they are not material. There was another thing mentioned, which was, that if this Hague letter was construed a libel, it would tend to the utter destruction of the liberty of the press. My lord, I am really at a loss to know what sort of liberty they mean by it; I hope they don't mean a licentious and an unbounded liberty, to libel and scandalize his majesty, or his principal officers and ministers of state, or his magistrates, or even any of the meanest of his subjects, whenever they think fit; for that would be a dangerous liberty indeed, and be of a very pernicious consequence. Gentlemen, I would have you to consider, that even the prerogatives of the king are founded on the law and limited by it, and so are all other things relating to his subjects; and it cannot be supposed, that a printer only is exempted, and at liberty to use his press for what purposes he pleases; if he is, I desire now, that the defendant's counsel would point out that law: no, the law is not so absurd as to allow such a liberty of the press. The liberty meant, is to be understood of a legal one: he may lawfully print and publish what belongs to his own trade; but he is not to publish any thing reflecting on the character, and reputation, and administration of his majesty, or his ministers; nor yet to stain the character or reputation of any of his subjects; for, as I said before, that to scandalize and libel people is no part of his trade, so I say, that it is only that liberty of the press, which he is to use, that is regulated by law and subjected to it; and if he breaks that law, or exceeds that liberty of the press, he is to be punished for it, as well as for breaking other laws or liberties. And, gentlemen, though it has been insinuated to you, by the other side, that the making of such things a libel came from the Star-Chamber; yet I must tell you, that printing such defamatory expressions, or slanderous news, was deemed a libel, and punished accordingly, long before the Star-Chamber. It is a law made in 1275, in the third of king Edward 1, intitled, An Act that none shall report slanderous news, whereby discord may arise. The words of that law are, "Forasmuch as there have been oftentimes found, in the country, devisors of tales, whereby discord, or occasion of discord, hath many times arisen between the king and his people, or great men of this realm; for the damage that hath and may thereof ensue, it is commanded, that from henceforth none be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord, or slander, may grow between the king and his people, or the great men of the realm; and he that do so, shall be taken and kept in prison," &c. So, gentlemen, you see that this of libels is not a new

law, or one that came from the Star-Chamber; but one that has been almost of 500 years standing; therefore I hope you will not suffer yourselves to be amused by such things. That court of the Star-Chamber punished without juries; but though juries were taken away, yet the law remained the same as to libels and crimes: So I hope it appears to you to be very plain, that the liberty of the press is limited and governed by law; and that the law sets limits both to the king and his subjects. Lastly, I think it was said to this effect, that it would be making Mr. Francklin a great politician in the world, to suppose that he knew any thing of the meaning of that pretended Hague letter which he printed and published: as to that, I think I may venture to say, that he could not nor cannot be ignorant of the meaning thereof, because it is plain to any common reader, that by the words 'certain ministers,' are and must be meant the ministers of Great-Britain: and I believe that the treaties of Hanover and Seville have been heard of, and known by you all; and that you likewise have heard, and know, that there have been differences between Great-Britain and Spain. So, gentlemen, I submit it to you, whether you are not convinced in your consciences, that Mr. Francklin, the defendant, is the publisher of that Craftsman, the 2nd of January last, wherein the pretended Hague letter is inserted; and secondly, Whether you are not likewise convinced, that these expressions in that letter, to wit, "certain court," and "certain ministers," and what is spoken against them, are to be understood of the court and ministers of Great Britain? These are the two things now under your consideration; for as to the question, whether these words amount to a libel or not, you have nothing to do with that, it being the office of the Court to determine whether they do, or do not. So we doubt not but you will give your verdict according to your conscience; and do justice between the king and the defendant, which is all that is required of you. My lord, the importance of the cause hath occasioned me to take up much of your time, which I hope your lordship will excuse.

L. C. J. Gentlemen of the jury, this is an information, wherein the king is plaintiff, and Mr. Francklin defendant, for printing and publishing the Country Journal or Craftsman, the 2d of January 1730, wherein is inserted an extract of a private letter from the Hague, reflecting on his majesty and his principal officers and ministers of state. In this information or libel, there are three things to be considered, whereof two by you the jury, and one by the Court. The first thing under your consideration is, Whether the defendant, Mr. Francklin, is guilty of the publication of this Craftsman or not? The second is, Whether the expressions in that letter refer to his present majesty and his principal officers and ministers of state, and are applicable to them or not? This is the chief thing in the information; for if you think that these defamatory expressions are not applicable to them, then the defendant is not guilty of what is charged upon him; but if you think that they are applicable to them, then the defendant is guilty thereof; upon this supposition, that you find him to be the publisher of that paper. These are the two matters of fact that come under your consideration; and of which you are proper judges. But then there is a third thing, to wit, Whether these defamatory expressions amount to a libel or not? This does not belong to the office of the jury, but to the office of the Court; because it is a matter of law, and not of fact; and of which the Court are the only proper judges;* and there is redress to be had at another place, if either of the parties are not satisfied; for we are not to invade one another's province, as is now of late a notion among some people who ought to know better; for matters of law and matters of fact are never to be confounded. As to the first thing, whether the defendant is guilty of the publication of that Craftsman which is under your consideration. And here in this and the second head I shall not be long, because things have been so often repeated, and all sorts of observations made on both sides that it is possible to be made on this occasion; and my endeavours shall be to hinder you from running away with notions which are not right. As to the evidence offered to prove the defendant the publisher of that Craftsman, the plaintiff's counsel called one Mr. Smith, against whom the defendant's counsel could not say any thing material. This Mr. Smith gives an account, that on the 9th of January last, he went

* It is now by Statute 32 G. 3, c. 60, settled, that the jury may give a general verdict of Guilty or Not Guilty upon the whole matter put to issue on the indictment or information. See vol. 8, p. 36.

As to the contests which had arisen respecting this matter, see the following Case of John Peter Zenger, and the Trials for state libels in the first thirty years of Geo. 3, particularly those of Woodfall and of the dean of St. Asaph. It is observable that lord Mansfield, in giving his judgment on the latter of those cases, quoted from memory an old party ballad, which was published on occasion of an acquittal of the Craftsman. It appears by the recent publication of the eloquent speeches of lord Erskine, vol. 1, p. 375, that lord Mansfield by misrecital altogether perverted the meaning of the passage which he thought he remembered. Thus hazardous even with the ablest men is the practice of quotation from memory.

The right and duty of juries in such cases has been very fully and ably discussed by Mr. Baron Maseres, in the second volume of his 'Additional Papers concerning the province of Quebec' (published in the year 1776) from p. 395 to 425.

As to judges controlling the verdict of a jury, see in this Collection, vol. 6, pp. 967. 992. 1013. Barrington, Obs. on West. primer, and the authorities cited in his Note (*z*).

to Mr. Francklin's shop to buy some Craftsman or Journals; he said he wanted half a dozen of that day, and two of the week before; he says, when he came he found Mr. Francklin in his shop, and asked him for half a dozen of his Journals of that day, and two of the Saturday before; and that Mr. Francklin asked him whom they were for; who answered that they were for himself; and that Mr. Francklin asked him if he sold them again; who answered, Yes; and that afterwards Mr. Francklin pointed to his servant, and told him to look out these Journals for him; which he accordingly did; and that he sold one of the Journals of the 2d of January again to another person; but before he sold it he marked it; and that Mr. Smith paid his servant for these eight Journals. I think he said, that the two Journals were those of the 2d of January. This evidence is very positive and full; for he bought them in the defendant's shop; and the defendant's servant delivered them to him by his master's direction, and paid the servant for them; which is an undeniable proof of the defendant's being the publisher thereof; and unless Mr. Smith is wilfully forsworn, his evidence alone is sufficient. Then the king's counsel went on, and called other witnesses to prove the defendant the publisher, though I thought there was no occasion for more; but they produced other witnesses (I shall not be long, or name every one). They produced Mrs. Dodd, who says, that she used to send her servant, Goram, to Mr. Francklin's weekly for his Craftsman, or Country Journal; and he brought them from thence; and these of the 2d of January among the rest; and gave the money to another servant, in order to pay Mr. Francklin for them. Goram tells you, that he went about a year and a half together, weekly, to Mr. Francklin's, for these Craftsman or Country Journals, and brought them into his mistress's shop; and that he brought some of the 2d of January, and brought no Country Journals of that day from any other place; and that he had great quantities of these Country Journals weekly. Mrs. Pierce says, that she sent her man, David Davies, to Mr. Francklin's weekly, for some time, for his Country Journals, and for that of the 2d of January among the rest; and had such a quantity of them as came to about 7*l.* weekly. David Davies says, that he was employed by Mrs. Pierce to fetch her Journals, the Craftsman, from Mr. Francklin's; and that of the 2d of January among the rest; and paid the money for them to the amount of about 7*l.* weekly. Then they called an officer of the Stamp-office, who says, that he registered thirty-eight advertisements that were in the Craftsman of the 2d of January last; and that the account of the advertisements for that month of January came to 10*l.* 18*s.* So, gentlemen, you are to consider whether or not you are satisfied with the evidence produced to prove the defendant to be the publisher of that Craftsman of the 2d of January last. The next thing which you are to consider is, whether the expressions in that Hague letter, refer to his present majesty and his principal officers and ministers of state, and are applicable to them as in the information or not; for when people's names are not set down at length, but pointed at by circumlocution, or pieces of words, or by initial letters, &c. the law always allows innuendos in informations, which explain and tell what the defendant meant by them; and the law likewise allows juries to give their verdict on oath, whether they think that these dark, defamatory speeches have the same meaning as mentioned in the information or not. The counsel for the king have gone on and explained and applied these defamatory expressions exactly as in the information; and they have given their arguments and reasons for so doing; drawn from the several parts of that letter, which I shall not trouble you with, because they have been so often repeated in your hearing; I say, they have explained them as mentioned in the information; that is to say, that by these defamatory expressions, are meant his present majesty and his principal officers and ministers of state; and indeed they must be applicable, and refer to them or to somebody else; and if they do mean them, then I must say that they are very scandalous and reflecting expressions; because they charge them with perfidy in breaking of treaties, ruining in a manner their country, &c. as you may see at large in the letter; and it is very evident that these treaties could not be made without the knowledge and direction of his majesty. The counsel for the defendant said, that these scandalous expressions could not be understood to refer to his majesty or his ministers; but they did not tell to whom they referred; I should have been glad to have heard them do so; so that you are to consider of whom these defamatory expressions are meant, or to whom they are applicable; and as to the rule and manner of understanding them, you are to do it, on oath, after the same manner and way as you do privately by yourselves, taking all the parts of the letter together. I shall not repeat the several parts of it now which the king's counsel did use, to shew that they were meant of his majesty and his ministers, because you are to have the letter along with you; for it is plain, that the construction of it depends on the words themselves and their connection. Gentlemen, I have been very short in summing up the evidence; and laid aside the points of the law; I mean, whether these defamatory expressions amount to a libel or not; because the Court can only determine that: and if not satisfactory to either of the parties, there is a proper redress to be had at another place, as I said before. There was one thing more mentioned by the defendant's counsel, which was, that there is no room to think that letter libellous; because there could be no malice supposed by inserting it in the Craftsman, being only designed as a piece of foreign news; and that the latter part of the letter qualifies it, by saying that the letter-

writer does not take upon him to justify the truth of that report; but that will not do; for the injury is the same to the persons scandalized, whether the letter was inserted out of malice or not; besides, there is no knowing or proving particular malice, otherwise than from the act itself; and therefore if the act imports as much, it is sufficient; nor is he to take the liberty to print what he pleases; for the liberty of the press is only a legal liberty, such as the law allows; and not a licentious liberty. Gentlemen, I tell you again, that I have designedly shortened things, because it hath been so fully again and again laid before you. But if there is any thing afterwards that you want to know, after you have considered these things, I desire you would acquaint me. So, gentlemen, if you are sensible, and convinced that the defendant published that Craftsman of the 2d of January last; and that the defamatory expressions in the letter refer to the ministers of Great Britain;* then you ought to find the defendant guilty; but if you think otherwise, then you ought not to find him guilty.

The Jury found the defendant guilty of publishing the said libel.†

The term following, Mr. Richard Francklin received sentence to pay a fine of 100*l.*, to be imprisoned for one year, and to find security for his good behaviour for seven years; himself in 1,000*l.* penalty, and his two sureties in 500*l.* each.

† This Hague letter was said to be written by the late Henry lord viscount Bolingbroke. Ex Infor. Mr. R. Francklin. *Former Edition.*

† In the case of Perry A. D. 1793, 5 Term Rep. 454, Mr. Justice Buller read a note of proceedings relating to an endeavour to set aside the verdict in this case. See a report of the Trial of Perry *infra.*

490. The Trial of Mr. JOHN PETER ZENGER, of New-York, Printer, for printing and publishing a Libel against the Government; before the Hon. James de Lancey, esq. Chief Justice of the Province of New-York; and the Hon. Frederick Phillipse, esq. second Judge; at New-York, on August 4th: 9 GEORGE II. A. D. 1735.*

AS there was but one printer in the province of New York, that printed a public news-paper, I was in hopes, if I undertook to publish another, I might make it worth my while; and I soon found my hopes were not groundless. My first paper was printed, Nov. 5th, 1733, and I continued printing and publishing of them, I thought to the satisfaction of every body, till the January following; when the chief justice was pleased to animadvert upon the doctrine of libels, in a long charge given in that term to the grand jury, and afterwards on the third Tuesday of October, 1734, was again pleased to charge the grand jury in the following words:

"Gentlemen, I shall conclude with reading a paragraph or two out of the same book, concerning libels; they are arrived to that height, that they call loudly for your animadversion; it is high time to put a stop to them; for at the rate things are now carried on, when all order and government is endeavoured to be trampled on, reflections are cast upon persons of all degrees. Must not these things end in sedition, if not timely prevented? Lenity, you have seen, will not avail; it becomes you then to enquire after the offenders, that we may, in a due course of law, be enabled to punish them. If you, gentlemen, do not interpose, consider whether the ill consequences that may arise from any disturbances of the public peace, may not in part lie at your door?

"Hawkins, in his chapter of Libels, considers three points: 1st, What shall be said to be a libel. 2dly, Who are liable to be punished for it. 3dly, In what manner they are to be punished. Under the 1st, he says, § 7, 'Nor 'can there be any doubt, but that a writing, 'which defames a private person only, is as 'much a libel as that which defames persons in-'trusted in a public capacity, in as much as it 'manifestly tends to create ill blood, and to cause 'a disturbance of the public peace; however, it 'is certain, that it is a very high aggravation 'of a libel, that it tends to scandalize the go-'vernment, by reflecting on those who are en-'trusted with the administration of public af-'fairs, which does not only endanger the public

* This Trial (or rather part of a trial) published by Mr. Zenger himself, having made a great noise in the world, is here inserted; though the doctrines advanced by Mr. Hamilton in his speeches, are not allowed in the courts here to be law.—See lord Raymond's opinion in the foregoing Trial, p. 672.—To which we have subjoined some remarks on this trial, published soon after it made its first appearance. *Former Edition.* See also stat. 32 Geo. 3, c. 60, as referred to in a note to Francklin's Case, *ante*, p. 672, and the other parts of that note.

'peace, as all other libels do, by stirring up the 'parties immediately concerned in it, to acts of 'revenge, but also has a direct tendency to 'breed in the people a dislike of their governors 'and incline them to faction and sedition.' As to the 2d point he says, § 10, 'It is certain, 'not only he who composes or procures ano-'ther to compose it, but also that he who pub-'lishes, or procures another to publish it, are in 'danger of being punished for it; and it is said 'not to be material, whether he who disperses a 'libel, knew any thing of the contents or effects 'of it or not; for nothing could be more easy 'than to publish the most virulent papers with 'the greatest security, if the concealing the 'purport of them from an illiterate publisher 'would make him safe in the dispersing 'them. Also it has been said, that if he who 'hath either read a libel himself, or hath heard 'it read by another, do afterwards maliciously 'read or report any part of it in the presence, 'of others, or lend or shew it to another, he is 'guilty of an unlawful publication of it. Also, 'it hath been holden, that the copying of a 'libel shall be a conclusive evidence of the pub-'lication of it, unless the party can prove that 'he delivered it to a magistrate to examine it, 'in which case the act subsequent is said to 'explain the intention precedent. But it seems 'to be the better opinion, that he who first 'writes a libel, dictated by another, is thereby 'guilty of making of it, and consequently 'punishable for the bare writing; for it was 'no libel till it was reduced to writing.'

"These, gentlemen, are some of the offences which are to make part of your enquiries; and if any other should arise in the course of your proceedings, in which you are at a loss, or conceive any doubts, upon your application here, we will assist and direct you."

The grand jury not indicting me as was expected, the gentlemen of the Council proceeded to take my Journals into consideration, and sent the following Message to the General Assembly:

"Die Jovis, 3 P. M. 17th of October, 1734.

"A Message from the Council by Philip Cortlandt, in these words, to wit: 'That board having had several of Zenger's New York Weekly Journals laid before them, and other scurrilous papers, tending to alienate the affections of the people of this province from his majesty's government, to raise seditions and tumults among the people of this province, and to fill their minds with a contempt of his majesty's government: And considering the pernicious consequences that may attend such growing evils, if not speedily and effectually put a stop to: And conceiving that the most likely method to put a stop to such bold and seditious practices, to maintain the dignity of his majesty's government, and to preserve the peace thereof, would be by a conference between a Committee of this board, and a Committee of the Assembly; it is therefore ordered, that the gentlemen of this board, now assembled, or any seven of them, be a committee, to join a committee of the House of Representatives, in order to confer together, and to examine and enquire into the said papers, and the authors and writers thereof.'

"Which Message being read,

"Ordered, That the members of this House, or any fourteen of them, do meet a Committee of the Council, at the time and place therein mentioned.

"Die Veneris, 9 A. M. 18 October, 1734.

"Mr. Garretson, from the Committee of this House, reported, That they last night met the Committee of the Council, on the subject-matter of their Message of yesterday to this House; and that after several preliminaries between the said Committees, the gentlemen of the Council reduced to writing, what they requested of this House, and delivered the same to the chairman, who delivered it in at the table, and being read, is in the words following:

"'At a Committee of the Council held the '17th of October, 1734: PRESENT; Mr. 'Clarke, Mr. Harrison, Dr. Colden, Mr. 'Livingston, Mr. Kennedy, Mr. Chief 'Justice, Mr. Cortlandt, Mr. Lane, Mr. 'Horsmanden.

"'Gentlemen; The matters we request 'your concurrence in are, That Zenger's pa-'pers, No. 7, 47, 48, 49, which were read, and 'which we now deliver, be burnt by the hands 'of the common hangman, as containing in 'them many things derogatory of the dignity 'of his majesty's government, reflecting upon 'the legislature, upon the most considerable 'persons in the most distinguished stations in 'the province, and tending to raise seditions 'and tumults among the people thereof.

"'That you concur with us in the address-'ing the governor, to issue his proclamation, 'with a promise of reward for the discovery of 'the authors or writers of these seditious libels.

"'That you concur with us in an Order for 'prosecuting the printer thereof.

"'That you concur with us in an Order to 'the magistrates, to exert themselves in the 'execution of their offices, in order to preserve 'the public peace of the province. By order 'of the Committee,

"'FRED. MORRIS, Cl. Con.'

"Mr. Garretson delivered likewise to the House the several papers referred to in the said request.

"Ordered, That the said papers be lodged with the clerk of this House; and that the consideration thereof, and the said request, be referred till Tuesday next.

"Die Martis, 9 A. M. 22 October, 1734.

"The House according to Order proceeded to take into consideration the request of a Committee of Council, delivered to a Committee of this House, on the 16th instant, as likewise of

the several papers therein referred to. And after several debates upon the subject-matters, it was ordered, That the said papers and requests lie on the table."

The Council finding the General Assembly would not do any thing about it, they sent the following Message to the House:

"Die Sabbati, 9 A. M. 2 November, 1734.

"A Message from the Council by Mr. Livingston, desiring this House to return by him to that board the several seditious Journals of Zenger's, No. 7, 47, 48, 49, which were delivered by a Committee of that Board to a Committee of this House the 17th of October last, together with the proposals of the Committee of that Board, delivered therewith to a Committee of this House; and then withdrew."

On Tuesday the 5th of November, 1734, the quarter-sessions for the city of New York began, when the sheriff delivered to the Court an Order, which was read in these words:

"At a Council held at Fort George, in New York, the 2d of November, 1734: PRESENT; His Excellency William Cosby, Captain General and Governor in Chief, &c. Mr. Clarke, Mr. Harrison, Dr. Colden,* Mr. Livingston, Mr. Kennedy, Mr. Chief Justice, Mr. Cortlandt, Mr. Lane, Mr. Horsmanden.

"Whereas by an Order of this Board, of this day, some of John Peter Zenger's Journals, entitled, 'The New York Weekly Journal, 'containing the freshest Advices, foreign and 'domestic,' No. 7, 47, 48, 49, were ordered to be burnt by the hands of the common hangman, or whipper, near the pillory in this city, on Wednesday the 6th instant, between the hours of eleven and twelve in the forenoon, as containing in them many things tending to sedition and faction, to bring his majesty's government into contempt, and to disturb the peace thereof, and containing in them likewise not only reflections upon his excellency the governor in particular, the legislature in general, but also upon the most considerable persons in the most distinguished stations in this province: it is therefore ordered, That the mayor and magistrates of this city do attend at the burning of the several Papers or Journals aforesaid, numbered as above mentioned.

"FRED. MORRIS, D. Cl. Con."

"To Robert Lurting, esq. mayor of the city of New York, and the rest of the magistrates for the said city and county."

Upon reading of which Order, the Court forbad the entering thereof in their books at that time; and many of them declared, that if it should be entered, they would have their protest entered against it.

On Wednesday the 6th of November, the sheriff of New York moved the Court of Quarter-sessions to comply with the said Order; upon which one of the aldermen offered a Protest, which was read by the clerk, and approved of by all the aldermen, either expressly or by not objecting to it, and is as followeth:

"Whereas an Order has been served on this Court, in these words." [The Order as above inserted.] "And whereas this Court conceives, they are only to be commanded by the king's mandatory writs, authorised by law, to which they conceive they have the right of shewing cause why they don't obey them, if they believe them improper to be obeyed; or by Orders, which have some known laws to authorise them; and whereas this Court conceives this Order to be no mandatory writ warranted by law, nor knows of no law that authorises the making the Order aforesaid; so they think themselves under no obligation to obey it: which obedience, they think would be in them, an opening a door for arbitrary commands, which, when once opened, they know not what dangerous consequences may attend it. Wherefore this Court conceives itself bound in duty (for the preservation of the rights of this corporation, and, as much as they can, the liberty of the press, and the people of the province, since an assembly of the province, and several grand juries, have refused to meddle with the papers, when applied to by the Council) to protest against the Order aforesaid, and to forbid all the members of this corporation to pay any obedience to it, until it be shewn to this Court, that the same is authorised by some known law, which they neither know, nor believe that it is."

Upon reading of which, it was required of the honourable Francis Harrison, recorder of this corporation, and one of the members of the Council, (present at making the said Order) to shew by what law or authority the said Order was made; upon which he spoke in support of it, and cited the case of Dr. Sacheverell's Sermon, which was by the House of Lords ordered to be burnt by the hands of the hangman, and that the mayor and aldermen of London should attend the doing of it. To which one of the aldermen answered to this purpose: That he conceived the case was no ways parallel, because Dr. Sacheverell and his Sermon were impeached by the House of Commons of England, which is the grand jury of the nation, and representative of the whole people of England: that this their impeachment they prosecuted before the House of Lords, the greatest court of justice of Britain, and which, beyond memory of man, has had cognisance of things of that nature: that there Sacheverell had a fair hearing in defence of himself and of his Sermon; and after that fair hearing, he and his Sermon were justly, fairly, and legally condemned: that he had read the case of Dr.

* "N. B. Dr. Colden was that day at Esopus, 90 miles from New York, though mentioned as present in council."—*Former Edition.*

Sacheverell, and thought he could charge his memory, that the judgment of the House of Lords in that case was, That the mayor and sheriffs of London and Middlesex only should attend the burning of the Sermon, and not the aldermen; and farther he remembered, that the Order upon that judgment was only directed to the sheriffs of London, and not even to the mayor, who did not attend the doing it: and farther said, that would Mr. Recorder shew, that the governor and council had such authority as the House of Lords, and that the papers ordered to be burnt were in like manner legally prosecuted and condemned, there the case of Dr. Sacheverell might be to the purpose; but without shewing that, it rather proved that a censure ought not to be pronounced, till a fair trial by a competent and legal authority were first had. Mr. Recorder was desired to produce the books from whence he cited his authorities, that the Court might judge of them themselves, and was told, that if he could produce sufficient authorities to warrant this Order, they would readily obey it, but otherwise not. Upon which he said, he did not carry his books about with him. To which it was answered, he might send for them, or order a constable to fetch them. Upon which he arose, and at the lower end of the table he mentioned, that bishop Burnet's Pastoral Letter was ordered, by the House of Lords, to be burnt * by the high bailiff of Westminster; upon which he abruptly went away, without waiting for an answer, or promising to bring his books, and did not return sitting the Court.

After Mr. Recorder's departure, it was moved, that the Protest should be entered; to which it was answered, that the Protest could not be entered, without entering also the Order, that it was not fit to take any notice of it; and therefore it was proposed that no notice should be taken in their books of either, which was unanimously agreed to by the Court.

The sheriff then moved, that the Court would direct their whipper to perform the said Order; to which it was answered, That as he was the officer of the corporation, they would give no such Order. Soon after which the Court adjourned, and did not attend the burning of the papers. Afterwards about noon, the sheriff, after reading the numbers of the several papers which were ordered to be burnt, delivered them unto the hands of his own negro, and ordered him to put them into the fire, which he did; at which Mr. Recorder, Jeremiah Dunbar, esq. and several of the officers of the garrison, attended.

On the Lord's day, the 17th of November, 1734, I was taken and imprisoned by virtue of a warrant in these words:

"At a Council held at Fort George in New York, the 2d day of November, 1734. PRESENT; his Excellency William Cosby, Captain General and Governor in Chief, &c. Mr. Clarke, Mr. Harrison, Mr. Livingston, Mr. Kennedy, Chief-Justice, Mr. Cortlandt, Mr. Lane, Mr. Horsmanden,

"It is ordered, that the sheriff for the city of New York do forthwith take and apprehend John Peter Zenger, for printing and publishing several seditious libels, dispersed throughout his Journals or News-papers, intituled, 'The New York Weekly Journal, containing the freshest advices, foreign and domestic;' as having in them many things tending to raise factions and tumults among the people of this province, inflaming their minds with contempt of his majesty's government, and greatly disturbing the peace thereof; and upon his taking the said John Peter Zenger, to commit him to the prison or common jail of the said city and county.

"FRED. MORRIS, D. Cl. Con."

And being, by virtue of that warrant, so imprisoned in the jail, I was for several days denied the use of pen, ink, and paper, and the liberty of speech with any persons.—Upon my commitment, some friends soon got a Habeas Corpus to bring me before the chief-justice, in order to my discharge, or being bailed; on the return whereof, on Wednesday the 20th of November, my counsel delivered exceptions to the return, and the chief-justice ordered them to be argued publicly at the city hall, on the Saturday following.

On Saturday the 23d of November, the said exceptions came to be argued, by James Alexander and William Smith, of counsel for me, and by Mr. Attorney General, and Mr. Warrel, of counsel against me, in presence of some hundreds of the inhabitants; where my counsel (saving the benefit of exception to the illegality of the warrant) insisted that I might be admitted to reasonable bail. And to shew that it was my right to be so, they offered Magna Charta, the Petition of Right, 3 Car. the Habeas Corpus Act of 31 Car. 2. which directs the sum, in which bail is to be taken, to be, 'according to the quality of the prisoner, and nature of the offence.' Also 2 Hawkins, cap. 15, §. 5, in these words, 'But justices must take care, that, under pretence of demanding sufficient security, they do not make so excessive a demand as, in effect, amounts to a denial of bail; for this is looked on as a great grievance, and is complained of as such, by 1 W. & M. sess. 2, by which it is declared, 'That excessive bail ought not to be required.' It was also shewn, that the Seven Bishops, who, in king James the 2d's time, were charged with the like crime that I stood charged with, were admitted to bail on their own recognizances,

* Bishop Kennet says, that this Letter seemed to be sacrificed to a poor jest on the author's name [Burnet]. Complete Hist. of Eng. vol. 3, p. 587, 2 Ed. in Lond. 1719.—*Former Edition.*

the archbishop in 200*l.* and each of the other six in 100*l.* a-piece only. Sundry other authorities and arguments were produced and insisted on by my counsel, to prove my right to be admitted to moderate bail, and to such bail as was in my power to give; and sundry parts of history they produced, to shew how much the requiring excessive bail had been resented by parliament. And, in order to enable the Court to judge what surety was in my power to give, I made affidavit, That (my debts paid) I was not worth forty pounds, (the tools of my trade, and wearing-apparel excepted.)

Some warm expressions (to say no worse of them) were dropt on this occasion, sufficiently known and resented by the auditory, which, for my part, I desire may be buried in oblivion: upon the whole, it was ordered, that I might be admitted to bail, myself in 400*l.* with two sureties, each in 200*l.* and that I should be remanded till I gave it. And as this was ten times more than was in my power to counter-secure any person in giving bail for me, I conceived I could not ask any to become my bail on these terms; and therefore I returned to jail, where I lay until Tuesday the 28th of January, 1734-5, being the last day of that term; and the grand jury having found nothing against me, I expected to have been discharged from my imprisonment: but my hopes proved vain; for the Attorney General then charged me, by information, for printing and publishing parts of my Journals No. 13 and 23, as being false, scandalous, malicious, and seditious.

To this information my Counsel appeared, and offered Exceptions, leaving a blank for inserting the judges commissions, which the Court were of opinion not to receive till those blanks were filled up. In the succeeding vacation the judges gave copies of their commissions; and on Tuesday the 15th of April last, the first day of the succeeding term, my Counsel offered these Exceptions; which were as follow:

"The ATTORNEY GENERAL, *v.* JOHN PETER ZENGER.—On Information for a Misdemeanor.

"Exceptions humbly offered by John Peter Zenger, to the honourable James de Lancey, esq. to judge in this cause.

"The defendant comes and prays hearing of the commission, by virtue of which the honourable James de Lancey, esq. claims the power and authority to judge in this cause, and it is read to him in these words:

"'George the 2d, by the grace of God, 'of Great Britain, France and Ireland, king, 'defender of the faith, &c. To our trusty 'and well beloved James de Lancey, esq. 'We, reposing special trust and confidence in 'your integrity, ability and learning, have 'assigned, constituted and appointed, and we 'do by these presents assign, constitute, and 'appoint you, the said James de Lancey, to 'be chief justice in and over our province of 'New York, in America, in the room of Lewis 'Morris, esq. giving and by these presents 'granting unto you full power and lawful authority to hear, try, and determine all pleas 'whatsoever, civil, criminal, and mixt, according to the laws, statutes, and customs of our 'kingdom of England, and the laws and usages 'of our said province of New York, not being 'repugnant thereto, and executions of all judgments of the said court to award, and to make 'such rules and orders in the said court, as may 'be found convenient and useful, and, as near 'as may be, agreeable to the rules and orders 'of our courts of King's-bench, Common 'Pleas, and Exchequer in England. To have, 'hold, and enjoy the said office or place of chief 'justice in and over our said province, with all 'and singular the rights, privileges, profits and 'advantages, salaries, fees and perquisites unto 'the said place belonging, or in any ways appertaining, in as full and ample manner as 'any person heretofore chief justice of our said 'province hath held and enjoyed, or of right 'ought to have held and enjoyed the same, to 'you the said James De Lancey, esq. for and 'during our will and pleasure. In testimony 'whereof we have caused these our letters to 'be made patent, and the great seal of our 'province of New York to be hereunto affixed. 'Witness our trusty and well-beloved William 'Cosby, esq. our captain-general and governor 'in chief of our provinces of New York, New 'Jersey, and the territories thereon depending 'in America, vice-admiral of the same, and 'colonel in our army, at Fort George in New 'York, the 21st day of August, in the 7th year 'of our reign, Anno Domini, 1733.'

"Which being read and heard, the said John Peter Zenger, by protestation not confessing nor submitting to the power of any other person to judge in this cause, doth except to the power of the honourable James de Lancey, esq. aforesaid, to judge in this cause, by virtue of the commission aforesaid, for these reasons, viz.

"1st. For that the authority of a judge of the King's-bench, in that part of Great Britain called England, by which the cognizance of this cause is claimed, is by the said commission granted to the honourable James de Lancey, esq. aforesaid, only during pleasure; whereas that authority (by a statute in that case made and provided) ought to be granted during good behaviour.

"2nd. For that, by the said commission, the jurisdiction and authority of a justice of the court of Common Pleas at Westminster, in that part of Great Britain called England, is granted to the said James de Lancey, esq. which jurisdiction and authority cannot be granted to, and exercised by, any one of the justices of the King's-bench.

"3rd. For that the form of the said commission is not founded on, nor warranted by the common law, nor any statute of England, nor of Great Britain, nor any act of assembly of this colony.

"4th. For that it appears, by the commis-

sion aforesaid, that the same is granted under the seal of this colony by his excellency William Cosby, esq. governor thereof; and it appears not, that the same was granted, neither was the same granted, by and with the advice and consent of his majesty's council of this colony; without which advice and consent, his excellency could not grant the same.

"Wherefore, and for many other defects in the said commission, this defendant humbly hopes, that the honourable James de Lancey, esq. will not take cognizance of this cause, by virtue of the commission aforesaid.

"JAMES ALEXANDER.
"WILLIAM SMITH."

The Exceptions to the Commission of the honourable Frederick Phillipse, esq. were the same with the foregoing, including therein his commission, which is in these words:

'George the 2d, by the grace of God, of 'Great Britain, France and Ireland, king, de-'fender of the faith, &c. To our trusty and 'well-beloved Frederick Phillipse, esq. greet-'ing: whereas it is our care, that justice be 'duly administered to our subjects within our 'province of New York, and territories thereon 'depending in America; and we, reposing 'especial confidence in your integrity, ability 'and learning, have assigned, constituted and 'appointed, and we do by these presents as-'sign, constitute and appoint you, the said 'Frederick Phillipse, to be second justice of 'our supreme court of judicature for our pro-'vince of New York, in the room of James de 'Lancey, esq. giving and granting to you, the 'said Frederick Phillipse, full power and au-'thority, with our other justices of our said 'supreme court, to hear, try, and determine all 'pleas whatsoever, civil, criminal, and mixed, 'according to the laws, statutes and customs 'of our kingdom of England, and the laws and 'usages of our said province of New York, not 'being repugnant thereto; and executions of all 'judgments of the said court to award, and to act 'and do all things, which any of our justices of 'either bench, or barons of the Exchequer, in 'our said kingdom of England, may or ought 'to do, and also to assist in the making such 'rules and orders in our said court, as shall be 'for the good and benefit of our said province; 'and, as near as conveniently may be, to the 'rules and orders of our said courts in our said 'kingdom of England: to have, hold, and en-'joy the said office or place of second justice of 'our said province of New York, together with 'all and singular the rights, privileges, salaries, 'fees, perquisites, profits and advantages there-'to, now or at any time heretofore belonging, 'or in any wise of right appertaining, unto you, 'the said Frederick Phillipse, for and during 'our pleasure. In testimony whereof, we have 'caused these our letters to be made patent, and 'the great seal of our said province of New York 'to be hereunto affixed. Witness our trusty 'and well-beloved William Cosby, esq. our 'captain general and governor in chief of our 'provinces of New York, New Jersey, and 'territories thereon depending in America, 'vice-admiral of the same, and colonel in our 'army, &c. at Fort George in New York, the '21st day of August, in the 7th year of our 'reign, Anno Domini, 1733.

'FRED. MORRIS, D. Secretary.'

Tuesday, April 15, 1735.

Mr. Alexander offered the above Exceptions to the Court, and prayed that they might be filed. Upon this the chief justice said to Mr. Alexander and Mr. Smith, that they ought well to consider the consequences of what they offered. To which both answered, that they had well considered what they offered, and all the consequences. And Mr. Smith added, that he was so well satisfied of the right of the subject to take an exception to the commission of a judge, if he thought such commission illegal,—that he durst venture his life upon that point. As to the validity of the Exceptions then offered, he said, he took that to be a second point; but was ready to argue them both, if their honours were pleased to hear him. To which the chief justice replied, that he would consider the Exceptions in the morning; and ordered the clerk to bring them to him.

Wednesday, April 16.

The chief justice delivered one of the Exceptions to the clerk, and justice Phillipse the other; upon which Mr. Smith arose, and asked the judges, whether their honours would hear him upon these two points. 1st. That the subject has a right to take such Exceptions, if they judged the commission illegal. 2dly. That the Exceptions tendered were legal and valid. To which the chief justice said, that they would neither hear nor allow the Exceptions; for (said he) you thought to have gained a great deal of applause and popularity by opposing this court, as you did the court of Exchequer; but you have brought it to that point, that either we must go from the bench, or you from the bar: therefore we exclude you and Mr. Alexander from the bar; and delivered a paper to the clerk, and ordered it to be entered; which the clerk entered accordingly, and returned the paper to the chief justice; after which the chief justice ordered the clerk to read publicly what he had written; an attested copy whereof follows:

"At a Supreme Court of Judicature held for the Province of New York, at the City-Hall of the City of New York, on Wednesday the 16th day of April, 1735. PRESENT; the Hon. James de Lancey, esq. chief justice. The Hon. Frederick Phillipse, esq. second justice.

"James Alexander, esq. and William Smith, attornies of this Court, having presumed, (notwithstanding they were forewarned by the Court of their displeasure, if they should do it) to sign, and having actually signed, and put into court, Exceptions, in the name of John

Peter Zenger; thereby denying the legality of the judges their commissions; though in the usual form, and the being of this Supreme Court. It is therefore ordered, that, for the said contempt, the said James Alexander, and William Smith, be excluded from any farther practice in this Court; and that their names be struck out of the roll of attornies of this Court. Per Cur'. JAMES LYNE, Cl."

After the order of the Court was read, Mr. Alexander asked, whether it was the order of Mr. Justice Phillipse as well as of the chief-justice? To which both answered, that it was their order; upon which Mr. Alexander added, That it was proper to ask that question, that they might know how to have their relief: he farther observed to the Court, upon reading of the Order, that they were mistaken in their wording of it, because the Exceptions were only to their commissions, and not to the being of the Court, as is therein alleged; and prayed that the Order might be altered accordingly. The chief-justice said, they conceived the Exceptions were against the being of the Court. Both Mr. Alexander and Mr. Smith denied that they were, and prayed the chief-justice to point to the place that contained such exceptions; and further added, that the Court might well exist, though the commissions of all the judges were void; which the chief-justice confessed to be true: and therefore they prayed again, that the Order in that point might be altered; but it was denied.

Then Mr. Alexander desired to know, whether they over-ruled or rejected the Exceptions? The chief-justice said, He did not understand the difference; to which said Alexander replied, that if he rejected the Exceptions, then they could not appear upon the proceedings, and in that case the defendant was entitled to have them made part of the proceedings by bills of exceptions: but if they over-ruled them, then, by so doing, they only declared them not sufficient, to hinder them from proceeding by virtue of those commissions; and the Exceptions would remain as records of the Court, and ought to be entered on the record of the cause, as part of the proceedings. The chief-justice said, They must remain upon the file, to warrant what we have done: as to being part of the record of the proceedings in that cause, he said, You may speak to that point to-morrow.

Friday, April 18th, 1735.

Mr. Alexander signified to the Court, that on Wednesday last their honours had said, that the counsel for Mr. Zenger might speak to the point, concerning the rejecting or overruling of Mr. Zenger's Exceptions, on the morrow: to which the chief-justice answered, that he said, You may get some person to speak to that point on the morrow, not meaning that the said Alexander should speak to it, that being contrary to the Order. Both Mr. Alexander and Mr. Smith said, they understood it otherwise.

They both also mentioned, that it was a doubt, whether by the words of the Order, they were debarred of their practice as counsel, as well as attornies, whereas they practised in both capacities. To which the chief-justice answered, That the Order was plain, "That James Alexander, esq. and William Smith, were debarred and excluded from their whole practice at this bar; and that the Order was intended to bar their acting both as counsel and as attornies, and that it could not be construed otherwise." And it being asked Mr. Phillipse, whether he understood the Order so? He answered, That he did.

Upon this exclusion of my counsel, I petitioned the Court to order counsel for my defence; who thereon appointed John Chambers, esq. who pleaded Not Guilty for me to the information. But as to the point, whether my Exceptions should be part of the record, as was moved by my former counsel, Mr. Chambers thought not proper to speak to it. Mr. Chambers also moved, that a certain day in the next term might be appointed for my trial, and for a Struck Jury; whereupon my trial was ordered to be on Monday the 4th of August, and the Court would consider till the first day of next term, whether I should have a struck jury or not; and ordered, that the sheriff should, in the mean time, at my charge, return the freeholders book.

At a Supreme Court of Judicature held for the Province of New York, before the honourable James De Lancey, esq. Chief-Justice of the said Province; and the honourable Frederick Phillipse, esq. second Justice of the said Province.

On Tuesday the 29th of July, 1735, the Court opened; and on motion of Mr. Chambers for a Struck Jury, pursuant to the rule of the preceding term, the Court were of opinion, that I was entitled to have a Struck Jury; and that evening, at five of the clock, some of my friends attended the clerk, for striking the jury; when, to their surprize, the clerk, instead of producing the freeholders book, to strike the jury out of it in their presence, as usual, he produced a list of 48 persons, whom, he said, he had taken out of the freeholders book: my friends told him, that a great number of these persons were not freeholders; that others were persons holding commissions and offices at the governor's pleasure; that others were of the late displaced magistrates of this city, who must be supposed to have resentment against me, for what I had printed concerning them; that others were the governor's baker, taylor, shoe-maker, candle-maker, joiner, &c. that as to the few indifferent men that were upon that list, they had reason to believe (as they had heard) that Mr. Attorney had a list of them to strike them out; and therefore requested, that he would either bring the freeholders book, and chuse out of it 48 upon

ceptionable men in their presence, as usual; or else, that he would hear their objections, particularly to the list he offered; and that he would put impartial men in the place of those against whom they could shew just objections. Notwithstanding this, the clerk refused to strike the jury out of the freeholders book, and refused to hear any objections to the persons on his list; but told my friends, if any objections they had to any persons, they might strike those persons out; to which they answered, There would not remain a jury, if they struck out all the exceptionable men; and, according to the custom, they had only a right to strike out 12.

But finding no arguments could prevail with the clerk to hear their objections to his list, nor to strike the jury as usual, Mr. Chambers told him, he must apply to the Court, which the next morning he did; and the Court, upon his motion, ordered, That the 48 should be struck out of the freeholders book, as usual, in the presence of the parties; and that the clerk should hear objections to persons proposed to be of the 48, and allow of such exceptions as were just. In pursuance of that order, a jury was that evening struck, to the satisfaction of both parties, though my friends and counsel insisted on no objections but want of freeholders; and though they did not insist, that Mr. Attorney General (who was assisted by Mr. Blagge) should shew any particular cause, against any persons he disliked, but acquiesced that any person he disliked should be out of the 48.

Before James De Lancey, esq. Chief-justice of the province of New York, and Frederick Phillipse, second judge, came on my trial, on the fourth day of August, 1735, upon an information for printing and publishing two news-papers, which were called libels against our governor and his administration.

The defendant John Peter Zenger, being called, appeared.

And the sheriff returned his Venire for the trial of this said cause.

Mr. *Chambers*, of counsel for the defendant. I humbly move your honours, that we may have justice done by the sheriff, and that he may return the names of the jurors in the same order as they were struck.

Mr. *Chief Justice*. How is that? Are they not so returned?

Mr. *Chambers*. No, they are not; for some of the names that were last set down in the pannel, are now placed first.

Mr. *Chief Justice*. Make out that, and you shall be righted.

Mr. *Chambers*. I have the copy of the pannel in my hand, as the jurors were struck; and if the clerk will produce the original, signed by Mr. Attorney and myself, your honour will see our complaint is just.

Mr. *Chief-Justice*. Clerk, is it so? Look upon that copy; is it a true copy of the pannel as it was struck?

Clerk. Yes, I believe it is.

Mr. *Chief-Justice*. How came the names of the jurors to be misplaced in the pannel annexed to the Venire?

Sheriff. I have returned the jurors in the same order in which the clerk gave them to me.

Mr. *Chief-Justice*. Let the names of the jurors be ranged in the order they were struck, agreeable to the copy here in court.

Which was done accordingly. And the jury, whose names were as follow, were called and sworn:

JURY.

Hermanus Rutgers,	Egbert Van Borson,
Stanley Holmes,	Tho. Hunt, Foreman,
Edward Man,	Benjamin Hildreth,
John Bell,	Abraham Keteltas,
Samuel Weaver,	John Goelet,
Andries Marschalk,	Hercules Wendover.

Mr. Attorney General opened the information, which was as follows:

Att. Gen. May it please your honours, and you gentlemen of the jury; the information now before the Court, and to which the defendant Zenger, has pleaded Not Guilty, is an information for printing and publishing a false, scandalous, and seditious libel, in which his excellency, the governor of this province, who is the king's immediate representative here, is greatly and unjustly scandalized, as a person that has no regard to law nor justice; with much more, as will appear upon reading the informations. This [practice] of libelling is what has always been discouraged, as a thing that tends to create differences among men, ill blood among the people, and oftentimes great bloodshed between the party libelling and the party libelled. There can be no doubt but you, gentlemen of the jury, will have the same ill opinion of such practices as the judges have always shewn upon such occasions: But I shall say no more at this time, until you hear the information, which is as follows:

"New-York, Supreme Court.

"Of the Term of January, in the eighth year of the reign of our Sovereign Lord King George the Second, &c.

"New York, *ss.* Be it remembered, that Richard Bradley, esq. Attorney General of our sovereign lord the king for the province of New-York, who for our said lord the king in this part prosecutes, in his own proper person comes here into the Court of our said lord the king, and for our said lord the king gives the Court here to understand, and be informed, that John Peter Zenger, late of the city of New-York, printer, (being a seditious person, and a frequent printer and publisher of false news and seditious libels, and wickedly and maliciously devising the government of our said lord the king of this his majesty's province of New-York, under the administration of his

excellency William Cosby, esq. captain-general and governor in chief of the said province, to traduce, scandalize and vilify, and his excellency the said governor, and the ministers and officers of our said lord the king, of and for the said province, to bring into suspicion, and the ill opinion of the subjects of our said lord the king residing within the said province) the 28th day of January in the 7th year of the reign of our sovereign lord George the Second, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, &c. at the city of New-York, did falsely, seditiously and scandalously print and publish, and cause to be printed and published a certain false, malicious, seditious, scandalous libel, intituled, 'The New-York Weekly Journal, containing the freshest advices, foreign and domestic;' in which libel (of and concerning his excellency the said governor, and the ministers and officers of our said lord the king, of and for the said province) among other things therein contained are the words, 'Your appearance in 'print, at last, gives a pleasure to many, 'though most wish you had come fairly into 'the open field, and not appeared behind re-'trenchments made of the supposed laws 'against libelling, and of what other men have 'said and done before: These retrenchments, 'gentlemen, may soon be shewn to you, and 'all men, to be weak, and to have neither law 'nor reason for their foundation, so cannot long 'stand you in stead: Therefore, you had much 'better as yet leave them, and come to what 'the people of this city and province [the city 'and province of New-York meaning] think 'are the points in question; (to wit) they '[the people of the city and province of New-'York meaning] think, as matters now stand, 'that their liberties and properties are pre-'carious, and that slavery is like to be in-'tailed on them and their posterity, if some 'past things be not amended; and this 'they collect from many past proceedings.' [Meaning many the past proceedings of his excellency the said governor, and of the ministers and officers of our said lord the king, of and for the said province.] And the said attorney General of our said lord the king, for our said lord the king, likewise gives the Court here to understand, and be informed, that the said John Peter Zenger afterwards, (to wit) the 8th day of April, in the 7th year of the reign of our said lord the king, at the city of New York aforesaid, did falsely, seditiously, and scandalously print and publish, and cause to be printed and published, another false, malicious, seditious and scandalous libel, entitled, 'The 'New York Weekly Journal, containing the 'freshest Advices foreign and domestic.' In which libel, [of and concerning the government of the said province of New York, and of and concerning his excellency the said governor, and the ministers and officers of our said lord the king, of and for the said province] among other things therein contained are these words, 'One of our neighbours [one of the inhabitants 'of New Jersey meaning] being in company, 'observing the strangers [some of the inha-'bitants of New York meaning] full of com-'plaints, endeavoured to persuade them to re-'move into Jersey; to which it was replied, 'That would be leaping out of the frying-pan 'into the fire: for, says he, we both are under 'the same governor [his excellency the said 'governor meaning] and your Assembly have 'shewn with a witness what is to be expected 'from them; one that was then moving to 'Pensylvania, [meaning one that was then 'removing from New York with intent to re-'side at Pensylvania] to which place it is re-'ported several considerable men are removing '[from New York meaning] expressed in terms 'very moving, much concern for the circum-'stances of New York [the bad circumstances 'of the province and the people of New York 'meaning] seemed to think them very much 'owing to the influence that some men [whom 'he called tools] had in the administration '[meaning the administration of government 'of the said province of New York] said he was 'now going from them, and was not to be hurt 'by any measures they should take, but could 'not help having some concern for the welfare 'of his countrymen, and should be glad to hear 'that the Assembly [meaning the General As-'sembly of the province of New York] would 'exert themselves as became them, by shew-'ing that they have the interest of their coun-'try more at heart, than the gratification of any 'private view of any of their members, or being 'at all affected by the smiles or frowns of a go-'vernor, [his excellency, the said governor, 'meaning] both which ought equally to be de-'spised, when the interest of their country is at 'stake. You, says he, complain of the law-'yers, but I think the law itself is at an end. 'We [the people of the province of New York 'meaning] see men's deeds destroyed, judges 'arbitrarily displaced, new courts erected, with-'out consent of the legislature [within the pro-'vince of New York meaning] by which it 'seems to me, trials by juries are taken away 'when a governor pleases, [his excellency the 'said governor meaning] men of known es-'tates denied their votes, contrary to the re-'ceived practice, the best expositor of any law: 'Who is then in that province [meaning the 'province of New York] that call [can call 'meaning] any thing his own, or enjoy any 'liberty [liberty meaning] longer than those in 'the administration [meaning the administra-'tion of government of the said province of 'New York] will condescend to let them do it, 'for which reason I have left it [the province 'of New York meaning] as I believe many 'will;' to the great disturbance of the peace of the said province of New York, to the great scandal of our said lord the king, of his excellency the said governor, and of all others concerned in the administration of the government of the said province, and against the peace of our sovereign lord the king, his crown and dignity, &c. Whereupon the said

Attorney General of our said lord the king, for our said lord the king, prays the advisement of the Court here, in the premises, and the due process of the law, against him the said John Peter Zenger, in this part to be done, to answer to our said lord the king of and in the premises, &c. R. BRADLEY, Attorney General."

To this information the defendant has pleaded Not Guilty, and we are ready to prove it.

Mr. Chambers has not been pleased to favour me with his notes, so I cannot, for fear of doing him injustice, pretend to set down his argument; but here Mr. Chambers set forth very clearly, "The nature of a libel, the great allowances that ought to be made for what men speak or write; that in all libels there must be some particular persons so clearly pointed out that no doubt must remain about who is meant; that he was in hopes Mr. Attorney would fail in his proof, as to this point; and therefore desired that he would go on to examine his witnesses."

Then Mr. Hamilton, who at the request of some of my friends, was so kind as to come from Philadelphia, to assist me on the trial, spoke:

Mr. *Hamilton.* May it please your honour: I am concerned in this cause on the part of Mr. Zenger, the defendant. The information against my client was sent me, a few days before I left home, with some instructions to let me know how far I might rely upon the truth of those parts of the papers set forth in the information, and which are said to be libellous. And though I am perfectly of the opinion with the gentleman who has just now spoke, on the same side with me, as to the common course of proceedings, I mean in putting Mr. Attorney upon proving, that my client printed and published those papers mentioned in the information; yet I cannot think it proper for me (without doing violence to my own principles) to deny the publication of a complaint, which, I think, is the right of every free-born subject to make, when the matters so published can be supported with truth; and therefore I'll save Mr. Attorney the trouble of examining his witnesses to that point; and I do (for my client) confess, that he both printed and published the two newspapers set forth in the information, and I hope in so doing he has committed no crime.

Mr. *Attorney.* Then, if your honour pleases, since Mr. Hamilton has confessed the fact, I think our witnesses may be discharged; we have no further occasion for them.

Mr. *Hamilton.* If you brought them here only to prove the printing and publishing of these newspapers, we have acknowledged that, and shall abide by it.

Here my journeyman and two sons (with several others subpœna'd by Mr. Attorney, to give evidence against me) were discharged, and there was silence in the Court for some time.

Mr. *Chief Justice.* Well, Mr. Attorney, will you proceed?

Mr. *Attorney.* Indeed, Sir, as Mr. Hamilton has confessed the printing and publishing these libels, I think the jury must find a verdict for the king; for supposing they were true, the law says that they are not the less libellous for that; nay indeed the law says, their being true is an aggravation of the crime.

Mr. *Hamilton.* Not so neither, Mr. Attorney, there are two words to that bargain: I hope it is not our bare printing and publishing a paper, that will make it a libel: you will have something more to do, before you make my client a libeller; for the words themselves must be libellous, that is false, scandalous, and seditious, or else they are not guilty.

As Mr. *Attorney* has not been pleased to favour us with his argument which he read, or with the notes of it, we cannot take upon us to set down his words, but only to shew the book cases he cited, and the general scope of his argument, which he drew from those authorities. 'He observed upon the excellency, as well as use of government, and the great regard and reverence which had been constantly paid to it, both under the law and the gospel. That by government we were protected in our lives, religion and properties; and that, for these reasons, great care had always been taken to prevent every thing that might tend to scandalize magistrates, and others concerned in the administration of the government, especially the supreme magistrate. And that there were many instances of very severe judgments, and of punishments inflicted upon such as had attempted to bring the government into contempt; by publishing false and scurrilous libels against it, or by speaking evil and scandalous words of men in authority; to the great disturbance of the public peace.' And to support this, he cited 5 Coke 121. (I suppose it should be 125.) Wood's Instit. 480. 2 Lilly 168. 1 Hawkins 73. 11, 6. From these books he insisted, 'That a libel was a malicious defamation of any person, expressed either in printing or writing, signs or pictures, to asperse the reputation of one that is alive, or the memory of one that is dead; if he is a private man, the libeller deserves a severe punishment, but if it is against a magistrate, or other public person, it is a greater offence; for this concerns not only the breach of the peace, but the scandal of the government; for what greater scandal of government can there be, than to have corrupt or wicked magistrates to be appointed by the king, to govern his subjects under him? And a greater imputation to the state cannot be, than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in, or concerning the administration of justice.' And from the same books Mr. Attorney insisted, that whether the person defamed is a private man or a magistrate, whether living or dead, whether the libel is true or false, or if the party against whom it is made is of good or evil fame, it is nevertheless a libel.

For in a settled state of government, the party grieved ought to complain for every injury done him, in the ordinary course of the law. And as to its publication, the law had taken so great care of men's reputations, that if one maliciously repeats it, or sings it in the presence of another, or delivers the libel or a copy of it over, to scandalize the party, he is to be punished as a publisher of a libel. He said it was likewise evident, that libelling was an offence against the law of God. Acts xxiii. 5. Then, said Paul, I wist not, brethren, that he was the high priest: For it is written, Thou shalt not speak evil of the ruler of the people. 2 Peter ii. 10. Despise government, presumptuous are they, self-willed, they are not afraid to speak evil of dignities, &c. He then insisted that it was clear, both by the law of God and man, that it was a very great offence to speak evil of, or to revile those in authority over us; and that Mr. Zenger had offended in a most notorious and gross manner, in scandalizing his excellency our governor, who is the king's immediate representative, and the supreme magistrate of this province: for can there be any thing more scandalous said of a governor than what is published in those papers? Nay, not only the governor, but both the council and assembly are scandalized; for there it is plainly said, That 'as matters now stand, their liberties and properties are precarious, and that slavery is like to be entailed on them and their posterity. And then again Mr. Zenger says, The assembly ought to despise the smiles or frowns of a governor; that he thinks the law is at an end; that we see men's deeds destroyed, judges arbitrarily displaced, new courts erected, without consent of the legislature; and, that it seems trials by juries are taken away when a governor pleases; that none can call any thing their own, longer than those in the administration will condescend to let them do it.'—And Mr. Attorney added, 'That he did not know what could be said in defence of a man, that had so notoriously scandalized the governor and principal magistrates and officers of the government, by charging them with depriving the people of their rights and liberties, and taking away trials by juries; and in short, putting an end to the law itself.——If this was not a libel, he said he did not know what was one. Such persons as will take those liberties with governors and magistrates, he thought, ought to suffer for stirring up sedition and discontent among the people. And concluded, by saying, that the government had been very much traduced and exposed by Mr. Zenger, before he was taken notice of; that at last it was the opinion of the governor and council, that he ought not to be suffered to go on, to disturb the peace of the government, by publishing such libels against the governor, and the chief persons in the government; and therefore they had directed this prosecution, to put a stop to this scandalous and wicked practice, of libelling and defaming his majesty's government and disturbing his majesty's peace.'

Mr. *Chambers* then summed up to the jury, observing with great strength of reason on Mr. Attorney's defect of proof, that the papers in the information were false, malicious or seditious, which was incumbent on him to prove to the jury, and without which they could not on their oaths say, that they were so as charged.

Mr. *Hamilton.* May it please your honour: I agree with Mr. Attorney, that government is a sacred thing; but I differ very widely from him, when he would insinuate, that the just complaints of a number of men, who suffer under a bad administration, is libelling that administration. Had I believed that to be law, I should not have given the Court the trouble of hearing any thing that I could say in this cause. I own, when I read the information, I had not the art to find out (without the help of Mr. Attorney's innuendos) that the governor was the person meant in every period of that news-paper; and I was inclined to believe, that they were wrote by some, who from an extraordinary zeal for liberty, had misconstrued the conduct of some persons in authority into crimes; and that Mr. Attorney, out of his too great zeal for power, had exhibited this information, to correct the indiscretion of my client; and at the same time, to shew his superiors the great concern he had, lest they should be treated with any undue freedom. But from what Mr. Attorney has just now said, to wit, That this prosecution was directed by the governor and council, and from the extraordinary appearance of people of all conditions which I observe in Court upon this occasion, I have reason to think, that those in the administration have by this prosecution something more in view, and that the people believe they have a good deal more at stake than I apprehended; and, therefore, as it is become my duty, to be both plain and particular in this cause, I beg leave to bespeak the patience of the Court.

I was in hopes, as that terrible court, where those dreadful judgments were given, and that law established, which Mr. Attorney has produced for authorities to support this cause, was long ago laid aside, as the most dangerous court to the liberties of the people of England that ever was known in that kingdom; that Mr. Attorney knowing this, would not have attempted to set up a Star-Chamber here, nor to make their judgments a precedent to us: for it is well known, that what would have been judged treason in those days for a man to speak, I think, has since not only been practised as lawful, but the contrary doctrine has been held to be law.

In Brewster's case, for printing, That the subjects might defend their rights and liberties by arms, in case the king should go about to destroy them, he was told, by the chief-justice, that it was a great mercy he was not proceeded against for his life; for that to say the king could be resisted by arms in any case what-

soever, was express treason. And yet we see, since that time, Dr. Sacheverell was sentenced in the highest court in Great Britain, for saying, that such a resistance was not lawful. Besides, as times have made very great changes in the laws of England, so in my opinion, there is good reason that places should do so too.

Is it not surprising to see a subject, upon his receiving a commission from the king to be a governor of a colony in America, immediately imagining himself to be vested with all the prerogatives belonging to the sacred person of his prince? And which is yet more astonishing, to see that a people can be so wild as to allow of and acknowledge those prerogatives and exemptions, even to their own destruction? Is it so hard a matter to distinguish between the majesty of our sovereign, and the power of a governor of the plantations? Is not this making very free with our prince, to apply that regard, obedience and allegiance to a subject which is due only to our sovereign? And yet in all the cases which Mr. Attorney has cited to shew the duty and obedience we owe to the supreme magistrate, it is the king that is there meant and understood, though Mr. Attorney is pleased to urge them as authorities to prove the heinousness of Mr. Zenger's offence against the governor of New-York. The several plantations are compared to so many large corporations, and perhaps not improperly; and can any one give an instance, that the mayor or head of a corporation ever put in a claim to the sacred rights of majesty? Let us not (while we are pretending to pay a great regard to our prince and his peace) make bold to transfer that allegiance to a subject, which we owe to our king only. What strange doctrine is it, to press every thing for law here which is so in England? I believe we should not think it a favour, at present at least, to establish this practice. In England so great a regard and reverence is had to the judges, (C. 3 Inst. 140.) that if any man strikes another in Westminster-hall, while the judges are sitting, he shall lose his right-hand, and forfeit his land and goods for so doing. And though the judges here claim all the powers and authorities within this government, that a court of King's-bench has in England, yet I believe Mr. Attorney will scarcely say, that such a punishment could be legally inflicted on a man for committing such an offence, in the presence of the judges sitting in any court within the province of New-York. The reason is obvious; a quarrel or riot in New-York cannot possibly be attended with those dangerous consequences that it might in Westminster-hall; nor (I hope) will it be alleged, that any misbehaviour to a governor in the plantations, will, or ought to be judged of or punished, as a like undutifulness would be to our sovereign. From all which, I hope Mr. Attorney will not think it proper to apply his law-cases (to support the cause of his governor), which have only been judged, where the king's safety or honour was concerned. It will not be denied but that a freeholder, in the province of New-York, has as good a right to the sole and separate use of his lands, as a freeholder in England, who has a right to bring an action of trespass against his neighbour, for suffering his horse or cow to come and feed upon his lands, or eat his corn, whether inclosed or not inclosed; and yet I believe it would be looked upon as a strange attempt for one man here to bring an action against another, whose cattle and horses feed upon his grounds not inclosed, or indeed for eating and treading down his corn, if that were not inclosed. Numberless are the instances of this kind that might be given, to shew, that what is good law at one time, and in one place, is not so at another time, and in another place; so that I think the law seems to expect, that in these parts of the world, men should take care, by a good fence, to preserve their property from the injury of unruly beasts. And perhaps there may be as good a reason why men should take the same care, to make an honest and upright conduct a fence and security against the injury of unruly tongues.

Mr. *Attorney.* I don't know what the gentleman means, by comparing cases of freeholders in England with the freeholders here. What has this case to do with actions of trespass, or men's fencing their ground? The case before the Court is, Whether Mr. Zenger is guilty of libelling his excellency the governor of New-York, and indeed the whole administration of the government? Mr. Hamilton has confessed the printing and publishing, and I think nothing is plainer, than that the words in the information are scandalous, and tend to sedition, and to disquiet the minds of the people of this province. And if such papers are not libels, I think it may be said, there can be no such thing as a libel.

Mr. *Hamilton.* May it please your honour, I cannot agree with Mr. Attorney; for though I freely acknowledge that there are such things as libels, yet I must insist at the same time, that what my client is charged with, is not a libel; and I observed just now, that Mr. Attorney, in defining a libel, made use of the words, scandalous, seditious, and tend to disquiet the people; but (whether with design, or not, I will not say) he omitted the word false.

Mr. *Attorney.* I think I did not omit the word false: but it has been said already, that it may be a libel, notwithstanding it may be true.

Mr. *Hamilton.* In this I must still differ with Mr. Attorney; for I depend upon it, we are to be tried upon this information now before the Court and jury, and to which we have pleaded Not Guilty, and by it we are charged with printing and publishing a certain false, malicious, seditious and scandalous libel. This word false must have some meaning, or else how came it there? I hope Mr. Attorney will not say he put it there by chance, and I am of opinion his information would not be good without it. But to shew that it is the princi-

pal thing, which, in my opinion, makes a libel, I put the case, the information had been for printing and publishing a certain true libel, would that be the same thing? Or could Mr. Attorney support such an information by any precedent in the English law? No, the falshood makes the scandal, and both make the libel. And to shew the Court that I am in good earnest, and to save the Court's time, and Mr. Attorney's trouble, I will agree, that if he can prove the facts charged upon us to be false, I'll own them to be scandalous, seditious, and a libel. So the work seems now to be pretty much shortened, and Mr. Attorney has now only to prove the word false, in order to make us guilty.

Mr. *Attorney*. We have nothing to prove; you have confessed the printing and publishing; but if it was necessary (as I insist it is not), how can we prove a negative? But I hope some regard will be had to the authorities that have been produced; and that supposing all the words to be true, yet that will not help them; that chief justice Holt, in his charge to the jury, in the case of Tutchin, made no distinction, whether Tutchin's papers were true or false; and as chief justice Holt has made no distinction in that case, so none ought to be made here; nor can it be shewn in all that case, there was any question made about their being false or true.

Mr. *Hamilton*. I did expect to hear, that a negative cannot be proved; but every body knows there are many exceptions to that general rule; for if a man is charged with killing another, or stealing his neighbour's horse; if he is innocent in the one case, he may prove the man said to be killed to be really alive; and the horse said to be stolen, never to have been out of his master's stable, &c. and this I think is proving a negative. But we will save Mr. Attorney the trouble of proving a negative, and take the *onus probandi* upon ourselves, and prove those very papers that are called libels to be true.

Mr. *Chief Justice*. You cannot be admitted, Mr. Hamilton, to give the truth of a libel in evidence. A libel is not to be justified; for it is nevertheless a libel that it is true.

Mr. *Hamilton*. I am sorry the Court has so soon resolved upon that piece of law; I expected first to have been heard to that point. I have not in all my reading met with an authority that says, we cannot be admitted to give the truth in evidence, upon an information for a libel.

Mr. *Chief Justice*. The law is clear, that you cannot justify a libel.

Mr. *Hamilton*. I own that, may it please your honour, to be so; but with submission I understand the word, justified, there to be a justification by plea, as it is in the case upon an indictment for murder, or an assault and battery; there the prisoner cannot justify, but plead Not Guilty: yet it will not be denied but he may, and always is admitted to give the truth of the fact, or any other matter in evidence, which goes to his acquittal; as in murder he may prove it was in defence of his life, his house, &c. and in assault and battery, he may give in evidence, that the other party struck first, and in both cases he will be acquitted. And in this sense I understand the word justify, when applied to the case before the Court.

Mr. *Chief Justice*. I pray shew that you can give the truth of a libel in evidence.

Mr. *Hamilton*. I am ready, both from what I understand to be the authorities in the case, and from the reason of the thing, to shew that we may lawfully do so. But here I beg leave to observe, that informations for libels is a child, if not born, yet nursed up, and brought to full maturity, in the Court of the Star-Chamber.

Mr. *Chief Justice*. Mr. Hamilton, you'll find yourself mistaken; for in Coke's Institutes you'll find informations for libels, long before the Court of Star-Chamber.

Mr. *Hamilton*. I thank your honour; that is an authority I did propose to speak to by and bye: but as you have mentioned it, I'll read that authority now. I think it is in the 3 Co. Inst. under title Libel; it is the case of John de Northampton for a letter wrote to Robert de Ferrers, one of the king's privy council, (Coke 3 Inst. 174,) concerning sir William Scot, chief justice, and his fellows; but it does not appear to have been upon information; and I have good grounds to say it was upon indictment, as was the case of Adam de Ravensworth, just mentioned before by lord Coke under the same title; and I think there cannot be a greater, at least a plainer authority for us, than the judgment in the case of John de Northampton, which my lord has set down at large. "Et quia predictus Johannes cognovit dictam Literam per se scriptam Roberto de Ferrers, qui est de Concilio Regis, quæ litera continet in se nullam veritatem," &c. Now Sir, by this judgment it appears the libellous words were utterly false, and there the falshood was the crime, and is the ground of that judgment; and is not that what we contend for? Do not we insist that the falshood makes the scandal, and both make the libel? And how shall it be known whether the words are libellous, that is, true or false, but by admitting us to prove them true, since Mr. Attorney will not undertake to prove them false? Besides, is it not against common sense, that a man should be punished in the same degree for a true libel (if any such thing could be) as for a false one? I know it is said, that truth makes a libel the more provoking, and therefore the offence is the greater, and consequently the judgment should be the heavier. Well, suppose it were so, and let us agree for once, that truth is a greater sin than falshood: yet as the offences are not equal, and as the punishment is arbitrary, that is, according as the judges in their discretion shall direct to be inflicted; is it not absolutely necessary that they should know whether the libel is true or false, that they may by that means be able

to proportion the punishment? For would it not be a sad case, if the judges, for want of a due information, should chance to give so severe a judgment against a man for writing or publishing a lie, as for writing or publishing a truth? And yet this (with submission,) as monstrous and ridiculous as it may seem to be, is the natural consequence of Mr. Attorney's doctrine, that truth makes a worse libel than falsehood, and must follow from his not proving our papers to be false, or not suffering us to prove them to be true. But this is only reasoning upon the case, and I will now proceed to shew, what in my opinion will be sufficient to induce the Court to allow us to prove the truth of the words, which in the information are called libellous. And first I think there cannot be a greater authority for us, than the judgment I just now mentioned in the case of John de Northampton, and that was in early times, and before the Star-chamber came to its fulness of power and wickedness. In that judgment, as I observed, the falshood of the letter which was wrote, is assigned as the very ground of the sentence. And agreeable to this it was urged by sir Robert Sawyer in the trial of the Seven Bishops,* that the falsity, the malice, and seditious of the writing, were all facts to be proved. But here it may be said, sir Robert was one of the Bishops' counsel, and his argument is not to be allowed for law: but I offer it only to shew, that we are not the first who have insisted, that to make a writing a libel, it must be false. And if the argument of a counsel must have no weight, I hope there will be more regard shewn to the opinion of a judge; and therefore I mention the words of justice Powel in the same trial, where he says (of the Petition of the Bishops, which was called a libel, and upon which they were prosecuted by information,) that, to make it a libel; it must be false and malicious, and tend to sedition; and declared, as he saw no falshood or malice in it, he was of opinion, that it was no libel. Now, I should think this opinion alone, in the case of the king, and in a case which that king had so much at heart, and which to this day has never been contradicted, might be a sufficient authority, to entitle us to the liberty of proving the truth of the papers, which in the information are called false, malicious, seditious, and scandalous. If it be objected, that the opinion of the other three judges were against him, I answer, that the censures the judgments of these men have undergone, and the approbation justice Powel's opinion, his judgment and conduct upon that trial, has met with, and the honour he gained to himself, for daring to speak truth at such a time, upon such an occasion, and in the reign of such a king, is more than sufficient, in my humble opinion, to warrant our insisting on his judgment, as a full authority to our purpose; and it will lie upon Mr. Attorney to shew, that this opinion has, since that time, been denied to be law; or that justice Powel, who delivered it, has ever been condemned or blamed for it, in any law-book extant at this day; and this, I will venture to say, Mr. Attorney cannot do. But, to make this point yet more clear, if any thing can be clearer, I will, on our part, proceed and shew, that in the case of sir Samuel Barnardiston, his counsel, notwithstanding he stood before one of the greatest monsters that ever presided in an English court (judge Jefferies,) insisted on the want of proof to the malice and seditious intent of the author, of what was called a libel. And in the case of Tutchin, which seems to be Mr. Attorney's chief authority, that case is against him; for he was, upon his trial, put upon shewing the truth of his papers, but did not; at least the prisoner was asked by the king's counsel,* whether he would say they were true? And as he never pretended that they were true, the chief justice was not to say so. But the point will still be clearer, on our side, from Fuller's case,† for falsely and wickedly causing to be printed a false and scandalous libel, in which (amongst other things) were contained these words. "Mr. Jones has also made oath, that he paid 5,000*l.* more, by the late king's order, to several persons in places of trust, that they might complete my ruin, and invalidate me for ever. Nor is this all; for the same Mr. Jones will prove, by undeniable witness and demonstration, that he has distributed more than 180,000*l.* in eight years last past, by the French king's order, to persons in public trust in this kingdom." Here, you see, is a scandalous and infamous charge against the late king; here is a charge, no less than high treason, against the men in public trust, for receiving money of the French king, then in actual war with the crown of Great Britain; and yet the Court were far from bearing him down with that Star-chamber doctrine, to wit, that it was no matter, whether what he said was true or false; no, on the contrary, lord chief justice Holt asks Fuller, "Can you make it appear they are true? Have you any witnesses? You might have had subpœnas for your witnesses against this day. If you take upon you to write such things as you are charged with, it lies upon you to prove them true, at your peril. If you have any witnesses, I will hear them. How came you to write those books which are not true? If you have any witnesses produce them. If you can offer any matter to prove what you have wrote, let us hear it." Thus said, and thus did, that great man, lord chief justice Holt, upon a trial of the like kind with ours; and the rule laid down by him, in this case, is, that he who will take upon him to write things, it lies upon him to prove them at his peril. Now, Sir, we have acknowledged the printing and publishing of those papers, set forth in the information, and (with the leave of the Court) agreeable to the rule

* See the Case, vol. 12, p. 183.

* See his Case, vol. 14, p. 1123.

† See his Case, vol. 14, p. 518.

laid down by chief justice Holt, we are ready to prove them to be true, at our peril.

Mr. *Chief Justice.* Let me see the book.

Here the Court had the Case under consideration a considerable time, and every one was silent.

Mr. *Chief Justice.* Mr. Attorney, you have heard what Mr. Hamilton has said, and the cases he has cited, for having his witnesses examined, to prove the truth of several facts contained in the papers set forth in the information. What do you say to it?

Att. Gen. The law, in my opinion, is very clear: they cannot be admitted to justify a libel; for, by the authorities I have already read to the Court, it is not the less a libel because it is true. I think I need not trouble the Court with reading the cases over again; the thing seems to be very plain, and I submit it to the Court.

Mr. *Chief Justice.* Mr. Hamilton, the Court is of opinion, you ought not to be permitted to prove the facts in the papers: these are the words of the book, "It is far from being a justification of a libel, that the contents thereof are true, or that the person upon whom it is made had a bad reputation, since the greater appearance there is of truth in any malicious invective, so much the more provoking it is."

Mr. *Hamilton.* These are Star-chamber cases; and I was in hopes that practice had been dead with the Court.

Mr. *Chief Justice.* Mr. Hamilton, the Court have delivered their opinion, and we expect you will use us with good manners: you are not to be permitted to argue against the opinion of the Court.

Mr. *Hamilton.* With submission, I have seen the practice in very great courts, and never heard it deemed unmannerly to——

Mr. *Chief Justice.* After the Court have declared their opinion, it is not good-manners to insist upon a point in which you are over-ruled.

Mr. *Hamilton.* I will say no more at this time: the Court, I see, is against us in this point; and that I hope I may be allowed to say.

Mr. *Chief Justice.* Use the Court with good-manners, and you shall be allowed all the liberty you can reasonably desire.

Mr. *Hamilton.* I thank your honour. Then, gentlemen of the jury, it is to you we must now appeal, for witnesses to the truth of the facts we have offered, and are denied the liberty to prove; and let it not seem strange, that I apply myself to you in this manner; I am warranted so to do, both by law and reason. The law supposes you to be summoned out of the neighbourhood where the fact is alleged to be committed; and the reason of your being taken out of the neighbourhood is, because you are supposed to have the best knowledge of the fact that is to be tried. And were you to find a verdict against my client, you must take upon you to say, the papers referred to in the information, and which we acknowledge we printed and published, are false, scandalous, and seditious; but of this I can have no apprehension. You are citizens of New York: you are really, what the law supposes you to be, honest and lawful men; and, according to my brief, the facts which we offer to prove were not committed in a corner; they are notoriously known to be true; and therefore in your justice lies our safety. And as we are denied the liberty of giving evidence, to prove the truth of what we have published, will beg leave to lay it down as a standing rule in such cases, That the suppressing of evidence ought always to be taken for the strongest evidence; and I hope it will have that weight with you. But since we are not admitted to examine our witnesses, I will endeavour to shorten the dispute with Mr. Attorney; and to that end, I desire he would favour us with some standard definition of a libel, by which it may be certainly known, whether a writing be a libel, yea or not.

Att. Gen. The books, I think, have given a very full definition of a libel: they say (1 Hawk. chap. 73, § 1, *et seq.*) it is, "in a strict sense, taken for a malicious defamation, expressed either in writing or printing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt or ridicule. § 2. But it is said, That, in a larger sense the notion of a libel may be applied to any defamation whatsoever, expressed either by signs or pictures, as by fixing up a gallows against a man's door, or by painting him in a shameful and ignominious manner. §. 3. And since the chief cause for which the law so severely punishes all offences of this nature, is the direct tendency of them to a breach of public peace, by provoking the parties injured, their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which, of all others, are most sensibly felt; and since the plain meaning of such scandal, as is expressed by signs or pictures, is as obvious to common sense, and as easily understood by every common capacity, and altogether as provoking as that which is expressed by writing or printing, why should it not be equally criminal? § 4. And from the same ground it seemeth also clearly to follow, that such scandal, as is expressed in a scoffing and ironical manner, makes a writing as properly a libel, as that which is expressed in direct terms; as where a writing, in a taunting manner reckoning up several acts of public charity done by one, says, You will not play the Jew, nor the Hypocrite, and so goes on in a strain of ridicule to insinuate, that what he did was owing to his vain-glory; or where a writing, pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally esteemed famous for, pitched on such qualities only which their enemies charge them with the want of;

as by proposing such a one to be imitated for his courage, who is known to be a great statesman, but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar, &c. which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so."

Mr. Hamilton. Ay, Mr. Attorney; but what certain standard rule have the books laid down, by which we can certainly know whether the words or the signs are malicious? Whether they are defamatory? Whether they tend to the breach of the peace, and are a sufficient ground to provoke a man, his family, or friends, to acts of revenge, especially those of the ironical sort of words? And what rule have you to know when I write ironically? I think it would be hard, when I say, Such a man is a very worthy, honest gentleman, and of fine understanding, that therefore I meant he was a knave or a fool.

Att. Gen. I think the books are very full: it is said in 1 Hawk. p. 193, just now read, "That such scandal as is expressed in a scoffing and ironical manner, makes a writing as properly a libel, as that which is expressed in direct terms; as where a writing, in a taunting manner says, reckoning up several acts of charity done by one, You will not play the Jew or the hypocrite; and so goes on to insinuate, that what he did was owing to his vain-glory, &c. which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so." I think nothing can be plainer or more full than these words.

Mr. Hamilton. I agree the words are very plain; and I shall not scruple to allow (when we are agreed that the words are false and scandalous, and were spoken in an ironical and scoffing manner, &c.) that they are really libellous; but here still occurs the uncertainty, which makes the difficulty to know what words are scandalous, and what not; for you say, they may be scandalous, true or false: besides, how shall we know whether the words were spoke in a scoffing and ironical manner, or seriously? Or how can you know, whether the man did not think as he wrote? For, by your rule, if he did, it is no irony, and consequently no libel. But, under favour, Mr. Attorney, I think the same book, and the same section, will shew us the only rule by which all these things are to be known. The words are these; 'which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if they had directly and expressly done so.' Here, it is plain, the words are scandalous, scoffing, and ironical, only as they are understood; I know no rule laid down in the books but this; I mean, as the words are understood.

Mr. Chief Justice. Mr. Hamilton, do you think it so hard to know when words are ironical, or spoke in a scoffing manner?

Mr. Hamilton. I own it may be known; but I insist, the only rule to know is, as I do or can understand them: I have no other rule to go by, but as I understand them.

Mr. Chief Justice. That is certain. All words are libellous, or not, as they are understood. Those who are to judge of the words, must judge whether they are scandalous or ironical, tend to the breach of the peace, or are seditious: there can be no doubt of it.

Mr. Hamilton. I thank your honour; I am glad to find the Court of this opinion. Then it follows, that those twelve men must understand the words in the information to be scandalous, that is to say, false; for I think it is not pretended they are of the ironical sort; and when they understand the words to be so, they will say we are guilty of publishing a false libel, and not otherwise.

Mr. Chief Justice. No, Mr. Hamilton; the jury may find that Mr. Zenger printed and published those papers, and leave it to the Court to judge whether they are libellous. You know this is very common: it is in the nature of a Special Verdict, where the jury leave the matter of law to the Court.

Mr. Hamilton. I know, may it please your honour, the jury may do so; but I do likewise know they may do otherwise. I know they have the right, beyond all dispute, to determine both the law and the fact; and where they do not doubt of the law, they ought to do so. This of leaving it to the judgment of the Court, whether the words are libellous or not, in effect, renders juries useless (to say no worse) in many cases; but this I shall have occasion to speak to by-and-bye: and I will, with the Court's leave, proceed to examine the inconveniences that must inevitably arise from the doctrines Mr. Attorney has laid down; and I observe, in support of this prosecution, he has frequently repeated the words taken from the case of Libellis Famosis, in 5 Co. This is indeed the leading case, and that to which almost all the other cases upon the subject of libels do refer; and I must insist upon saying, that, according as this case seems to be understood by the Court and Mr. Attorney, it is not law at this day: for though I own it to be base and unworthy to scandalize any man, yea, I think it is even villainous to scandalize a person of public character; and I will go so far into Mr. Attorney's doctrine as to agree, that if the faults, mistakes, nay even the vices, of such a person be private and personal, and don't affect the peace of the public, or the liberty or property of our neighbour, it is unmanly and unmannerly to expose them, either by word or writing. But when a ruler of the people brings his personal failings, but much more his vices, into his administration, and the people find themselves affected by them, either in their liberties or properties, that will alter the case mightily; and all the high things that are said in favour of rulers, and of dignities, and upon the side of power, will not be able to stop people's mouths when they feel themselves op-

pressed, I mean in a free government. It is true, in times past, it was a crime to speak truth; and in that terrible court of Star-chamber, many worthy and brave men suffered for so doing; and yet, even in that court, and in those bad times, a great and good man durst say, what I hope will not be taken amiss of me to say in this place, to wit, "The practice of informations for libels is a sword in the hands of a wicked king, and an arrand coward, to cut down and destroy the innocent; the one cannot because of his high station, and the other dares not, because of his want of courage, revenge himself in another manner."

Att. Gen. Pray, Mr. Hamilton, have a care what you say; don't go too far neither: I don't like those liberties.

Mr. *Hamilton.* Sure, Mr. Attorney, you won't make any applications: All men agree, that we are governed by the best of kings; and I cannot see the meaning of Mr. Attorney's caution: My well known principles, and the sense I have of the blessings we enjoy under his present majesty, make it impossible for me to err, and, I hope, even to be suspected, in that point of duty to my king. May it please your honour, I was saying, that notwithstanding all the duty and reverence claimed by Mr. Attorney to men in authority, they are not exempt from observing the rules of common justice, either in their private or public capacities; the laws of our mother-country know no exception. It is true, men in power are harder to be come at, for wrongs they do, either to a private person, or to the public; especially a governor in the plantations, where they insist upon an exemption from answering complaints of any kind in their own government. We are indeed told, and it is true they are obliged to answer a suit in the king's courts at Westminster, for a wrong done to any person here: But do we not know how impracticable this is to most men among us, to leave their families, (who depend upon their labour and care for their livelihood) and carry evidences to Britain, and at a great, nay, a far greater expence, than almost any of us are able to bear, only to prosecute a governor for an injury done here? But when the oppression is general, there is no remedy even that way: No, our constitution has (blessed be God) given us an opportunity, if not to have such wrongs redressed, yet, by our prudence and resolution, we may in a great measure prevent the committing of such wrongs, by making a governor sensible, that it is his interest to be just to those under his care; for such is the sense that men in general (I mean freemen) have of common justice, that when they come to know that a chief magistrate abuses the power with which he is intrusted for the good of the people, and is attempting to turn that very power against the innocent, whether of high or low degree, I say, mankind in general seldom fail to interpose, and, as far as they can, prevent the destruction of their fellow subjects. And has it not often been seen (and, I hope, it will always be seen) that when the representatives of a free people are, by just representations or remonstrances, made sensible of the sufferings of their fellow subjects, by the abuse of power in the hands of a governor, they have declared (and loudly too) that they were not obliged by any law to support a governor who goes about to destroy a province or colony, or their privileges, which by his majesty he was appointed, and by the law he is bound, to protect and encourage. But I pray it may be considered, of what use is this mighty privilege, if every man that suffers must be silent? And if a man must be taken up as a libeller, for telling his sufferings to his neighbour, I know it may be answered, Have you not a legislature? have you not a House of Representatives, to whom you may complain? And to this I answer, We have: But what then? Is an Assembly to be troubled with every injury done by a governor? Or are they to hear of nothing but what those in the administration will please to tell them? Or what sort of a trial must a man have? And how is he to be remedied; especially if the case were, as I have known it to happen in America in my time, that a governor who has places (I will not say pensions, for, I believe they seldom give that to another which they can take to themselves) to bestow, and can or will keep the same Assembly (after he has modelled them so as to get a majority of the House in his interest) for near twice seven years together? I pray, what redress is to be expected for an honest man, who makes his complaint against a governor to an Assembly, who may properly enough be said to be made by the same governor against whom the complaint is made? The thing answers itself. No, it is natural, it is a privilege—I will go farther, it is a right which all freemen claim, and are intitled to, to complain when they are hurt; they have a right publicly to remonstrate against the abuses of power, in the strongest terms, to put their neighbours upon their guard, against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it, as one of the greatest blessings heaven can bestow. And when a House of Assembly, composed of honest freemen, sees the general bent of the people's inclinations, that is it which must and will (I'm sure it ought to) weigh with a legislature, in spite of all the craft, caressing, and cajoling, made use of by a governor, to divert them from hearkening to the voice of their country. As we all very well understand the true reason, why gentlemen take so much pains, and make such great interest, to be appointed governors, so the design of their appointment is not less manifest. We know his majesty's gracious intentions to his subjects; he desires no more than that his people in the plantations should be kept up to their duty and allegiance to the crown of Great Britain; that peace may be preserved amongst

them, and justice impartially administered; that we may be governed so as to render us useful to our mother-country by encouraging us to make and raise such commodities as may be useful to Great Britain. But will any one say, that all or any of these good ends are to be effected by a governor's setting his people together by the ears, and by the assistance of one part of the people to plague and plunder the other? The commission which governors bear, while they execute the powers given them, according to the intent of the royal grantor, expressed in their commissions, requires and deserves very great reverence and submission; but when a governor departs from the duty enjoined him by his sovereign, and acts as if he was less accountable than the royal hand that gave him all that power and honour which he is possessed of, this sets people upon examining and enquiring into the power, authority, and duty of such a magistrate, and to compare those with his conduct; and just as far as they find he exceeds the bounds of his authority, or falls short in doing impartial justice to the people under his administration, so far they very often, in return, come short in their duty to such a governor. For power alone will not make a man beloved; and I have heard it observed, that the man who was neither good nor wise before his being made a governor, never mended upon his preferment, but has been generally observed to be worse: for men who are not endowed with wisdom and virtue, can only be kept in bounds by the law: and by how much the farther they think themselves out of the reach of the law, by so much the more wicked and cruel they are. I wish there were no instances of the kind at this day. And wherever this happens to be the case of a governor, unhappy are the people under his administration, and in the end he will find himself so too; for the people will neither love him nor support him. I make no doubt but there are those here, who are zealously concerned for the success of this prosecution; and yet I hope they are not many; and even some of those, I am persuaded (when they consider to what lengths such prosecutions may be carried, and how deeply the liberties of the people may be affected by such means) will not all abide by their present sentiments; I say, not all: for the man who, from an intimacy and acquaintance with a governor, has conceived a personal regard for him; the man who has felt none of the strokes of his power; the man who believes that a governor has a regard for him, and confides in him; it is natural for such men to wish well to the affairs of such a governor; and as they may be men of honour and generosity, may, and no doubt will, wish him success, so far as the rights and privileges of their fellow-citizens are not affected. But as men of honour, I can apprehend nothing from them; they will never exceed that point. There are others that are under stronger obligations, and those are such as are in some sort engaged in support of a governor's cause, by their own or their relations dependence on his favour for some post or preferment: such men have, what is commonly called, duty and gratitude to influence their inclinations, and oblige them to go his lengths. I know men's interests are very near to them, and they will do much, rather than forego the favour of a governor, and a livelihood at the same time; but I can with very just grounds hope, even from those men, whom I will suppose to be men of honour, and conscience too, that when they see the liberty of their country is in danger, either by their concurrence, or even by their silence, they will, like Englishmen, and like themselves, freely make a sacrifice of any preferment or favour, rather than be accessary to destroying the liberties of their country, and entailing slavery upon their posterity. There are indeed another set of men, of whom I have no hopes; I mean, such who lay aside all other considerations, and are ready to join with power in any shape, and with many or any sort of men, by whose means or interest they may be assisted to gratify their malice and envy, against those whom they have been pleased to hate; and that for no other reason, but because they are men of abilities and integrity, or at least are possessed of some valuable qualities far superior to their own. But as envy is the sin of the devil, and therefore very hard, if at all, to be repented of, I will believe there are but few of this detestable and worthless sort of men, nor will their opinions or inclinations have any influence upon this trial. But to proceed: I beg leave to insist, that the right of complaining or remonstrating is natural; and the restraint upon this natural right is the law only, and that those restraints can only extend to what is false: for as it is truth alone which can excuse or justify any man for complaining of a bad administration, I as frankly agree, that nothing ought to excuse a man who raises a false charge or accusation, even against a private person, and that no manner of allowance ought to be made to him who does so against a public magistrate. Truth ought to govern the whole affair of libels, and yet the party accused runs risk enough even then; for if he fails of proving every tittle of what he has wrote, and to the satisfaction of the Court and Jury too, he may find to his cost, that when the prosecution is set on foot by men in power, it seldom wants friends to favour it. And from thence (it is said) has arisen the great diversity of opinions among judges, about what words were or were not scandalous or libellous. I believe it will be granted, that there is not greater uncertainty in any part of the law, than about words of scandal: it would be mis-spending of the Court's time to mention the cases; they may be said to be numberless; and therefore the utmost care ought to be taken in following precedents; and the times when the judgments were given, which are quoted for authorities in the case of libels, are much to be regarded. I think it will be agreed, that ever since the time of the Star-Chamber, where the most arbitrary and destructive judgments and opinions

were given, that ever an Englishman heard of, at least in his own country: I say, prosecutions for libels since the time of that arbitrary court, and until the glorious Revolution, have generally been set on foot at the instance of the crown, or its ministers; and it is no small reproach to the law, that these prosecutions were too often and too much countenanced by the judges, who held their places at pleasure (a disagreeable tenure to any officer, but a dangerous one in the case of a judge). To say more to this point may not be proper. And yet I cannot think it unwarrantable, to shew the unhappy influence that a sovereign has sometimes had, not only upon judges, but even upon parliaments themselves.

It has already been shewn, how the judges differed in their opinions about the nature of a libel, in the case of the Seven Bishops. There you see three judges of one opinion, that is, of a wrong opinion, in the judgment of the best men in England, and one judge of a right opinion. How unhappy might it have been for all of us at this day, if that jury had understood the words in that information as the Court did? Or if they had left it to the Court to judge, whether the Petition of the Bishops was or was not a libel? No! they took upon them, to their immortal honour, to determine both law and fact, and to understand the Petition of the Bishops to be no libel, that is, to contain no falsehood nor sedition, and therefore found them Not Guilty. And remarkable is the case of sir Samuel Barnardiston, who was fined 10,000*l.* for writing a letter, in which, it may be said, none saw any scandal or falsehood but the Court and Jury; for that judgment was afterwards looked upon as a cruel and detestable judgment, and therefore was reversed by parliament. Many more instances might be given of the complaisance of court-judges about those times, and before; but I will mention only one case more, and that is the case of sir Edward Hales, who, though a Roman Catholic, was by king James 2, preferred to be a colonel of his army, notwithstanding the statute of 25 Ch. 2, chap. 2, by which it is provided, That every one that accepts of an office, civil or military, &c. shall take the oaths, subscribe the declaration, and take the sacrament, within 3 months, &c. otherwise he is disabled to hold such office, and the grant for the same to be null and void, and the party to forfeit 500*l.* Sir Edward Hales did not take the oaths or sacrament, and was prosecuted for the 500*l.* for exercising the office of a colonel by the space of three months, without conforming as in the act is directed. Sir Edward pleads, That the king, by his letters patent, did dispense with his taking the oaths and sacrament, and subscribing the declaration, and had pardoned the forfeiture of 500*l.* And whether the king's dispensation was good, against the said act of parliament? was the question. I shall mention no more of this case, than to shew how in the reign of an arbitrary prince, where judges hold their seats at pleasure, their determinations have not always been such as to make precedents of, but the contrary; and so it happened in this case, where it was solemnly judged, That, notwithstanding this act of parliament, made in the strongest terms, for preservation of the Protestant religion, that yet the king had, by his royal prerogative, a power to dispense with that law; and sir Edward Hales[a] was acquitted by the judges accordingly. So the king's dispensing power being by the judges set up above the act of parliament, this law, which the people looked upon as their chief security against Popery and arbitrary power, was, by this judgment, rendered altogether ineffectual. But this judgment is sufficiently exposed by sir Robert Atkins, late one of the judges of the Court of Common Pleas, in his Enquiry into the King's Power of Dispensing with Penal Statutes; wherein it is shewn, who it was that first invented dispensations; how they came into England; what ill use has been made of them there; and all this principally owing to the countenance given them by the judges. He says of the dispensing power, 'The Pope was the inventor of it; our kings have borrowed it from them; and the judges here, from time to time, nursed and dressed it up, and given it countenance; and it is still upon the growth, and encroaching, till it has almost subverted all law, and made the regal power absolute, if not dissolute.' This seems not only to shew how far judges have been influenced by power, and how little cases of this sort, where the prerogative has been in question in former reigns, are to be relied upon for law: but I think it plainly shews too, that a man may use a greater freedom with the power of his sovereign, and the judges in Great Britain, than it seems he may with the power of a governor in the plantations, who is but a fellow-subject. Are the words with which we are charged, like these? Do Mr. Zenger's papers contain any such freedoms with his governor, or his council, as sir Robert Atkins has taken with the regal power and the judges in England? And yet I never heard of any information brought against him for these freedoms.

If then, upon the whole, there is so great an uncertainty among judges (learned and great men) in matters of this kind; if power has had so great an influence on judges, how cautious ought we to be in determining by their judgments, especially in the plantations, and in the case of libels? There is heresy in law as well as in religion, and both have changed very much; and we well know that it is not two centuries ago that a man would have been burnt as an heretic, for owning such opinions in matters of religion as are publicly wrote and printed at this day. They were fallible men, it seems, and we take the liberty not only to differ from them in religious opinions, but to condemn them and their opinions too; and I must presume, that in taking these freedoms in thinking and speaking about matters of faith

[a] See his Case, vol. 11, p. 1166.

or religion, we are in the right: For, though it is said there are very great liberties of this kind taken in New-York, yet I have heard of no information preferred by Mr. Attorney for any offences of this sort. From which I think it is pretty clear, that in New-York a man may make very free with his God, but he must take special care what he says of his governor. It is agreed upon by all men, that this is a reign of liberty; and while men keep within the bounds of truth, I hope they may with safety both speak and write their sentiments of the conduct of men in power, I mean of that part of their conduct only, which affects the liberty or property of the people under their administration; were this to be denied, then the next step may make them slaves. For what notions can be entertained of slavery, beyond that of suffering the greatest injuries and oppressions, without the liberty of complaining; or if they do, to be destroyed, body and estate, for so doing.

It is said, and insisted upon by Mr. Attorney: That government is a sacred thing; that it is to be supported and reverenced; it is government that protects our persons and estates; that prevents treasons, murders, robberies, riots, and all the train of evils that overturns kingdoms and states, and ruins particular persons; and if those in the administration, especially the supreme magistrates, must have all their conduct censured by private men, government cannot subsist. This is called a licentiousness not to be tolerated. It is said, that it brings the rulers of the people into contempt, and their authority not to be regarded, and so in the end the laws cannot be put in execution. These, I say, and such as these, are the general topics insisted upon by men in power, and their advocates. But I wish it might be considered at the same time, how often it has happened, that the abuse of power has been the primary cause of these evils, and that it was the injustice and oppression of these great men, which has commonly brought them into contempt with the people. The craft and art of such men is great, and who, that is the least acquainted with history or law, can be ignorant of the specious pretences, which have often been made use of by men in power, to introduce arbitrary rule, and destroy the liberties of a free people. I will give two instances, and as they are authorities not to be denied, nor can be misunderstood, I presume they will be sufficient.

The first is the statute of 3d of Hen. 7, cap. 1. The preamble of the statute will prove all, and more than I have alleged. It begins: 'The king our sovereign lord remembereth, how by unlawful maintenances, giving of liveries, signs and tokens, &c. untrue demeanings of sheriffs in making of panncls, and other untrue returns, by taking of money, by injuries, by great riots and unlawful assemblies; the policy and good rule of this realm is almost subdued; and for the not punishing these inconveniencies, and by occasion of the premisses, little or nothing may be found by enquiry, &c. to the increase of murders, &c. and unstreties of all men living, and losses of their lands and goods.' Here is a fine and specious pretence for introducing the remedy, as it is called, which is provided by this act; that is, instead of being lawfully accused by twenty-four good and lawful men of the neighbourhood, and afterwards tried by twelve like lawful men, here is a power given to the lord chancellor, lord treasurer, the keeper of the king's privy seal, or two of them, calling to them a bishop, a temporal lord, and other great men mentioned in the act, (who, it is to be observed, were all to be dependants on the court) to receive information against any person for any of the misbehaviours recited in that act, and by their discretion to examine, and to punish them according to their demerit.

The second statute I proposed to mention, is the 11th of the same king, chap. 3d, the preamble of which act has the like fair pretences as the former; for the king calling to his remembrance the good laws made against the receiving of liveries, &c. unlawful extortions, maintenances, embracery, &c. unlawful games, &c. and many other great enormities, and offences committed against many good statutes, to the displeasure of Almighty God, which, the act says, could not, nor yet can, be conveniently punished by the due order of the law, except it were first found by twelve men, &c. which, for the causes aforesaid, will not find nor yet present the truth. And therefore the same statute directs, that the justices of assize, and justices of the peace, shall upon information for the king before them made, have full power, by their discretion, to hear and determine all such offences. Here are two statutes that are allowed to have given the deepest wound to the liberties of the people of England of any that I remember to have been made, unless it may be said that the statute made in the time of Henry 8th, by which his proclamations were to have the effect of laws, might in its consequence be worse. And yet we see the plausible pretences found out by the great men to procure these acts. And it may justly be said, that by these pretences the people of England were cheated or awed into the delivering up their ancient and sacred right of trials by grand and petit juries. I hope to be excused for this expression, seeing my lord Coke calls it (4 Inst.) 'unjust and strange act, that tended in its execution to the great displeasure of Almighty God, and the utter subversion of the common law.'

These, I think, make out what I alleged, and are flagrant instances of the influence of men in power, even upon the representatives of a whole kingdom. From all which, I hope, it will be agreed, that it is a duty which all good men owe to their country, to guard against the unhappy influence of ill men when entrusted with power, and especially against their creatures and dependents, who, as they are generally more necessitous, are surely more covetous and cruel. But it is worthy of observation, that though the spirit of liberty was

borne down and oppressed in England that time, yet it was not lost; for the parliament laid hold of the first opportunity to free the subject from the many insufferable oppressions and outrages committed upon their persons and estates by colour of these acts, the last of which being deemed the most grievous, was repealed in the first year of Hen. 8th. Though it is to be observed, that Hen. 7th, and his creatures, reaped such great advantages by the grievous oppressions and exactions, grinding the faces of the poor subjects, as my lord Coke says, by colour of this statute by information only, that a repeal of this act could never be obtained during the life of that prince. The other statute being the favourite law for supporting arbitrary power, was continued much longer. The execution of it was by the great men of the realm; and how they executed it, the sense of the kingdom, expressed in the 7th of Charles 1st, (by which the Court of Star-Chamber, the soil where informations grew rankest) will best declare. In that statute Magna Charta, and the other statutes made in the time of Edw. 3, which, I think, are no less than five, are particularly enumerated as acts, by which the liberties and privileges of the people of England were secured to them, against such oppressive courts as the Star-Chamber, and others of the like jurisdiction. And the reason assigned for their pulling down the Star-Chamber, is, That the proceedings, censures and decrees of the Court of Star-Chamber, even though the great men of the realm, nay, and a bishop too (holy man) were judges, had by experience been found to be an intolerable burthen to the subject, and the means to introduce an arbitrary power and government. And therefore that court was taken away, with all the other courts in that statute mentioned, having like jurisdiction.

I do not mention this statute, as if by the taking away the Court of Star-Chamber, the remedy for many of the abuses or offences censured there, was likewise taken away; no, I only intend by it to shew, that the people of England saw clearly the danger of trusting their liberties and properties to be tried, even by the greatest men in the kingdom, without the judgment of a jury of their equals. They had felt the terrible effects of leaving it to the judgment of these great men to say what was scandalous and seditious, false or ironical. And if the parliament of England thought this power of judging was too great to be trusted with men of the first rank in the kingdom, without the aid of a jury, how sacred soever their characters might be, and therefore restored to the people, their original right of trial by juries, I hope to be excused for insisting, that by the judgment of a parliament, from whence no appeal lies, the jury are the proper judges of what is false at least, if not of what is scandalous and seditious. This is an authority, not to be denied, it is as plain as it is great, and to say, that this act indeed did restore to the people trials by juries, which was not the practice of the Star-Chamber, but that it did not give the jurors any new authority, or any right to try matters of law, I say this objection will not avail; for I must insist, that where matter of law is complicated with matter of fact, the jury have a right to determine both. As for instance; upon indictment for murder, the jury may, and almost constantly do, take upon them to judge whether the evidence will amount to murder or manslaughter, and find accordingly; and I must say, I cannot see, why in our case the jury have not at least as good a right to say, whether our news-papers are a libel or no libel, as another jury has to say, whether killing of a man is murder or manslaughter. The right of the jury to find such a verdict as they in their conscience do think is agreeable to their evidence, is supported by the authority of Bushel's case,* in Vaughan's Reports, page 135, beyond any doubt. For, in the argument of that case, the chief-justice who delivered the opinion of the Court, lays it down for law: (Vaughan's Rep. p. 150.) That in all general issues, as upon non. cul. in trespass, non tort. nul disseizin in assize, &c. though it is matter of law, whether the defendant is a trespasser, a disseizer, &c. in the particular cases in issue, yet the jury find not (as in a special verdict) the fact of every case, leaving the law to the Court; but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately. It appears by the same case, that though the discreet and lawful assistance of the judge, by way of advice to the jury, may be useful, yet that advice or direction ought always to be upon supposition, and not positive and upon coercion. The reason given in the same book is, (page 144, 147.) Because the judge (as judge) cannot know what the evidence is which the jury have, that is, he can only know the evidence given in court; but the evidence which the jury have, may be of their own knowledge, as they are returned of the neighbourhood. They may also know from their own knowledge, that what is sworn in court is not true; and they may know the witnesses to be stigmatized, to which the Court may be strangers. But what is to my purpose, is, that suppose that the Court did really know all the evidence which the jury know, yet in that case it is agreed, That the judge and jury may differ in the result of their evidence, as well as two judges may, which often happens. And in page 148, the judge subjoins the reason, why it is no crime for a jury to differ in opinion from the Court, where he says, That a man cannot see with another's eye, nor hear by another's ear; no more can a man conclude or infer the thing by another's understanding or reasoning. From all which (I insist) it is very plain, that the jury are by law at liberty (without any affront to the judgment of the Court) to find both the law and the fact, in our case, as they did in the case I am speaking to,

* See it, vol. 6, p. 999.

which I will beg leave just to mention, and it was this: Mr. Penn and Mead being Quakers, and having met in a peaceable manner, after being shut out of their meeting-house, preached in Grace-Church-street in London, to the people of their own persuasion, and for this they were indicted; and it was said, That they with other persons, to the number of 300, unlawfully and tumultuously assembled, to the disturbance of the peace, &c. To which they pleaded, Not Guilty. And the petit jury being sworn to try the issue between the king and the prisoners, that is, whether they were guilty, according to the form of the indictment? Here there was no dispute but they were assembled together, to the number mentioned in the indictment; but, whether that meeting together was riotously, tumultuously, and to the disturbance of the peace? was the question. And the Court told the jury it was, and ordered the jury to find it so; for (said the Court) the meeting was the matter of fact, and that is confessed, and we tell you it is unlawful, for it is against the statute; and the meeting being unlawful, it follows of course that it was tumultuous, and to the disturbance of the peace. But the jury did not think fit to take the Court's word for it, for they could neither find riot, tumult, or any thing tending to the breach of the peace committed at that meeting; and they acquitted Mr. Penn and Mead.* In doing of which they took upon them to judge both the law and the fact; at which the Court (being themselves true courtiers) were so much offended, that they fined the jury 40 marks apiece, and committed them till paid. But Mr. Bushel, who valued the right of a juryman and the liberty of his country more than his own, refused to pay the fine, and was resolved (though at a great expence and trouble too) to bring, and did bring, his Habeas Corpus, to be relieved from his fine and imprisonment, and he was released accordingly; and this being the judgment in his case, it is established for law, That the judges, how great soever they be, have no right to fine, imprison, or punish a jury, for not finding a verdict according to the direction of the Court. And this, I hope, is sufficient to prove, that jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings in judging of the lives, liberties, or estates of their fellow subjects. And so I have done with this point.

This is the second information, for libelling of a governor, that I have known in America. And the first, though it may look like a romance, yet, as it is true, I will beg leave to mention it. Governor Nicholson, who happened to be offended with one of his clergy, met him one day upon the road; and as it was usual with him (under the protection of his commission) used the poor parson with the worst of language, threatened to cut off his ears, slit his nose, and at last to shoot him through the head. The parson, being a reverend man, continued all this time uncovered in the heat of the sun, until he found an opportunity to fly for it; and coming to a neighbour's house, felt himself very ill of a fever, and immediately writes for a doctor; and that his physician might be the better judge of his distemper, he acquainted him with the usage he had received; concluding, that the governor was certainly mad; for that no man in his senses would have behaved in that manner. The doctor unhappily shews the parson's letter: The governor came to hear of it, and so an information was preferred against the poor man for saying, He believed the governor was mad; and it was laid in the information to be false, scandalous and wicked, and wrote with intent to move sedition among the people, and bring his excellency into contempt. But by an order from the late queen Anne, there was a stop put to the prosecution, with sundry others set on foot by the same governor against gentlemen of the greatest worth and honour in that government.

And may not I be allowed, after all this, to say, that, by a little countenance, almost any thing which a man writes, may, with the help of that useful term of art called an innuendo, be construed to be a libel, according to Mr. Attorney's definition of it, that whether the words are spoke of a person of a public character, or of a private man, whether dead or living, good or bad, true or false, all make a libel; for according to Mr. Attorney, after a man hears a writing read, or reads and repeats it, or laughs at it, they are all punishable. It is true, Mr. Attorney is so good as to allow, after the party knows it to be a libel; but he is not so kind as to take the man's word for it.

[Here were several cases put to shew, that though what a man writes of a governor was true, proper, and necessary, yet, according to the foregoing doctrine, it might be construed to be a libel. But Mr. Hamilton, after the trial was over, being informed, that some of the cases he had put had really happened in this government, he declared he had never heard of any such; and as he meant no personal reflections, he was sorry he had mentioned them, and therefore they are omitted here.]

Mr. *Hamilton.* If a libel is understood in the large and unlimited sense urged by Mr. Attorney, there is scarce a writing I know that may not be called a libel, or scarce any person safe from being called to account as a libeller: for Moses, meek as he was, libelled Cain; and who is it that has not libelled the Devil? For, according to Mr. Attorney, it is no justification to say one has a bad name. Echard has libelled our good king William; Burnet has libelled, among many others, king Charles and king James; and Rapin has libelled them all. How must a man speak or write, or what must he hear, read, or sing? Or when must he laugh, so as to be secure from being taken up as a libeller? I sincerely believe, that were some persons to go through the streets of New York, now-a-days, and read a part of the

* See the Case, vol. 6, p. 951.

Bible, if it was not known to be such, Mr. Attorney, with the help of his innuendos, would easily turn it into a libel. As for instance, Is. xi. 16. "The leaders of the people cause them to err, and they that are led by them are destroyed." But should Mr. Attorney go about to make this a libel, he would read it thus: 'The leaders of the people' [innuendo, the governor and council of New-York] 'cause 'them' [innuendo, the people of this province] 'to err, and they' [the governor and council meaning] 'are destroyed' [innuendo, are deceived into the loss of their liberty]; which is the worst kind of destruction. Or if some persons should publicly repeat, in a manner not pleasing to his betters, the 10th and the 11th verses of the 56th chap. of the same book, there Mr. Attorney would have a large field to display his skill, in the artful application of his innuendos. The words are; 'His watchmen 'are blind, they are ignorant, &c. Yea, they 'are greedy dogs, that can never have enough.' But to make them a libel, there is, according to Mr. Attorney's doctrine, no more wanting but the aid of his skill, in the right adapting his innuendos. As for instance; 'His watch-'men' [innuendo, the governor's council and assembly] 'are blind, they are ignorant,' [innuendo, will not see the dangerous designs of his excellency.] 'Yea, they' [the governor and council meaning] 'are greedy 'dogs, which can never have enough' [innuendo, enough of riches and power.] Such an instance as this seems only fit to be laughed at; but I may appeal to Mr. Attorney himself, whether these are not at least equally proper to be applied to his excellency, and his ministers, as some of the inferences and innuendos in his information against my client. Then if Mr. Attorney is at liberty to come into court, and file an information in the king's name, without leave, who is secure, whom he is pleased to prosecute as a libeller? And as the crown law is contended for in bad times, there is no remedy for the greatest oppression of this sort, even though the party prosecuted is acquitted with honour. And give me leave to say, as great men as any in Britain have boldly asserted, that the mode of prosecuting by information (when a grand jury will not find *Bills vera*) is a national grievance, and greatly inconsistent with that freedom which the subjects of England enjoy in most other cases. But if we are so unhappy as not to be able to ward off this stroke of power directly, let us take care not to be cheated out of our liberties by forms and appearances; let us always be sure that the charge in the information is made out clearly, even beyond a doubt; for though matters in the information may be called form upon trial, yet they may be, and often have been found to be, matters of substance upon giving judgment.

Gentlemen, the danger is great, in proportion to the mischief that may happen through our too great credulity. A proper confidence in a court is commendable; but as the verdict (whatever it is) will be yours, you ought to refer no part of your duty to the discretion of other persons. If you should be of opinion, that there is no falsehood in Mr. Zenger's papers, you will, nay, (pardon me for the expression) you ought to say so; because you don't know whether others (I mean the Court) may be of that opinion. It is your right to do so, and there is much depending upon your resolution, as well as upon your integrity.

The loss of liberty, to a generous mind, is worse than death; and yet we know there have been those in all ages, who, for the sake of preferment, or some imaginary honour, have freely lent a helping hand to oppress, nay, to destroy their country. This brings to my mind that saying of the immortal Brutus, when he looked upon the creatures of Cæsar, who were very great men, but by no means good men: "You Romans," said Brutus, "if yet I may call you so, consider what you are doing; remember that you are assisting Cæsar to forge those very chains, which one day he will make yourselves wear." This is what every man (that values freedom) ought to consider: he should act by judgment, and not by affection or self-interest; for where these prevail, no ties of either country or kindred are regarded; as upon the other hand, the man who loves his country, prefers its liberty to all other considerations, well knowing that without liberty life is a misery.

A famous instance of this you will find in the history of another brave Roman, of the same name; I mean Lucius Junius Brutus, whose story is well known; and therefore I shall mention no more of it, than only to shew the value he put upon the freedom of his country. After this great man, with his fellow-citizens, whom he had engaged in the cause, had banished Tarquin the Proud, the last king of Rome, from a throne which he ascended by inhuman murders, and possessed by the most dreadful tyranny and proscriptions, and had by this means amassed incredible riches, even sufficient to bribe to his interest many of the young nobility of Rome, to assist him in recovering the crown; but the plot being discovered, the principal conspirators were apprehended, among whom were two of the sons of Junius Brutus. It was absolutely necessary that some should be made examples of, to deter others from attempting the restoring of Tarquin, and destroying the liberty of Rome. And to effect this it was, that Lucius Junius Brutus, one of the consuls of Rome, in the presence of the Roman people, sat judge, and condemned his own sons, as traitors to their country: and to give the last proof of his exalted virtue, and his love of liberty, he with a firmness of mind, (only becoming so great a man) caused their heads to be struck off in his own presence; and when he observed that his rigid virtue occasioned a sort of horror among the people, it is observed he only said: "My fellow-citizens, do not think that this proceeds from any want of natural affection: No, the death of the sons of Brutus can affect Brutus only; but the loss of liberty will affect

my country." Thus highly was liberty esteemed in those days, that a father could sacrifice his sons to save his country. But why do I go to heathen Rome, to bring instances of the love of liberty? The best blood in Britain has been shed in the cause of liberty; and the freedom we enjoy at this day, may be said to be (in a great measure) owing to the glorious stand the famous Hampden, and others of our countrymen, in the Case of Ship-Money,* made against the arbitrary demands, and illegal impositions, of the times in which they lived; who, rather than give up the rights of Englishmen, and submit to pay an illegal tax of no more, I think, than three shillings, resolved to undergo, and, for the liberty of their country, did undergo the greatest extremities in that arbitrary and terrible court of Star-Chamber; to whose arbitrary proceedings (it being composed of the principal men of the realm, and calculated to support arbitrary government) no bounds or limits could be set, nor could any other hand remove the evil but a parliament.

Power may justly be compared to a great river; while kept within its due bounds, it is both beautiful and useful; but when it overflows its banks, it is then too impetuous to be stemmed; it bears down all before it, and brings destruction and desolation wherever it comes. If then this is the nature of power, let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against lawless power, which, in all ages, has sacrificed to its wild lust, and boundless ambition, the blood of the best men that ever lived.

I hope to be pardoned, Sir, for my zeal upon this occasion: it is an old and wise caution, "That when our neighbour's house is on fire, we ought to take care of our own." For though, blessed be God, I live in a government where liberty is well understood, and freely enjoyed; yet experience has shewn us all (I'm sure it has to me), that a bad precedent in one government, is soon set up for an authority in another; and therefore I cannot but think it mine, and every honest man's duty, that (while we pay all due obedience to men in authority) we ought at the same time to be upon our guard against power, wherever we apprehend that it may affect ourselves or our fellow-subjects.

I am truly very unequal to such an undertaking, on many accounts. And you see I labour under the weight of many years, and am borne down with great infirmities of body; yet old and weak as I am, I should think it my duty, if required, to go to the utmost part of the land, where my service could be of any use, in assisting to quench the flame of prosecutions upon informations, set on foot by the government, to deprive a people of the right of remonstrating, (and complaining too) of the arbitrary attempts of men in power. Men who injure and oppress the people under their administration, provoke them to cry out and complain; and then make that very complaint the foundation for new oppressions and prosecutions. I wish I could say there were no instances of this kind. But to conclude; the question before the Court, and you, gentlemen of the jury, is not of small nor private concern; it is not the cause of a poor printer, nor of New York alone, which you are now trying: No! It may, in its consequence, affect every freeman that lives under a British government on the main of America. It is the best cause; it is the cause of liberty; and I make no doubt but your upright conduct, this day, will not only entitle you to the love and esteem of your fellow-citizens; but every man, who prefers freedom to a life of slavery, will bless and honour you, as men who have baffled the attempt of tyranny; and, by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbours, that to which nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth.

Here Mr. *Attorney* observed, that Mr. Hamilton had gone very much out of the way, and had made himself and the people very merry; but that he had been citing cases not at all to the purpose. He said, there was no such cause as Mr. Bushel's, or sir Edward Hale's, before the Court; and he could not find out what the Court or Jury had to do with dispensations, riots, or unlawful assemblies: all that the jury had to consider of, was Mr. Zenger's printing and publishing two scandalous libels, which very highly reflected on his excellency, and the principal men concerned in the administration of this government, which is confessed; that is, the printing and publishing of the Journals set forth in the information is confessed. And concluded, that as Mr. Hamilton had confessed the printing, and there could be no doubt but they were scandalous papers, highly reflecting upon his excellency, and the principal magistrates in the province; and therefore he made no doubt but the jury would find the defendant guilty, and would refer to the Court for their direction.

Mr. *Chief Justice.* Gentlemen of the jury, the great pains Mr. Hamilton has taken to shew how little regard juries are to pay to the opinion of the judges, and his insisting so much upon the conduct of some judges in trials of this kind, is done, no doubt, with a design that you should take but very little notice of what I may say upon this occasion. I shall therefore only observe to you, that, as the facts or words in the information are confessed, the only thing that can come in question before you is, whether the words, as set forth in the information, make a libel; and that is a matter of law, no doubt, and which you may leave to the Court. But I shall trouble you no further with any thing more of my own; but read to you the words of a learned and upright judge, in a case of the

* See it in this Collection, vol. 3, p. 826.

like nature. [Lord Chief Justice Holt, in Tutchin's Case.*]

"To say that corrupt officers are appointed to administer affairs, is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; for it is necessary for all governments that the people should have a good opinion of it; and nothing can be worse to any government, than to endeavour to procure animosities. As to the management of it, this has been always looked upon as a crime, and no government can be safe without it be punished."

Now you are to consider, whether these words I have read to you do not tend to beget an ill opinion of the administration of the government; to tell us, that those that are employed know nothing of the matter, and those that do know are not employed. Men are not adapted to offices, but offices to men, out of a particular regard to their interest, and not to their fitness for the places. This is the purport of these papers.

Mr. *Hamilton.* I humbly beg your honour's pardon; I am very much misapprehended, if you suppose what I said was so designed.

Sir, you know I made an apology for the freedom I found myself under a necessity of using upon this occasion. I said, there was nothing personal designed; it arose from the nature of our defence.

The Jury withdrew, and in a small time returned; and being asked by the clerk,

Whether they were agreed of their verdict, and whether John Peter Zenger was Guilty of printing and publishing the libels in the information mentioned?

They answered, by Thomas Hunt, their foreman, Not Guilty.

Upon which there were three huzzas in the Hall, which was crowded with people; and the next day I was discharged from my imprisonment.

City of New York, *ss.*

At a Common Council, held at the City-hall of the said city, on Tuesday the 16th day of September, A. D. 1735.—PRESENT, Paul Richards, esq. Mayor; Gerardus Stuyvesant, esq. Deputy Mayor; Daniel Horsemanden, esq. Recorder.—*Aldermen*, William Roome, esq. Simon Johnson, esq. John Walter, esq. Christopher Fell, esq. Stephen Bayard, esq. Johannes Burger, esq.—*Assistants*, Mr. Johannes Waldron, Mr. Ede Myer, Mr. John Moore, Mr. John Fred, Mr. Charles Le Roux, Mr. Evert Byvank.

Ordered, That Andrew Hamilton, esq. of Philadelphia, barrister at law, be presented with the Freedom of this Corporation: and that alderman Bayard, alderman Johnson, and alderman Fell, be a Committee to bring in a draught thereof.

City of New York, *ss.*

At a Common Council, held at the City-hall of the said city, on Monday the 29th day of September, being the feastday of St. Michael the Archangel, A. D. 1735.—PRESENT, Paul Richards, esq. Mayor; Daniel Horsemanden, esq. Recorder.—*Aldermen*, William Roome, esq. Simon Johnson, esq. John Walter, esq. Christopher Fell, esq. Stephen Bayard, esq. Johannes Burger, esq.—*Assistants*, Mr. Johannes Waldron, Mr. John Fred, Mr. Charles le Roux, Mr. Evert Byvank, Mr. Henry Bogert.

Stephen Bayard, Simon Johnson, and Christopher Fell, esqrs. aldermen, to whom it was referred to prepare the draught of the Freedom of this Corporation, to be presented to Andrew Hamilton, esq. make the Report thereon in the words following, (to wit) That they have prepared the form of the grant to the said Andrew Hamilton, esq. of the Freedom of the city of New York, in these words, (to wit.)

"City of New York, *ss.*

"Paul Richards, esq. the Recorder, Aldermen, and Assistants of the city of New York, convened in Common Council, to all to whom these presents shall come greeting. Whereas honour is the just reward of virtue, and public benefits demand a public acknowledgment: We therefore, under a grateful sense of the remarkable service done to the inhabitants of this city and colony by Andrew Hamilton, esq. of Pennsylvania, barrister at law, by his learned and generous defence of the rights of mankind, and the liberty of the press, in the case of John Peter Zenger, lately tried on an information exhibited in the supreme court of this colony, do, by these presents, bear to the said Andrew Hamilton, esq. the public thanks of the freemen of this Corporation for that signal service, which he cheerfully undertook under great indisposition of body, and generously performed, refusing any fee or reward: and in testimony of our great esteem for his person, and sense of his merit, do hereby present him with the Freedom of this Corporation. These are therefore to certify and declare, that the said Andrew Hamilton, esq. is hereby admitted, received, and allowed a freeman and citizen of the said city: to have, hold, enjoy, and partake of all the benefits, liberties, privileges, freedoms and immunities whatsoever, granted or belonging to a freeman and citizen of the same city. In testimony whereof, the Common Council of the said city, in Common Council assembled, have caused the seal of the said city to be hereunto affixed, this 29th day of September, A. D. 1735. By order of the Common Council.

WILLIAM SHARPAS, Clerk.

* See his Case, vol. 14, p. 1095.

"And we do further report, that sundry of the members of this corporation, and gentlemen of this city, have voluntarily contributed sufficient for a gold-box of five ounces and a half, for inclosing the seal of the said freedom; upon the lid of which, we are of opinion, should be engraved the arms of the city of New-York. Witness our hands this 29th day of Sept. 1735.

STEPHEN BAYARD.
SIMON JOHNSON.
CHRISTOPHER FELL."

Which Report is approved by this Court, and ordered, That the Freedom and Box be forthwith made, pursuant to the said Report; and that Mr. Sharpas, the common clerk of this city, do affix the seal of the same Freedom, and inclose it in the said Box.

Mr. Alderman Bayard going to Philadelphia, and offering to be the bearer, of the said Freedom to Mr. Hamilton; Ordered, That Mr. Sharpas deliver it to Alderman Bayard for that purpose; and that Alderman Bayard do deliver it to Mr. Hamilton, with assurances of the great esteem that this corporation have for his person and merit.

City of New York, *ss.*

At a Common Council, held at the City-hall of the said city, on Wednesday the 15th day of October, A. D. 1735.—PRESENT, Paul Richards, esq. Mayor; Daniel Horsemanden, esq. Recorder.—*Aldermen.* John Walter, esq. Simon Johnson, esq. William Roome, esq. Johannes Burger, esq.—*Assistants,* Mr. Johannes Waldron, Mr. Abraham De Peyster, Mr. Gerardus Beekman, Mr. Peter Stoutenburgh, Mr. Henry Bogert.

Ordered, That the Freedom granted by this Corporation to Andrew Hamilton, esq. with the Report of the Committee for preparing a draught of the same, and the order of this court thereon, may be printed. WM. SHARPAS.

Round on the lid of the box, mentioned in the abovesaid Report and Order, there are engraved not only the arms of the city of New York, but also this motto in a garter; "Demersæ Leges—timefacta Libertas—hæc tandem emergunt."

On the inner side of the lid of the box, shewing itself at the same time with the certificate of the freedom, there are engraven, in a flying garter, these words; "Non nummis, Virtute paratur."

As an incentive to public virtue, on the front of the rim of the said box, there is engraven a part of Tully's wish; "Ita eniqe eveniat, ut de republica meruit."

Which Freedom and Box were presented in the manner that had been directed, and gratefully accepted by the said Andrew Hamilton, esq.*

* In the celebrated Tract, intitled, "A Letter concerning Libels, Warrants, Seizure of Papers, &c. by The Father of Candour;" which has been ascribed to Lord Chancellor Camden, and also to Lord Ashburton, it is noticed that the Preface to Zenger's Trial contains many things very well worth reading.

REMARKS

ON THE TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL, WHO WAS LATELY TRIED AND ACQUITTED, FOR PRINTING AND PUBLISHING TWO LIBELS AGAINST THE GOVERNMENT OF THAT PROVINCE.†

Sir; It has been a common remark among those who have observed upon the capricious dispensations of fortune, that great events are

† "These Remarks were written by two eminent lawyers in one of our colonies in America, immediately after the publication of the Trial of Mr. Zenger, which it seems had been industriously spread over that part of the world, before it reached England.

"As the doctrines contained in that trial, or rather in the speech of Mr. Hamilton, are of so new a cast, and so absolutely contradictory to all the resolutions and judgments that have been settled and established for so many ages, and by judges of the highest reputation, and most unquestionable characters, for their integrity, virtues and abilities, it could not be imagined so wild and idle an harangue could have had any weight, or have met with any reception here, where the laws relating to libels have been so often canvassed, and are generally so well understood; and therefore the person to whom these Remarks were sent, never thought of making any other use of them than to satisfy his own curiosity, and that of his friends,

"But seeing, to his great surprize, that this extraordinary declamation has been mentioned with an air of applause and triumph in several news-papers, as striking out some new lights with regard to the doctrine of libels; and, upon the credit of that recommendation, the whole Trial not only twice printed here, but retailed out in scraps in the public news-papers, whereby many well meaning people may be deceived, and led into wrong notions concerning the laws of their country in this point: He has thought fit to communicate these Remarks to the public, in order to remove any mistakes or errors that persons may fall into for want of an adequate judgment in these matters; and the rather, because if such false opinions should happen to influence the conduct or practice of any, the consequences may be very dangerous; it being an established maxim in our law, that neither ignorance nor mistake is an excuse to any one who has broke it, from the penalty of it." Preface to the Remarks.

often produced by instruments that are not seemingly adequate; nay, that the same apparent causes have quite contrary effects; and the road that leads one man to wealth, honour, and power, sometimes carries another to poverty, infamy, and ruin. Hence comes that confused distribution of axes and coronets, halters and ribbons, which history displays by numerous shocking examples; and thus it is, that fate seems to play at cross-purposes with mankind; or to speak in Scripture-phrase, in this sense as well as many others, "the wisdom of this world is foolishness."

I find myself drawn into these grave reflections, by reading the Trial of John Peter Zenger, at New-York, upon an information for printing and publishing a libel. This piece, it seems, has been lately printed there, and was put into my hand the other day by a friend, who has both a general acquaintance and a correspondence with the northern colonies, as a rare production, containing many things new and surprising. And, in truth, I must say it affords a lively specimen, in miniature, of the justness of the foregoing remarks: I mean that part of it which is attributed to Andrew Hamilton, esq. of Philadelphia, barrister at law; together with the sequel, describing the munificent behaviour of the citizens, in common council assembled, to the learned gentleman, for his singular performance on that occasion.

I must at the same time assure you, that if Zenger's trial had been printed by order of the Court that tried him, or from a copy taken by a private hand at the trial, or by any other means that excluded Mr. Hamilton's approbation or privity, I should have enjoyed my own opinion without troubling you or any body else about it, and had the charity to resolve all the extravagancies that occur throughout his declamation, into a right discernment of the people he talked to, and a dexterity in captivating them, which had its effect in the acquittal of his client. But when a gentleman of the bar takes the pains to write over a long discourse (he being the only lawyer, of either side, who gave the printer his notes), in order to send it abroad through the world, as a specimen of his abilities, sentiments and principles; as a solemn argument in the law, fit to see the light, and abide the test in all places; and, above all, as a task of duty, which he thought himself bound to perform, even by going to the utmost parts of the land for the purpose; and all this, without fee or reward, under the weight of many years, and great infirmities of body: When a barrister, I say, thus becomes a volunteer for error, and presumes to obtrude bad law and false reasoning upon the sense of mankind, because the sage magistrates of New-York have put their seal to it; I think myself at liberty, without using any other apology, to exercise the judging privilege of a reader, since the gentleman himself has put me into the possession of it.

In doing this, I shall not in the least gratify a vain itch of writing; for there are no extraordinary talents necessary for refuting gross absurdities; but I shall have the honest merit of endeavouring to undeceive such of my fellow-subjects in the plantations as may, from the late uncommon success of the doctrine, mistake the liberty of the press for a licence to write and publish infamous things of their superiors, and of all others, at their pleasure, provided they write and publish nothing but what is true. In the next place, I would preserve, as far as I am able, the dignity of the profession of the law in these remote parts of the British dominions; and prevent its learned professors in England, who probably will see the renowned piece above mentioned (if we may judge from the industry used in dispersing it), from suspecting that all their American brethren use the like arts to gain popularity and honourable rewards. The former, having the advantage of going daily to the great school of law at Westminster, are already apt enough to think meanly of the accomplishments of the latter, who are far removed from instruction; and their opinion must be strongly confirmed in this respect, if such a rhapsody, as was uttered at New-York, should not only be applauded and rewarded publicly there, but printed and scattered in reams through the other colonies, without being followed by a suitable animadversion.

Neither will it be amiss to take some notice, in this place, of the quackery of the profession in general, without any particular application, as it has been practised with vast success in some of our colonies. You will often see (if common fame may be trusted) a self-sufficient enterprising lawyer, compounded of something between a politician and a broker, who, making the foibles of the inhabitants his capital study, and withal taking advantage of the weakness of his judges, the ignorance of some of his brethren, the modesty of others, and the honest scruples of a third sort (without having any of his own), becomes insensibly an oracle in the courts, and acquires by degrees a kind of dominion over the minds, as well as the estates of the people; an influence never to be obtained but by the help of qualities very different from learning and integrity. Whenever such a man is found, the wonder is not great, if, from a long habit of advancing what he pleases, and having it received for law, he comes in time to fancy that what he pleases to advance is really law.

I have taken the pains, during this short vacation between our monthly courts, candidly to examine this new system of libels, lately composed and propagated on the continent; the discovery of which cost the good city of New-York five ounces and a half of gold, a scrip of parchment, and three Latin sentences. My intention is to consider things, not persons, having no other knowledge of the gentleman principally concerned, than what is derived from the paper now before me; and being wholly a stranger to the merit of those disputes that gave rise to the prosecution of this printer.

Much less shall I turn advocate for any lawless power in governors; God forbid I should be guilty of such a prostitution, who know by experience of what stuff they are commonly made: the wrong impressions they are apt to receive of themselves and others; their passions, prejudices, and pursuits; though when all reasonable allowances are made for certain circumstances that attend their mission from home, and their situation abroad, a considerate person may be tempted to think—it is well they are no worse than they are.

But to come to my remarks on Mr. Zenger's trial.

In considering the Defence made for the defendant (Mr. Zenger) by his counsel (Mr. Hamilton), upon Not Guilty pleaded to an information for printing and publishing a libel, it is not to the purpose to inquire how far the matters charged in the information are in their nature libellous; nor whether the innuendoes are properly used, to apply the matters to persons, things and places. It is only necessary to examine the truth of this single proposition, upon which the whole Defence is grounded, and to which the several parts of it refer; namely, That the several matters charged in the information are not, and cannot be libellous, because they are true in fact.

This is the cardinal point upon which the learned gentleman's whole argument turns, and which he lays down, over and over, as the first principle that governs the doctrine of libels; and accordingly he confesses the printing and publishing of the papers laid in the information, and puts it upon the king's counsel to prove the facts contained in them to be false; alleging, at the same time, that, unless that were done, the defendant could not be guilty; but if the same were proved to be false, he would own the papers containing them to be libels. To this, it seems the Attorney General answered, that a negative is not to be proved; and the other replied in these words, which I choose to set down, that I may not be thought to do him wrong—"I did expect to hear that a negative cannot be proved; but every body knows, there are many exceptions to that general rule: For if a man is charged with killing another, or stealing his neighbour's horse; if he is innocent in the one case, he may prove the man said to be killed to be still alive; and the horse said to be stolen never to have been out of his master's stable; &c. and this, I think, is proving a negative." Now, I must think, that it is strange a gentleman of his sagacity, who owns he was prepared for the objection, could not yet hit upon some of these many exceptions which every body knows; for he does no more than give two instances of one affirmative being destroyed by another, that infers a negative of the first; at which rate most negatives may be proved, and then the old rule may be discarded. Thus, if it is shewn that a man is alive, it follows clearly that he was not killed; and if a horse is proved to have been always in his master's stable (for this is what must be understood of his being never out of the stable), it certainly follows that he could not be stolen. So that, according to this new scheme of proof, he who is accused of killing a man, or stealing an horse, is to be put upon proving that he did not kill or steal, because it is possible that such proof may be had sometimes: And so, in the principal case, if a question arises whether a certain magistrate has done particular acts of injustice or not, the method is to shew that he did not do such acts, not that he did them. I have touched upon this, not for its importance, but as a specimen of the learned barrister's manner of reasoning, and of the spirit with which he sets out from the begining.

At length however he takes the *onus probandi* upon himself; and rather than the thing should go unproved, generously undertakes, at his client's peril, to prove the matters, charged in the information as libellous, to be true. But I would be glad to know, by the way, how this undertaking gentleman could have proved the truth of divers facts contained in the paper which the defendant published, supposing the Court had been so much overseen as to let him into a proof of this sort. Could he prove for example, that judges were arbitrarily displaced, and new courts erected, in the province of New York, without consent of the legislature? For, I am credibly informed, there never was a pretence or surmise of more than one judge being displaced, or more than one court erected, under Mr. Cosby's administration, both which happened upon one and the same occasion. Now I would not have this esteemed a captious exception, when I have to deal with a man of law, who must or ought to know, that, if such a justification as he offered were at all allowable, it ought to be full and express, so as to leave no room for a libeller to multiply and exaggerate facts at his pleasure, when he is disposed to traduce persons in authority; there being a manifest difference between a single act of power without or against law (from which perhaps few governments have been free), and an habitual abuse of power in repeated instances of the same species. I would further ask, how he could prove, that the law itself was at an end, and that trials by juries were taken away when a governor pleased; for, if I mistake not, he was at that time speaking to a jury in a regular court of law, and in a prosecution which the governor had much at heart (as the gentleman himself insinuates), and would have been highly pleased to convict his client; yet would not attempt it, but in the ordinary course of trial by a jury; and then too, could not find a jury that would convict him. I think I am warranted in putting these questions, even by the authority of the barrister himself, who says, "Truth ought to govern the whole affair of libels, and yet the party accused runs risk enough even then; for if he fails of proving every tittle he has wrote, and to the satisfaction of the court and jury too, he may find to his cost," &c.

But for the present, I will suppose Mr. Hamilton was able to prove all these things; nay, that the jury knew them all to be true. I will go further, and allow, that juries in criminal cases may determine both law and fact, when they are complicated, if they will take such a decision upon their consciences (which is almost the only point in which I can have the honour of agreeing with him); yet, after all these concessions, the main question rests still between us, viz. Whether a writing can be a libel, in legal acceptation, if the matter contained in it be true? He is pleased, indeed, to express his dislike of infamous papers, even when they are true, if levelled against private vices and faults; and in this case he calls them base, unworthy, scandalous, unmanly and unmannerly. But surely it might be expected, when a point of law was in question, that he would have told us, whether they were lawful or unlawful, innocent, or criminal, since these last are the only epithets that were relative to his subject, though the first might have their weight in a sermon or moral essay. But, it is plain, he was aware of the consequence of being explicit upon this head; for had he owned such writings to be lawful, because true, he would have alarmed the common sense of mankind, by opening a door for exposing at mercy the frailties, vices, defects and misfortunes of every person, high and low, which must inevitably destroy the peace of families, and beget ill blood and disorders. If, on the other hand he had acknowledged such writings to be unlawful, inasmuch as they concerned private miscarriages and transactions; but that every man might write as much truth as he pleased about the administration of the government, not only by pointing out faults and mistakes, but by publishing his own comment and inferences, in order to fill the minds of the people with all the jealousies and apprehensions his imagination can form; it must have shocked men of understanding to be thus told, that the law had provided against private quarrels and breaches of the peace, occasioned by virulent writing; but had taken no care to prevent sedition and public disturbance arising from the same cause.

His favourite position, however, was to be maintained at all events; and therefore, when the Chief-justice rightly instructed him, that he could not be admitted to give the truth of a libel in evidence, that the law was clear that he could not justify a libel; for it is nevertheless a libel, though it is true; the discerning gentleman was pleased to understand by the word justify, a justification by plea, as it is in the case of an indictment for murder, or an assault and battery: there (says he) the prisoner cannot justify, but plead Not Guilty; yet in murder, he may prove it was in defence of his life, his house, &c. and in assault and battery, he may give in evidence, that the other party struck first; and in both these cases he will be acquitted.

If the party in either case is acquitted, the reason is, I presume, because the matter given in evidence amounts to a justification in law of the fact charged on him, and is equivalent to a confession and avoidance in pleading. In like manner, if truth be a sufficient justification of a libel, the defendant will be acquitted upon proving the contents of his paper to be true. Now let it be observed, that the words of the book which the chief-justice relied on are these:——It is far from being a justification of a libel, that the contents thereof are true—since the greater appearance there is of truth in any malicious invective, so much the more provoking it is. That this is good law, I hope I shall be able to shew fully hereafter, as I shall shew, in the mean time, that it is an express authority against the well-read barrister, who declares, he has not in all his reading met with an authority that says, he cannot be admitted to give the truth in evidence, &c.

He seems to take it for granted (and I shall not dispute it with him now) that matter of justification cannot, in any case, be pleaded specially to an indictment of assault or murder; but the party is to take advantage of it in evidence upon Not Guilty pleaded. Let it be so; yet still this matter must be a sufficient justification, or the party can have no benefit from it any way. In an action of assault and battery, where the first assault must be pleaded specially; the matter of justification is just the same, as in an indictment for the same offence, where it must be given in evidence upon the general issue. I ask then, Whether the first assault is a justification in an indictment of assault and battery? If the barrister should answer negatively, such answer is against all sense, for the party is acquitted by virtue of the justification only. If he should answer affirmatively, he is inconsistent with himself; for he has but just affirmed that when the book says, truth is no justification, it must be understood of a justification by plea, by which he must mean that nothing else is a justification but what is pleaded, or he must mean nothing at all. For the words of the book are—it is far from being a justification, &c. it is not said,—you are far from being at liberty to plead it in bar. In truth, the author is not there speaking of the forms and rules of proceedings upon libels, (1 Hawk. chap. 73, § 5, 6, 7,) but upon the substance and nature of the crime, what shall and what shall not excuse or justify it. This is manifest from the reason subjoined to support his assertion, viz. Since the greater appearance there is of truth, &c. which is a solid reason grounded on the wisdom of the law, which punishes libels even against private persons, as public offences, because they provoke men to acts of revenge and breaches of the peace. I hope it will not be said that a libel is less provoking, because the truth of it is to be given in evidence, than if it was to be pleaded in bar.

But all this is Star-chamber doctrine with the barrister, and the very mention of that court serves him for an answer to every thing,

for which he has no other answer; because the memory of that tribunal is justly detested on account of many illegal and exorbitant proceedings. No; this is the authority of Mr. serjeant Hawkins (though he uses marginal references to some Star-chamber cases), whose name is too great to receive any addition from this paper, and who, after a long and studious search in the crown-law, laid down this proposition for law at the time he wrote his book; and I believe it will appear in the sequel that he was not mistaken. And now I come to join issue with the barrister upon this point, whether Mr. Serjeant or he is in the right; or, in other words, whether falsity in fact be essential to a libel, so that the truth of the fact may be given in evidence to prove a writing to be no libel.

He maintains the affirmative of the question, both from what he understands to be the authorities in the case, and from the reason of the thing. All which shall be considered in their order.

The authorities cited by Mr. Hamilton to support the proposition formerly stated, consist principally of four cases, which I shall consider in the order as they were produced.

The first is the case of John de Northampton, 18 Edw. 3, 3 Inst. 174, which he observes does not appear to have been a case upon an information, but that he has good grounds to say it was upon an indictment. This is what I shall not contest with him, because it is not material, or indeed easy to be determined, without seeing the record; though I conceive there are grounds to say it was not upon an indictment, as was the case of Adam de Ravensworth, mentioned by lord Coke in the same chapter. The case, however, stands thus: 'John de Northampton, an attorney of the 'King's-bench, wrote a letter to one Ferrers, 'one of the king's council, that neither sir William Scot, a chief-justice, nor his fellows the 'king's justices, nor their clerks, any great 'thing would do by the commandment of our 'lord the king, &c. which said John being 'called, confessed the letter, &c. Et quia 'prædictus Johannes cognovit dictam literam per se scriptam Roberto de Ferrers, 'qui est de concilio Regis, quæ litera continet 'in se nullam veritatem: Prætextu cujus Dom. 'Rex erga Curiam et Justiciarios suos habere 'posset indignationem, quod esset in scandalum Justic. et Curiæ. Ideo dictus Johannes 'committitur, &c.' Here says the barrister, by this judgment it appears the libellous words were utterly false, and there the falsehood was the crime, and is the ground of the judgment. For my own part, I can neither see truth nor falsehood in the words at the time they were wrote, for they refer to a future contingency that might, or might not be as he said; and in this respect, they were the same as if the man had said, the roof of Westminster-hall would fall upon sir William Scot and his fellows. Besides, the words taken by themselves have no ill meaning; for I imagine it will be allowed that most of the great things which judges do as judges, are such as ought neither to be done, nor left undone by the king's commandment. Where then was the offence? The record, I think, shews that in the following words: "prætextu cujus Dom. Rex erga Curiam et Jus- "tic. suos habere posset indignationem." &c. "Ideo dictus Johannes committitur," &c. It is observable, that the author of this letter was an attorney of the Court, and by the contents thereof he presumes to undertake for the behaviour of the judges in some great matters that concerned their office. The letter was addressed to a person who was of the king's council, and might possibly communicate the contents of such a letter to the king; the consequence of which might naturally be, that "Dom. Rex habere posset indignationem ergo "Curiam," &c. for great things were sometimes done, in those days, by the king's commandment; and the judges, besides, held their posts at will and pleasure.

The words "quæ litera continet in se nullam veritatem," were therefore proper for the judges to insert, in order to acquit themselves to the king; but they are no more the ground of the judgment than these other words, "quæ est de Concilio Regis;" both being only incidental clauses that come in by way of description; for it is not said, "Quia litera prædicta continet in se nullam veritatem." After all, I would not have this construction of the case, plain and natural as it is, pass merely upon my own credit; for I shall shew that this case was so understood by one of the greatest lawyers of his time, before lord Coke's 3d Inst. appeared in the world.

21 Jac. B. R. Tanfield v. Hiron. Godbolt 405, 6.

The plaintiff brought an action upon the case against the defendant, for delivering of a scandalous writing to the prince, &c. Noy for the plaintiff cited, 18 Ed. 3, a letter was sent to Ferrers one of the king's council, the effect of which was, that Scot chief-justice, and his companions of the same bench, would not do a vain thing at the command of the king; yet because he sent such a letter to the king's council, although he spake no ill, yet because it might incense the king against the judges, he was punished. If no ill was said, will it be pretended that the falsehood of what was said could be a reason for punishing a man? Is it not ridiculous to say, that the falsehood of innocent or insignificant words can be criminal? This book, therefore, follows the record of Northampton's case, and says, because it might incense the king against the judges, he was punished; which is almost a translation of 'prætextu cujus,' &c. which was the ground of the judgment, 'Ideo committitur.'

The next case which the barrister called to his aid, is that of the Seven Bishops.* And here he relies on a flourish of one of the counsel for the bishops, and a dubious expression of

* See it in this Collection, vol. 12, p. 183.

one of the judges, separated from the rest of his discourse.

Sir Robert Sawyer, it is true, says, "Both the falsity of it (the libel) and that it was malicious and seditious, are all matters of fact, which they (the king's counsel) have offered to the jury no proof of," &c. This, I must confess, proves one point to which the barrister adduced it, viz. that he was not the first who insisted that to make a writing a libel, it must be false. And when I have allowed this, I may almost venture to say, it is the only point he does prove from the beginning to the ending of his long elaborate speech.—Let me, however, oppose to this the reply of sir Thomas Powis, in these words: "Whether a libel be true or not, as to the matter of fact; was it ever yet permitted in any court of justice to be made a question, whether the party be punishable for it? And therefore I wonder to hear these gentlemen say, that because it is not a false one, therefore it is not a libel." Fol. 382.

Mr. Justice Powel also does say, that to make it a libel, it must be false; it must be malicious; and it must tend to sedition. Upon which words of this learned and worthy judge, I would not presume to offer any comment except that which other words of his own afford, that plainly shew in what sense he then spoke. His subsequent words are these: "They," the bishops "tell his majesty, it is not out of averseness to pay all due obedience; nor want of tenderness to their dissenting fellow-subjects; but because they do conceive the thing that was commanded them, was against the law of the land. They say, they apprehend the Declaration is illegal, because it is founded on a dispensing power. I do not remember in any case in all our law, that there is any such power in the king; and the case must turn upon that. In short, if there be no such dispensing power in the king, then that can be no libel which they presented to the king, which says that the Declaration being founded upon such a pretended power, is illegal." So that the judge put the whole upon that single point, whether it be true that the king had such a dispensing power, or not; which is a question of law, and not of fact; and accordingly the judge appeals to his own reading in the law, not to witnesses or other testimony, for a decision of it. In truth, the Petition of the Bishops is not capable of having falsehood or truth applied to it in any other sense, there being nothing else affirmed or denied in it, but that they thought they could not do what was commanded them, because it was against the law. This was the behaviour, these were the sentiments of that upright judge, that gained him so much honour among all good men, as the barrister takes notice; not any opinion of his, that the contents of a libel must be false in fact, to make it a libel; as he would unfairly insinuate.

Sir Samuel Barnardiston's case is the third that is touched upon; and here too the gentleman finds nothing that can be strained to his purpose, but the defendant's counsel insisting on the want of proof to the malice and seditious intent of the author. He seems to have forgot that the same gentleman insisted also to have it proved, that the defendant was a person of a turbulent and unquiet spirit, because these words were set forth in the information; and he takes no manner of notice how all this was answered, which I must now do for him, in the words of the Court: "Certainly the law supplies the proof, if the thing itself speaks malice and sedition. As it is in murder; we say always in the indictment, he did it by the instigation of the devil: can the jury, if they find the fact, find he did it not by such instigation? No, that does necessarily attend the very nature of such an action or thing. So in informations for offences of this nature, we say, he did it falsely, maliciously, and seditiously, which are the formal words; but if the nature of the thing be such as necessarily imports malice, reproach and scandal to the government, there needs no proof but of the fact done; the law supplies the rest." How shall any man prove another person's malice, which is a thing that lies only in a man's mind? How should any man know that I am malicious against the government, but by my actions? These words, indeed, were pronounced by the chief justice Jefferies, who was then the mouth of the Court; but though he was really an intemperate judge, (or a monster, as the barrister, in his bar-language, delights to call him) yet I may safely refer it to all men of law, whether these words could have discredited the best mouth that ever spoke upon that bench.

An instance of this sort may not be impertinent, where a chief justice (who was no monster) addresses himself to a jury, that was trying a libel in this manner: "I will not repeat the particulars to you, only something to what the defendant has said, that you may not be misled. He says, it does not appear that he did it maliciously or knowingly. There are some things that you that are of the jury are not to expect evidence for, which it is impossible to know but by the act itself. Malice is conceived in the heart; no man knows it, unless he declares it: as in murder, I have malice to a man; no man knows it. I meet this man and kill him; the law calls this malice. If a man speak scandalous words against a man in his calling or trade, he lays his action, malice; though he cannot prove it but by the words themselves; you may see, there is malice supposed to a private person in that slander, much more to the king and the state."

Tutchin's case, the barrister does not properly cite, but endeavours to answer as a case urged against him by the king's counsel; and therefore I shall observe upon it in another place.

But the case of cases is still behind, which he reserved for the last, to make the point clearer on his side, than all the rest put together could do. It is Fuller's case. And it deserves notice, that although Fuller was charged with writ-

ing a libel, yet that was not the gist of the information. He was, in truth, prosecuted for *being* a cheat and impostor, by order of the House of Lords, as the king's counsel declare in the opening.

The information accordingly sets forth, "That W. F. intending the late king William and his subjects to deceive, and to get several great sums of money fraudulently and deceitfully from the said king, concerning a correspondency between divers officers and subjects of the said late king, and the late king James, falsely pretended to be had; did write and print a libel, intituled, Original Letters, &c. with the deposition of T. J. and T. F. esqrs. proving the corruption lately practised in this nation; and the said W. F. afterwards did publish, utter, and for truth affirm, the said several false and scandalous libels, without any lawful authority; whereas in truth, the said T. J. did not depose, upon his oath, as is contained in the said false and scandalous libel; but the said scandalous libels are false, feigned, and altogether contrary to truth, &c." Here it is manifest he was accused of a cheat, in forging the correspondence and the depositions just mentioned, with a design of getting money by his pretended discovery. And hence it comes, that the judge very properly asks him, "Have you any witnesses? If you take upon you to write such things as you are charged with, it lies upon you to prove them true, at your peril. How came you to write these books that are not true? If you have any witnesses, produce them." Thus said and thus did that great man, lord chief justice Holt; but not upon a trial of the like kind with Mr. Zenger's, as his counsel would have it thought. For, in this case, the cheat and the imposture was the offence, which consisted wholly in the falsity; that is, in affirming such things for realities, when they were nought but fictions. On the contrary, had he been able to prove those letters and those depositions to be authentic, the discovery would have been valuable, and might intitle him perhaps to favour and protection, instead of punishment, however irregular he was in taking such a method to publish matters of that high consequence. After this, let the learned barrister, in all his reading, shew an information or indictment for a libel, where the falsity is assigned in form with an *ubi re vera*, as the foundation of the offence, which is done in Fuller's case; and then I will acknowledge, that the questions put here by lord Holt would have been proper, upon the trial of his client.

This is the sum of the barrister's law-cases. And is it not high time to ask, whether such grossmisrepresentations of the books can proceed from ignorance or disingenuity? Be that as it will, it might certainly be expected, that a proposition, advanced with so much assurance, by a man of years and reading, should have been supported by some one authority in point, rather than by a series of low prevarication and quibble. Could he not find, in all the book-cases and trials at large, concerning libels (which are sufficient of themselves to make a large volume,) one example of proof being received to the truth or falsity contained in a libellous writing? Indeed, there is nothing like it to be found; though the occasions have been many, where such proof might be had, if it were proper; nay, where the truth of the thing was notorious to all men, and yet no question ever moved concerning it. This shall fully appear in the sequel.

If any thing can be necessary further to expose Mr. Hamilton's doctrine of libels, after answering his own cases, it is only to subjoin some others, that will shew how much he is mistaken in almost every thing he has offered on the subject. I shall therefore mention a very few, that will bear a particular application to his crude notions, without entering into a multitude of others, to tire the reader.

16 Car. 2, the King *v.* Pym, 1 Sid. 219, B. R.

Pym was indicted at Exeter for a libel, which he delivered to a parson to be published in church there, and was to this effect: "You are desired to bewail the sodomitry, wickedness, whoredom, lewdness, that is of late broken out in this formerly well-governed city; that God would turn their hearts from committing those wickednesses which go unpunished by the magistrates." Pym confessed the indictment, and was fined 100*l.* He afterwards brought a Writ of Error, and assigned for error, that this was no offence, because though he says, go unpunished by the magistrates; yet he does not say that the magistrates knew of it, and wickedness unknown cannot be punished. It was answered by the Court, that this contains matter of great scandal to the government of the city; for it makes the late government better than the present, &c. Hide, Twisden, Keelyng, Windham, Just.

I have pitched upon this case, because the barrister is fond of comparing the plantations to large corporations; and he will find here, that even those are not left to the mercy of libellers, although they do not put in a claim to the sacred rights of majesty: and that a misbehaviour of this kind to the magistrates of a corporation is not entirely innocent, because it is not to be judged of, or punished, as a like undutifulness would be to our sovereign.

This case was adjudged about four years after the Restoration, when the memory of the preceding usurpation was fresh in every body's mind. It is strange, therefore, Mr. Pym did not put himself on his trial at Exeter; for it was evident, beyond contradiction, to the people of that age from their own knowledge, as it is now to us from history, that the wickedness specified in the libel was restrained by a stricter hand before, than after the Restoration. But this notorious truth, it seems, did not avail Mr. Pym.

22 Car. 2, the King *v.* Saunders. Raym. 2C1, B. R.

Information for writing a scandalous libel to H. Rich, who was indebted to him, and kept

him out of his money three years by obtaining a protection, and at length getting into the prison of the King's-bench. Saunders wrote him a letter, wherein he tells him, That if he had any honesty, civility, sobriety, or humanity, he would not deal so by him; and that he would one day be damned, and be in hell for his cheating; and cited several places of Scripture to make good his allegations. The defendant was found guilty, and moved in arrest of judgment, that the substance of the letter is not scandalous, but impertinent and insignificant, &c. Cur. The letter is provocative, and tends to the incensing Mr. Rich to break the peace. The Court adjudged the letter scandalous, and fined him 40 marks. Keelyng, Twisden, Rainsford, Moreton, Just.

I would intreat the clear-sighted barrister to look carefully into the words of this libel, and try if he can discover any truth or falshood in them that was capable of proof. And I must remark upon both these cases, that though they were adjudged in the reign of king Charles 2, yet neither of them was upon a state-prosecution, or at a time when the spirit of plots and factions had infected the courts of justice; but they remain unquestionable authorities at this day.

The case of Tutchin is strong against him; a case adjudged since the Revolution, before that learned and upright judge sir John Holt, and plainly shews the fallacy that runs throughout his whole argument.

The points insisted on by this chief justice, in his charge to the jury, were these: "To say that corrupt officers are appointed to administer affairs, is certainly a reflection on the government. If people should not be called to an account for possessing the people with an ill opinion of the government, no government can subsist: Now you are to consider, whether these words I have read to you do not tend to beget an ill opinion of the administration of the government; to tell us, that those that are employed know nothing of the matter, and those that do know are not employed. Men are not adapted to offices, but offices to men, out of a particular regard to their interest, and not to their fitness for the places. This is the purport of these papers." If this was the purport of the papers, and so criminal as hath been just said, it is amazing surely, that Mr. Tutchin did not offer to prove the truth of these allegations, and thereby take out their sting! Could not he possibly think of as many corrupt or incompetent officers, ecclesiastical, civil, or military in England, preferred by interest rather than merit, as there were judges displaced and courts erected in New-York? Or if he was restrained, by the hard-hearted judge, from disporting himself in this pleasant and spacious field, could he not apply to the private knowledge which the jurors (as well as the rest of mankind) had of these matters? For I imagine it will be allowed, that if no instances of this sort could be shewn at the time of Tutchin's trial, it was the only period within the memory of man, or the reach of history, that wanted the like.

But the misfortune was, the poor man was not blessed with such skilful counsel as is to be had in Philadelphia, to think of these good things for him; otherwise you might have heard an alert advocate (after returning thanks to his lordship for nothing) address himself to the jury in this or the like eloquent strain: "Then, gentlemen of the jury, it is to you we must appeal for witnesses to the truth of the facts we have offered, and are denied the liberty to prove: the law supposes you to be summoned out of the neighbourhood where the fact is alleged to be committed; and the reason of your being taken out of the neighbourhood is, because you are supposed to have the best knowledge of the fact that is to be tried. And were you to find a verdict against my client, you must take upon you to say, the papers referred to in the information, and which are proved to be written and published by us, are false, scandalous, and seditious. You are citizens of London, honest and lawful men, and the facts which we offer to prove were not committed in a corner; they are notoriously known to be true. And as we are denied the liberty of giving evidence to prove the truth of what we have published, I will beg leave to lay it down as a standing rule in such cases, that the suppressing of evidence ought always to be taken for the strongest evidence; and I hope it will have that weight with you. Lay your hands upon your hearts, gentlemen, and recollect: do none of you know, nay, do not all of you know, certain persons, who shall be nameless, that have been lately promoted, by favour and interest, to places of trust and profit, both in church and state, army and navy, whom you must know and believe in your consciences, to be ill men, and no way qualified for such preferment; as my sagacious client has most seasonably remonstrated to the neighbours, by virtue of that right which every free-born subject hath of publishing his complaints, when the matters so published can be supported with truth?" But is lord Holt asleep all this time? Can any reasonable man, who has but common notions of judicature, imagine that this great judge would suffer such trash as this to be thrown out in any court where he sat in judgment? But what must he have said, if the libeller before him had offered to prove, that the law itself was at an end; that trials by juries were taken away when a minister pleased; that no man could call any thing his own, or enjoy any liberty, longer than those in the administration would condescend to let him do it? Would he have said, that these things did not tend to possess the people with an ill opinion of the government; and that governments might well subsist, though men should not be called to an account for publishing the like? Or would he have said, it was no matter what opinion the people had

of the government, nor whether it subsisted or not, provided these assertions were true; and so have discharged the man as a publisher of precious and useful truths, to put the neighbours on their guard?

But here also the barrister lays hold of a random question, put by one of the king's counsel to Mr. Montague, who was for the defendant, and was then touching upon the affairs of the navy: Saith the former, Will you say they are true? Now the latter had hinted as much as that these things were true; but did it with that caution which a man of skill uses, when he would say something in support of a lame cause, but don't care to press an impropriety too far. For that learned gentleman was very sensible, that if he had presumed to insist expressly on the truth of the matters contained in his client's papers, a severe reprimand was the best thing that could have befallen him. His words are these: "Nobody can say, that we never had any mismanagements in the royal navy; and whenever that has happened; the merchants of England, in all probability, have suffered for it." But does the judge, in his charge to the jury, vouchsafe to give this matter any answer, or so much as to mention it? Lord Holt did not usually pass by material things, that were offered in defence of persons tried before him; yet, in this case, he makes no question or scruple about the truth or falshood of Tutchin's papers, although they contained many things which his lordship, the jury, and all the world knew to be ****. This candid judge, however, puts the merits of the whole upon the scandal of the government, and the evil tendency of such writings. And therefore I must once more call upon the northern barrister to shew a single instance, where witnesses have been produced by counsel, and admitted by the Court to prove the truth of a libel. When he does this, it will deserve consideration; but till then, he may talk by the hour without any meaning.

I could mention some cases of a more modern date, that have been adjudged in Westminster-hall, when this wild doctrine was not so much as thought of, and when it would not have been altogether useless, had it been practicable; but I have chose to mention such only as are reported, that the books may speak for themselves, and judge between us.

But this lawyer seems to be above having his points of law decided by the authorities of the law; and has something in reserve, which may serve to overthrow not only what has been offered in this paper, but even all the books of the law. This is what he calls the reason of the thing; but is truly and properly a sketch of his own politics; which leads me to shew, that the true reason of the thing here agrees with the law, and consequently both these are against this expert master of law and reason.

The reason of the thing, as well as it can be collected from a heap of particulars huddled together without order and method, may be reduced to the three following heads:

1. The form of an information for a libel, and the necessity of knowing the truth or falshood of its contents, in order to direct the judges in awarding arbitrary punishment.

2. The right every man hath of publishing his complaints, when the matters so published can be supported with truth.

3. The necessity there is of using this right, in the plantations especially, by reason of the difficulty of obtaining redress against evil governors by any other means.

1. It will not be improper to premise, under the first head, that a gentleman of the law, who takes upon him to pronounce so magisterially as the northern barrister has done concerning libels, ought to have considered well the nature and extent of his subject. It might be expected, that he is not unknowing in any part of learning necessary to fix his idea of a libel; and yet the present case would appear to be quite different. This learned gentleman might have informed himself, by reading some of the ancient laws before the Conquest, that when the falsity of virulent writings and speeches was taken into the description of the crime, there was a specific penalty annexed, viz. Cutting out the offender's tongue, Lamb. Sax. Laws. But this severity seems to have fallen into disuse under the Norman kings; and accordingly Bracton, who wrote in the reign of Henry 3, gives a description of these offences, as they were understood in his days, wherein falsity is neither expressed nor implied. These are his words: "Fit autem injuria, non solum cum quis pugno peroussus fuerit, verberatus, vulneratus, vel fustibus cæsus; verum cum ei Convitium dictum fuerit, vel de eo factum Carmen famosum et hujusmodi," fol. 155. Indeed, here is no mention of libels against the king, or the state; the reason of which seems plainly to be, that offences of this sort were considered as a species of treason, not only in that age, but in several ages after, notwithstanding the statute 25 Ed. 3, and though they have by happy degrees dwindled into misdemeanours, yet nobody, except the barrister, will say they are come to have a greater indulgence from the law, than the like offences against private persons. How far, therefore, Bracton's acceptation of a libel has prevailed ever since, must be submitted upon what has been offered in the preceding part of the Remarks.

Here the barrister throws in a shrewd question, arising from the form of the information, which charges the libel to be false: This word 'false,' says he, must have some meaning, else how came it there? I hope Mr. Attorney will not say he put it there by chance; and, I am of opinion, his information would not be good without it. By way of answer to this, I must take leave to put a question or two in the same strain. Suppose a man brings an action of trespass for violating his wife, and he family sets forth the truth of the case, viz. That the defendant, by amorous addresses, letters, pre-

sents, &c. did gain the consent of the plaintiff's wife, and at length debauched her: I would ask, whether an action of trespass thus laid can be supported? I fancy not; and yet this is a more just account of the matter, than when *vi et armis*, viz. swords, staves, knives, &c. are introduced as instruments of invading this tender part of our neighbour's property. Suppose further, a man kills another, whom he never saw or heard of before, and he is accused of murdering him of malice fore-thought, how come such words to be put into an indictment for a fact so circumstanced? They must have some meaning; surely they are not put there by chance; and, I am of opinion, the indictment would not be good without them? Why, there is this short answer to be given to all these childish questions: there are many words used in pleadings of most kinds, sometimes for aggravations, sometimes for comprehension, often in compliance with ancient usage, which are not traversable, and many times are incapable of proof. The form of indictments and informations follows the nature of the fact, and sets it out in its worst dress; and if the fact is made appear to be unlawful, all the hard names are supplied by implication of law.

This is not all, quoth the counsellor: "It is said, that truth makes a libel the more provoking: well, let us agree for once, that truth is a greater sin than falsehood; yet, as the offences are not equal, and as the punishment is arbitrary, is it not absolutely necessary that they should know whether the libel is true or false, that they may by that means be able to proportion the punishment? For would it not be a sad case, if the judges, for want of a due information, should chance to give as severe a judgment against a man for writing or publishing a lie, as for writing or publishing a truth?" Now is it not a sad case, that he should want to be told, that human laws don't strictly regard the moral pravity of actions, but their tendency to hurt the community, whose peace and safety are their principal objects; so that by this standard only are punishments measured? If this profound sophister is of another opinion, let him give a reason why it should be a greater crime in our law for a man to counterfeit a silver shilling, than to cut his father's throat.

2. The right of remonstrating or publishing just complaints, the barrister thinks the right of all freemen; and so think I, provided such remonstrances and complaints are made in a lawful way. But when he comes to explain, it is not a court of justice, it is not a house of representatives, it is not a legislature that is to be troubled (as he phrases it) with these things. Who then, I pray, is to be troubled with them; for the king, it seems, is out of the question? Let the barrister speak for himself: They have a right, (says he) publicly to remonstrate against the abuses of power in the strongest terms, to put their neighbours upon their guard, &c. and in another place, he speaks of it as a hardship, If a man must be taken up as a libeller, for telling his sufferings to his neighbour. Now, though I wish and hope, as earnestly as he can do, that a free people may never want the means of uttering their just complaints, and of redressing their wrongs too, when their complaints are not heard; yet I always thought these things were better understood than expressed in a court of law; and I shall probably remain in that opinion, till the learned gentleman can produce something from the common or statute law to shew, that a British subject has a right of appealing publicly to his neighbours (that is, to the collective body of the people) when he is injured in his person, rights or possessions. When I am assured that he can do this, I promise him I shall not grudge a voyage to that country, where liberty is so well understood, and so freely enjoyed, that I may receive the important discovery from his own instructive mouth.

I know the law-books assert the right of complaining to the magistrates and courts of justice, to the parliament, to the king himself; but a right of complaining to the neighbours is what has not occurred to me. After all, I would not be thought to derogate, by any thing I have said, or shall say, from that noble privilege of a free people, the liberty of the press. I think it the bulwark of all other liberty, and the surest defence against tyranny and oppression. But still it is a two-edged weapon, capable of cutting both ways, and is not therefore to be trusted in the hands of every discontented fool, or designing knave. Men of sense and address (who alone deserve public attention) will ever be able to convey proper ideas to the people, in a time of danger, without running counter to all order and decency, or crying fire and murder through the streets, if they chance to awake from a frightful dream. But I must again urge, that these points are not fit to be discussed in a court of justice, whose jurisdiction is circumscribed by positive and known laws. Besides, they take place properly in a sovereign state, which has no superior on earth; and where an injured people can expect no relief, but from an appeal to heaven. This is far from being the case of colonies; and therefore I come to shew, under the third head, that the barrister's reason of the thing is no other than reason inverted, which possibly may help the projects of a demagogue in America, but can never be reconciled to the sentiments of a lawyer, or the principles of a patriot, considered as a subject of Great Britain.

3. I have hitherto been taught to believe, that when a brave and free people have resorted to measures unauthorised by the ordinary course of the laws, such measures have been justified by the extraordinary necessity of the case, which excluded all other means of redress: and, as far as I understand the constitution, and have heard accounts of the British colonies, such a case cannot well happen, and has never yet happened among them. But here the barrister is ready to ask, how must we behave when we are oppressed by a governor,

in a country where the courts of law are said to have no coercive power over his person, and where the representatives of the people are, by his intrigues, made accomplices of his iniquity? Certainly it can't be a new discovery to tell this lawyer that as the governor is a creature of the crown, so the most natural and easy course is to look up to the hand that made him. And I imagine it may be affirmed (without catching an occasion of offering incense to majesty) that if one half of the facts contained in Zenger's papers, and vouched for true by his counsel, had been fairly represented and proved at home, Mr. Cosby would not have continued much longer in his government; and then the city of New York might have applied to itself the inscription of the gold box, "Demersæ legi, timefactæ libertas hæc tandem emergunt," with greater propriety and security, than could possibly be derived from the impetuous harangue of any lawyer whatsoever. I am the more emboldened to say thus much, because though it is my lot to dwell in a colony where liberty has not always been well understood, at least not freely enjoyed, yet I have known a governor brought to justice, within these last 20 years, who was not only supported by a council and assembly, besides a numerous party here, but also by powerful friends at home; all which advantages were not able to screen him from censure, disgrace, and a removal from the trust he had abused.

It is not always necessary, that particular persons should leave their affairs and families in the plantations to prosecute a governor in Westminster-hall, unless their fortunes are equal to the expence; for it is seldom seen, that the violence of a bad governor terminates in private injuries, inasmuch as he can't find his account in any thing less than what is of a general and public nature. And when this is the case, I hope none of our colonies are, even at this time, so destitute, but that they can find the means of making a regular application to their sovereign, either in person, or in his courts at Westminster, as their case may require.

But the wild inconsistency that shines through most parts of this orator's speech, is peculiarly glaring in that part of it now before me. The remedy which he says our constitution prescribes, for curing or preventing the diseases of an evil administration in the colonies, I shall give in his own words: "Has it not been often seen (and I hope it will always be seen) that when the representatives of a free people are, by just representations or remonstrances, made sensible of the sufferings of their fellow-subjects, by the abuse of power in the hands of a governor, they have declared (and loudly too) that they were not obliged by any law to support a governor, who goes about to destroy a province or colony," &c. One would imagine, at first sight, that this man had the same notion, with the rest of mankind, of just representations and remonstrances to the representatives of a free people, which has ever been understood to be by way of petition or address, directed and presented to them in form; in which case it is hoped that they, being moved by the complaints of the people, will stretch forth their arms to help them. But, alas! we are all mistaken; for he tells us, in the same breath, that the right way is by telling our sufferings to our neighbours in gazettes and newspapers; for the representatives are not to be troubled with every injury done by a governor; besides, they are sometimes in the plot with the governor, and the injured party can have no redress from their hands; so that the first complaint (instead of the last resort) must be to the neighbours, and so come about to the representatives through that channel.

Now I would be very glad to know, what the neighbours can do towards effecting the desired reformation, that will be attended with so good success, and so few ill consequences, as a regular application to his majesty would be. It would be pleasant, doubtless, to hear this politician speak out and explain himself at large upon this subject. I confess it surpasses my comprehension to conceive what the neighbours, inspired with weekly revelations from the city journalist, can do with their governor and assembly, unless it be to reform them by those persuasive arguments which the *major vis* never wants good store of. If this be the patriot's meaning, his words may possibly be understood; but without this meaning they are mere jargon.

In a word, I shall agree with the barrister (and so take my leave of him), that the liberty of exposing and opposing arbitrary power is the right of a free people; and he ought, at the same time, to admit, that the order of things, and the peace of society, require that extraordinary means should not be used for this purpose, till the ordinary have failed in the experiment. The supreme magistrate of an independent kingdom or state, cannot always be controuled by the one, and then the other is justified by that consideration. But in colonies that are from their creation subordinate to their mother-country, there is no person who is not controulable by regular and well-known methods of proceeding; and consequently there can be no absolute necessity of flying to extremities, at least in the first instance. From all which, I conceive, it follows, that local considerations, upon which the gentleman lays so great stress, conclude directly against him; and I hope the security which the British constitution affords to every man's person, property, and reputation, as well as to the public tranquillity, is not lessened by any distance from the fountain of power and justice; but that a libel is a libel, and punishable as such in America, as well as in Europe.

I am sensible, there is a freedom of expression used in these papers, of which I should disapprove in the common cases of controversy: but I found myself under a necessity of shewing no respect to the performance under consideration, unless I were to forfeit the little that

might be due to the Remarks. For though a lawyer is free, nay obliged by the duty of his profession, to make the most of the cause he espouses, (his real sentiments being suspended for that time, by reason of the biass under which he acts) yet when he draws his private opinion into the debate, and interests his passions in the success of it, he then departs from his character, and becomes a party, rather than an advocate. In short, there is an air of self-sufficiency and confidence mixed with the whole lump, enough to give a disrelish even to good sense and good law; but is nauseous, beyond all bearing, when neither of these is found. Among lawyers, I was sure this lawyer deserved no answer; and yet an answer seemed indispensable, not only for the reasons given at my setting out, but also in order to save many well-meaning people from reverencing a piece of buffoonery, that had been thrust into the world with so much florid conceit, and a gold box tagged to the end of it: a piece, wherein the whole common-place of popular declamation (equally adapted to all popular occasions) is exhausted, and the Holy Scriptures brought in to season his jokes. But as this last seems designed only for a sally of wit and humour, I shall not offer to detract from its merit; considering too, it had so happy an effect as to set the good people a laughing, when they heard the Word of God most ingeniously burlesqued in a Christian court: a piece that hardly shews the author to have been serious when he pronounced it, or his wise benefactors when they rewarded him; but that his solemn professions of principle and duty compel a charitable mind to suspect his knowledge rather than his sincerity; and citizens are ever thought to be in earnest, when they part with their gold and shew their learning.

Sir, I ought to make an apology to you for trespassing so long upon your patience, which might have been better employed; but I flatter myself with the hopes of having some allowance made for an honest, though weak attempt to rescue the profession of the law, and the interest of lawful liberty from the disgrace thrown upon both in one of our sister-colonies. This is the truth, and let it be my excuse. I am yours, &c. ANGLO-AMERICANUS.

LETTER II.

Sir; It must be mortifying, no doubt, to a person who has received peculiar marks of public approbation, to be told, that the very act which procured it was so far from being commendable, that it really deserved a severe censure; and one would the rather decline such an office, how just soever the occasion, because it cannot be done without condemning at the same time the judgment of those whose suffrage had been thus unworthily obtained. But when the laws are openly perverted, and courts of justice, with an air of gravity, drolled out of their established rules, by such whose profession supposes them ministers of justice; and when this too shall be dignified with applause, and made highly meritorious; I conceive neither good-nature, nor the solemnity of public seals, should restrain an honest pen from exploding the practice, in order as well to stop the progress of its evil effects; as to prevent the like attempts for the future.

Virtue and merit, it is most certain, ought to be encouraged, especially by all in authority; but when that which is merely counterfeit shall gain esteem, stand in the room of what is truly genuine, and be actually loaded with the rewards thereof, it does not only frustrate the original intention of such rewards, but likewise give countenance to the impostor, and furnish him with still further means of vending his false wares, in prejudice of the public. Now this, with all due submission, I take to be the case of the Corporation in North America, with regard to the honours they were lately pleased to confer on a noted barrister in those parts, for his supposed services in the affair of Zenger the printer, whose trial has been so plentifully dispersed here, and in other places. Aggregate bodies, we find, may be mistaken, and too often are, as well as private men; and when they do err, it is of the more dangerous consequence, on account of the extent of their power and influence. The province in general of New York, or the city in particular, might, for aught I know, have sufficient cause of complaint, in some respects, against their then commander in chief, and his administration; but it is to be considered, that as there never was one absolutely free from faults, so it is the great privilege of the inhabitants of every British government, that a proper channel is chalked out, in all such events, and a way open for relief. The method, therefore, which the constitution prescribes ought to be strictly pursued; and any illegal deviation is not only inconsistent, and unjustifiable in itself, but has besides, a tendency to introduce mischiefs more to be dreaded even than those that were sought to be redressed. It is the law which must be the standard of right and wrong; and whoever has recourse to any other aid, or knowingly advises thereto, in the case of particular grievances, cannot act on a true principle of public spirit, but must be influenced by unworthy motives, and is always more or less an enemy to the community, according to his situation, and in proportion to the talents he happens to possess. If Mr. Zenger then will avowedly publish seditious libels against the government under which he lives, and his counsel will offer to support him by artifices unbecoming the long robe, and advancing propositions manifestly contrary to law; as the former deserves to be punished by it, so the latter, I humbly presume to say, whatever he may claim from his client, ought not to be paid his wages by any set of men who owe their being to the law, and cannot exist without it.

But I shall not scruple to acknowledge here, and I do it on no superficial observation, that

there can't be a more pernicious creature, in a distant colony, than that of a practitioner of the law, with much assurance, little knowledge, and no morals; a character not unheard of in more than one of his majesty's plantations, and which yet I would by no means apply to Mr. Hamilton, any otherwise than may appear to be just, from the performance he has, it seems, taken so much pains to publish to the world. The judicious Remarks already made upon it by Anglo-Americanus, will hardly leave room for any thing to be added that is very material; and therefore I shall content myself with a few gleanings only, and make some cursory reflections thereon, whilst they afford me an opportunity of bearing my testimony also against what I think the most indecent behaviour at least, if it may not be called the boldest outrage, that ever was exhibited from the bar, without a suitable chastisement.

Whoever has enquired into the doctrine of libels, and the reason of their punishment, will perceive, that they take their degrees as they affect private persons, particular magistrates, or are aimed against the government itself; and I may venture to say, that no lawyer of reputation will deny but what is set forth in the information against John Peter Zenger was of this last kind, and that too conceived in the grossest terms, such as will not admit of a different construction, or of any other meaning than what is put upon them by the prosecutor for the crown. Now I am sensible, that great allowances are, with good reason, made to counsel in the heat of argument, and when supposed to be animated with a laudable zeal for their clients. Nor has it been usual to correct them for every harsh and hasty expression, provided they keep within bounds, and stick to that which is their duty, without running into matters that have no relation to the issue, and cannot fairly serve the side they espouse. Yet, as the lord chancellor Nottingham occasionally said, Counsel should not speak as if they would abet the guilt of their clients rather than advocate for their innocency. And since your ingenious correspondent has clearly evinced, that the truth of a libel cannot be given in evidence, that it is no justification, on the general issue, and consequently no proper defence to a charge of that nature (of all which Mr. Hamilton could not, or ought not to have been ignorant), it is worthy of consideration whether he did not involve himself in his client's crime, and partake of his guilt, by declaring in the most public manner, that the facts published in the news-papers, and contained in the information, were true; and offering to prove them to be so before a court, which had no power to redress the grievances complained of, 4 Co. 14. Hob. 166, 7.

Sir Bartholomew Shower, I remember, in his argument in the case of the king against Berchet *et al.* asserts, that "in all cases of contempts to a court, no presentment is necessary, no not so much as to convict; for if done in *Facie Curiæ*, a record may be made of it, and a punishment judicially inflicted, and that executed immediately." Show. Rep. 110. And agreeable hereto, we find, that in a late case of the king against Thorogood, Trin. 9 Geo. primi, the defendant having made an affidavit in C. B. and appearing on summons, confessed that he made it, and that it was false; whereupon the Court recorded his confession, and ordered that he should be taken into custody and stand in the pillory, &c. which was executed accordingly the last day of the term. Mod. Ca. in Law & Eq. 179, 180. This is the more remarkable, because it was in the Court of Common-Pleas, which has ordinarily no jurisdiction in criminal cases.—May it not from hence be inferred (I hint it with a due saving to all the just privileges of the bar) that the Court at New-York might well have recorded some of the most seditious expressions in Mr. Hamilton's rhapsody, and committed him for the same, &c.? If they had, I doubt the blame must have centered in himself, and his own conduct; of which therefore he might then have had leisure to repent, as well as of his long journey to so ill a purpose.

But it will not be amiss, perhaps, for example sake, to give an instance of what has been done on the like occasion with that before us; and to this end I shall cite a case in the Court of King's-bench, many years after that of the Star Chamber was at an end, and which, in the words of sir Thomas Raymond, was as followeth: "Memorandum, June 18, 1680, Mr. Nathaniel Reading having been convicted (before justices of Oyer and Terminer by virtue of a special commission (for endeavouring to persuade Bedlow, who was a witness against the noblemen imprisoned in the Tower of London, to forbear his prosecution of them; and he the said Mr. Reading having had judgment executed upon him, by being set in the pillory, and fined 1,000*l.* and imprisoned for the same, but his fine since pardoned by the king, came this day into court, and demanded that an information, which he there brought in his hand, might be received by Mr. Astrey against the commissioners who condemned him, of which my brother Jones and brother Dolben were two, and that the information might be filed. But the Court did declare, that he was in the wrong way to exhibit any information in this manner, and did cause his words, whereby he did accuse the two judges of oppression, to be recorded; and for these words, and for that he was infamous by having been on the pillory, the gentlemen at the bar did pray that his gown might be pulled over his ears, he having been formerly a practiser at the bar, which was ordered and executed in court; and he was also condemned in court to pay the king 500*l.* and to lie in prison till he paid it," Raym. Rep. 376. The trial of this gentleman referred to here, may be seen in the State Trials, on which occasion the lord chief-justice North made a speech aggravating the defendant's offence as he was a counsel, one who ought to be a man of knowledge, and a minister of justice to assist the

Court wherein he pleaded. He said, he thought the Court ought to shew a more than ordinary severity against such an one; and that it is a great credit and benefit to the profession, that the members of it for such offences should be dealt with more severely than we should deal in other cases. Id. p. 374, 5. Far be it from me to make any invidious comparison here betwixt the present practiser in Pennsylvania, and the quondam one in Westminster-hall, though they are both celebrated, the one in the trial of Mr. Zenger, and the other in his own. It may however be noted, that the latter was said to be artful and affectedly eloquent, and to have strove to lead the judges out of the way, while he was told by the chief-justice, that his defence was artificial, because it was nothing to the purpose; and by another of the judges, that he disgraced his profession by making so weak a defence. But without adverting to any particular beauties in the modern performance, this is certain, that counsellor Reading lost the bar-gown by his art, and counsellor Hamilton got a gold-box of five ounces, with the freedom of the city of New-York, by his. A pregnant instance of the capriciousness of fate, and of the justness of your late correspondent's observation at the entrance to his excellent Remarks!

The gentlemen at the bar (as indeed it might well be expected from their education, and the nature of their business) have been remarkable for observing the regard that is due to all in authority with the utmost delicacy; and in return have always been used with suitable respect. But that the lawyer of Philadelphia may see the courts of justice in former ages, as well as of late years, did not spare the unruly members of the profession any more than others, for much less faulty behaviour than that of the leading counsel in Zenger's trial, I will refer him to a case which happened Mich. 13 Eliz. Rot. 39, when Henry Blaundford, a counsellor at law, was committed to the Fleet, and fined, for falsely reporting the opinion of the lord Leicester and secretary Cecil with these words, 'Humanum est errare.' And that even noblemen met with the like treatment on such occasions, will appear from the case of the lord Stourton, who, 19 Hen. 8, was committed by the Court, and fined for saying these words, "I am sorry to see rhetoric rule where law should."

Before I proceed, I will mention one case more, purely to shew how dangerous it is to afford any unlawful helps to persons on their trials in criminal prosecutions, even though it be merely by way of private instructions, when such instructions are to be publicly made use of, and import scandal to the government. It is the case of the King against Aaron Smith, Mich. 35 Car. 2, in B. R. "This term (says the book, which has the allowance of all the judges) Aaron Smith was brought into court, being formerly convicted on a trial at bar, for delivering to Stephen College, being upon his trial at Oxford for high-treason, a paper of instructions, full of scandalous reflections upon the king and government; as, That they might as well have hanged him at Tyburn as he came by, as brought him thither, only to murder him with a little more formality. For which the Court gave judgment, that he should pay a fine of 500*l.* stand on the pillory twice, and be of the good behaviour for a twelvemonth," Skinner's Rep. 124. I shall only observe this case was on an information, so much inveighed against by Zenger's counsel, and yet I never heard it censured at all, as was that of poor College, I own, with too good reason.

It is now time to take notice, that there is, amidst a heap of jargon and absurdities, one obvious mistake, which runs throughout Mr. Hamilton's ostentatious harangue, and that is in relation to the Court of Star-chamber. He would suggest, that because that court was abolished by act of parliament, on account of some insufferable abuses that had crept into it, all the cases that had been adjudged there, on informations for libels, were consequently of no authority. Whereas the judgments given there, in matters properly cognizable before them, which libelling especially was, are allowed to be good law at this day, and are constantly quoted as such in the Court of King's-bench. Indeed it is said, that the reason of disallowing the Star-Chamber-Court was because their authority was before, and now is, in B. R. and consequently that court unnecessary, Comb. 36. So the lord chief justice Holt declared, that B. R. possessed all the lawful power the Star-Chamber had, Id. 142. And that the Court of Star-Chamber was taken away, because the crimes were punishable here, 5 Mod. 464, which is likewise intimated by the statute itself. Now though I am as well satisfied perhaps with the taking away of the Court of Star-Chamber, considering the occasion that had been given, as our northern barrister can possibly be, and should equally rejoice, I hope, at the redressing any other public grievance; yet I cannot, with him, condemn by the lump, and argue, that because that court did some things amiss, therefore it did nothing right. At this rate, every court that had, or has a being, may be in danger of the same epithets he loves to bestow on that we are speaking of; and it may as well be supposed, that because a certain set of citizens, not unknown to Mr. Hamilton, lately did a very silly thing, they therefore never did a wise one. For which reason I presume it will not be altogether impertinent to produce the sentiments of that oracle of the law, sir Edward Coke, concerning the Court of Star-Chamber. "It is (says he) the most honourable court, our parliament excepted, that is in the Christian world, both in respect to the judges, and of their honourable proceedings according to their just jurisdiction, and the ancient and just orders of the Court. For the judges of the same are, the grandees of the realm, the lord chancellor, the lord treasurer, the lord president of the king's council, the lord privy seal, all the lords spiritual and temporal, and others

of the king's most honourable privy council, and the principal judges of the realm, and such other lords of parliament as the king shall name. And they judge upon confession, or deposition of witnesses. And the Court cannot sit for hearing of causes under the number of eight at the least. And it is truly said, "Curia Cameræ Stellatæ si vetustatem spectemus, est antiquissima, si dignitatem, honoratissima." This court, the right institution and ancient orders thereof being observed, doth keep all England in quiet." 4th Inst. p. 64. Conformable hereto, a late learned writer, who was advanced to the highest posts in the law in a neighbouring kingdom to that of our mother country, and wherein he died, has a paragraph, which I believe will give us a truer account of the Court itself, and the abolishment of it, than what is to be learned from our barrister's speech at New York, and therefore I will insert it here.* "The court of Star-chamber, whilst kept within due bounds, was certainly of the greatest use to preserve the peace and security of the kingdom; and perhaps was the only court which by its ordinary and proper jurisdiction, could effectually prevent and punish riots, perjuries, and other misdemeanors of the highest nature. But being made use of by the Court to support proclamations and orders of state, and to vindicate illegal commissions and monopolies, that extension of their power became a grievance insupportable, and the nation was never easy till that court was entirely suppressed by act of parliament. The House of Commons were so eager in their zeal to destroy what they called a Court of Inquisition, that though the Bill was of so great consequence, yet they sent it up to the Lords, with only once reading it, and without its being ever committed, which was a thing, perhaps, never before heard of in parliament." Cla. v. 1. 223.

I need only add on this head, that the crime of libelling is the same now as it was while the Court of the Star Chamber subsisted, and the nature of the offence the same then as now; a crime that must necessarily be punished as long as there are states and communities established in the world. And our assuming barrister will not find an author that treats of the crown law since the statute of 16 Cha. 1. cap. 10, any more than before, but makes use of the cases adjudged in the Star-Chamber generally as good law, and of equal authority in those matters with such as were afterwards adjudged in the King's-bench. Some indeed are justly liable to exception in the former, as we have also known too many in the latter, particularly during the next succeeding reign of Cha. 2, none whereof are, however, God be praised, to be met with, or heard of since the glorious and happy Revolution in 1688, which, I trust, has for ever excluded all partiality and oppression from Westminster-hall.

But the learned lawyer of Philadelphia declares, That he has not, in all his reading, met with an authority that says we cannot be admitted to give the truth in evidence upon an information for a libel. I don't know what this gentleman's reading may be; but if he had read some of the cases above-mentioned, which could not well escape him, it might reasonably have been expected he would have taken warning, been a little more cautious, and not have ventured to incur the penalties which others before him had so justly suffered. By all his reading, he would insinuate, I suppose, that he had read all: and if that was true, it might well be thought he had read to very little purpose, who could make so ill an use of it, or think it a duty on him to go to the utmost parts of the land, to propagate doctrines and principles diametrically opposite to, and just the reverse of what he must have read. We shall soon discover that the barrister's reading is not quite so extensive as he would have it imagined. But it is previously to be observed, that if there was no such authority *in terminis* as that he calls for, a man who reads with any tolerable understanding would of course infer the same thing, when all the books on the subject of libels lay it down as a rule, which they unanimously do, that it is not material whether the libel be true or false. For if that be not material, to what end should the truth be offered in evidence? Or, how should it be rejected before it was offered, which undoubtedly is the reason that there have been no late instances of that sort. It might suffice therefore to undertake, as often as this well-read lawyer produced a precedent of its being demanded from the bar to give evidence of the truth of a libel, to shew that it was as often denied by the Court. And though I admit it has been attempted before, on trials for libels of the less enormous kinds, yet he is probably the only one that has done it in any case within these hundred years. However, if we would find an instance of that sort, we must necessarily have recourse to the proceedings of the Court where that crime was usually punished. The Star-Chamber Reports then may satisfy Mr. Hamilton, that Term Pasc. 7 Car. 1, there was the case of Coston, gent. *v.* Hitcham, Mil. Servient. ad legem, as follows: "The defendant, the morning before he went to the sessions, being a justice of the peace, received scandalous and libellous articles against the plaintiff, carried them to the sessions in his pocket, and, in open court, in disgrace of the plaintiff, pulled them out and said, You shall see what a lewd fellow this is, and not fit to speak in this place; and then caused the said libellous articles to be read in the public sessions. And the plaintiff then desiring a copy of them, and to be tried upon them, the witnesses to prove them being noted in the margin, the defendant did not suffer him to have a

* See A Discourse concerning Treasons and Bills of Attainder, p. 94, printed anno 1716, wrote by Mr. West, afterwards Lord Chancellor of Ireland, who also wrote an ingenious and learned treatise, entitled, An Inquiry into the Manner of creating Peers. *Former Edit.*

copy, or to be tried thereupon, nor took any course that he might at the next sessions, or at any time after be questioned for them, but took the articles again out of the sessions and carried them away. And after, further to disgrace the plaintiff in his practice (being an attorney,) sent the said articles to Mr. Justice Harvey, at the reference of a cause to him, which Coston attended; and a jury having given a verdict against the defendant, he sent for the jurors and questioned them about their verdict, and told them they were a company of fools, and that if there had been but one wise man among them, their verdict had not been so. And for these offences he was committed to the Fleet, and fined 200*l.* In this cause, the defendant would have had witnesses to prove the matter of the said scandalous articles to be true, but that was disallowed by the Court." Rush. Col. vol. 3. p. 36, in Append. This, I presume, the barrister, when he is serious, will allow to be in point, though it happened not to fall in the way of his reading. He cannot object, surely, that it does not appear to be on an information preferred by the Attorney-General, since it is a much stronger case than if it had. For if the Court would not receive such evidence in a cause depending on the complaint of a petty solicitor for being libelled, and this too preferred against a justice of peace, a knight, and a serjeant at law; *a fortiori*, they would never admit it on an information exhibited, by his majesty's attorney general, against a private person, for libelling the government.

There was also, as I have learned, divers years before, viz. Mich. 2 Jac. the case of Peter Brereton, clerk, for writing a scandalous letter to Loyd, register to the bishop of St. Asaph, and sent to himself, who was therein charged with bribery and extortion in his office; for which libellous letter the defendant was sentenced, though, as the book has it, he would have undertaken to prove the contents of the letter to be true. Here then are two precedents of what the barrister himself had never met with all in his reading; the one in a case for libelling a practising attorney, and the other of the register of a bishop's court; but I believe I may defy this gentleman, if he were to read as many more years as he has done, to produce a third, where the offence under prosecution, being of the highest degree, and levelled at the government, like that for which he was so zealous an advocate, the counsel for the defendant dared to offer evidence of the truth of it. On the contrary, if he had dipt into the lord chief justice Keelyng's Reports, fol. 23, (before he left his chambers) he would have there found it resolved by the whole court, that though a counsellor at law may plead his client's cause against the king, yet, if under colour of that he takes upon him to vent sedition, he is to be punished.

It is no wonder, indeed, if our barrister should be unapprized of Brereton's case, it not being (at least to my knowledge) in print; and you perceive I was under no necessity of mentioning it, being before provided with an authority to my purpose. But it is reported, as above, in sir Thomas Mallet's MS. Treatise of the Court of Star-Chamber, a copy whereof has fallen into my hands by the favour of a friend. And since I have named this work, I shall, with his leave, take a paragraph out of it, which, I am persuaded, will not be deemed unsuitable to the present debate, after hinting that the book seems to be wrote in the time of James 1, when the doctrine now revived, and so tenaciously advanced by Mr. Hamilton, is said to have been long before exploded as a gross error. "There are," says sir Thomas, "two gross errors crept into the world concerning libels; the one, that it is no libel if the party put his hand unto it, and the other, that it is not a libel if it be true; both which have been long since exploded out of this court. For the first, the cause why the law punisheth libels is, for that they tend to raise the breach of the peace, which may as well be done, and more easily, when the hand is subscribed, than when it is not. And for the other, it hath been ever agreed, that it is not the matter but the manner which is punishable. For libelling against a common strumpet is as great an offence as against an honest woman, and perhaps more dangerous to the breach of the peace; for, as the woman said, she should never grieve to be told of her red nose, if she had not one indeed. Neither is it a ground to examine the truth or falshood of a libel, because it is *sub judice*, whether it be a libel or not; for that takes away *subjectum questionis*, and determines it to be no libel, by admitting the defendant to prove the truth; and the defendant in that case ought to plead a justification and demur in law. But if he plead Not Guilty, the question is gone, whether it be a libel or not." Thus, according to this author's opinion, who, if I mistake not, was one of the justices of the court of King's-bench in his time, Mr. Hamilton, could he really have persuaded himself that the matters charged in the information were not libellous, as he insists they are not, would have discovered more accuracy in his profession, as well as candour in his practice, by advising his client to demur to it, whereby he would have admitted no more than what was avowed at the trial on the general issue. Then, indeed, it would have fairly come before the Court to be considered whether the papers were libellous or not, and he, as counsel for the defendant, might regularly have been heard to it.

He would then have been at liberty to exert his uncommon talents, manifest his extraordinary reading, his superior genius and great skill in language, and in explaining the true import of words, without so directly flying in the face of every authority, and opposing all the cases that ever were adjudged concerning libels, before he was born and since. But alas! that would not have answered the intention of our eloquent barrister. He would not then have had it in his power to use his arts, and play his game with a dozen honest men, of as good natural understandings, perhaps,

though not of equal experience and cunning with himself. If he had gone that way to work, he would have had no chance for the prize. Vain had been his expedition, and lost, entirely lost, all his labour. In a word, if the learning and integrity of the bar only were required, he might as well have staid at home, where, if I am rightly informed, there are instances in abundance of the blessed effects of Mr. Hamilton's well-known principles.

This sagacious gentleman begs leave to observe, that informations for libels is a child, if not born, yet nursed up and brought to full maturity in the Court of Star-Chamber: but what is particularly to be inferred from this shrewd observation, he does not at present tell us. If the Star-Chamber was the Court where crimes of this nature were generally punished, according to its ordinary and proper jurisdiction, as it certainly was, how should it be otherwise than that informations for libels must be met with there? And considering the antiquity of that court, it is more than probable the crime was first prosecuted and punished in it. But what then? Is the legitimacy of the child (if I may be allowed to carry on the metapher) therefore to be called in question; or its education the less honourable? I might put our witty barrister in mind, that what I have mentioned is the very reason why the spurious brat he is so fond of, which was never brought to full maturity, nor ever will, first appeared in the Star-Chamber, though it has not been heard of since in any other court, till very lately, at New-York; I mean that of making falshood to be essential to a libel, and claiming a right to give evidence of the truth of it by way of justification.

He must, however, intend by the foregoing passage, to impeach the legality of informations *qua* such (which by some words that drop from him many pages after, would seem to be what he aims at), or as they relate only to libels; and in either case he will again betray the scantiness of his reading and knowledge in the law. As to informations in general, it has been incontestibly proved, that this method of proceeding is no way contrariant to any fundamental rule of law, but agreeable to it. "That it was the constant usage, and had the approbation of the judges and lawyers of all ages, and in all reigns." Show. Rep. 106, to 125. And in the case of the information against seventy poor persons for a riot in pulling down fences, &c. 2 W. and M. (which probably may be the same) it was said by lord chief justice Holt, that "the lord chief justice Hales complained of the abuse of informations, but not that they were unlawful; that he should not come now and impeach the judgment of all his predecessors; that the Star-Chamber was not set up by the statute of Hen. 7, but was as common-law, and informations were accordingly brought in that court and others. And the whole court were of opinion, that informations lay at common-law." 5 Mod. 463, 4. Now this I take to be as good an authority as the extrajudicial opinions of those anonymous great men who, Mr. Hamilton says, have boldly asserted that the mode of prosecution by information is a national grievance, and greatly inconsistent with the freedom which the subjects of England enjoy in most other cases; nor can one forbear observing, *en passant*, that he seems much more disposed, where there is no danger at least, to follow the example of bold, than of wise and judicious men.

This then being a legal course of proceeding in criminal cases, and for all public offences, it must undeniably be as proper in the case of libels as in any other. And sir B. Shower in reckoning up the several crimes that were cognizable in the court of Star-Chamber, includes libels among the rest, for which he says, There were always informations in the Star-Chamber and King's-bench. Show. 119. I am the more free in borrowing what I do from that eminent practiser, on the subject of informations, because he had studied it well, and taken more than usual pains therein; and as the judgment afterwards given by the court of King's-bench was pursuant thereto, so it seems to have put a period in Westminster-hall to all cavils against that mode of prosecution.

If the barrister means notwithstanding to suggest moreover, that informations for libels are but of modern date, or little longer standing than about the time of the expiration of that court, where he supposes they had their origin, let him be further refuted by the abovementioned sir Thomas Mallet, who wrote professedly on the court of Star-Chamber, and may be supposed to be pretty well acquainted with his subject: he tells us, [Treatise of the court of Star-Chamber, *ubi supra*] that "in all ages libels have been severely punished in this court, but most specially when they began to grow frequent about 42 and 43 Eliz. when sir Edward Coke was her attorney general." And, treating of the antiquity of that court, he makes it very probable [Id. 1 Part, 4th Consid.] that it was the most ancient of any court of justice, and the mother-court of the kingdom; wherein he does not differ from sir Edward himself, in his 4th Inst. 64, already quoted. Now it was while this consummate lawyer, it seems, was attorney-general to the renowned queen Elizabeth, that informations for libels began to be most frequent, or, in Mr. Hamilton's elegant stile, when the child was brought to full maturity: and it is readily submitted to all who are versed in our history and constitution, whether that period will be any disparagement to the offspring.

But if informations for libels in particular, were one of the grievances of that court, nay the chief, as the barrister would labour to make his hearers believe, how came they to be practised after the abolishment of it? Or what will he say to the case of the king against Darby, which was an information exhibited against the defendant, being an attorney of the Common-Pleas, for defamatory words only of sin

John Kay, a justice of peace, concerning the exercise of his office? The words were, as they are set forth in Comb. 65. "Sir John Kay is a buffle-headed fellow, (a pretty thing to be proved in court!) understands not law, and is not fit to discourse it with me; he hath not done justice to my client." There it was argued for the defendant on a demurrer, (and I chuse to recite it because of the concessions of his counsel, against our northern advocate,) "That an information would not lie for scandalous words spoken only of a particular person, because he might have an action on the case to recompence him in damages.—It is true, such a proceeding might be warranted for libels, or for dispersing defamatory letters, because by such means the public peace might be disturbed, and discords fomented amongst neighbours, which might at last be a public injury: but there is no such thing alleged in this case, only words in common discourse, for which an action on the case might lie, but no information. On the other side it was insisted, that this information was founded on sufficient matter, because the prosecution is not only as it respects the person of sir John Kay, but it relates to him as he is a public magistrate, and who is subordinate to the government, and therefore such defamatory words are a reproach to the supreme governor, by whom magistrates are intrusted, and from whom they derive their authority; and it will not be denied, but that words reflecting on the public government are punishable at the suit of the king by an information. And for this reason the Court held that an information would lie, and thereupon gave judgment against the defendant, and fined him an hundred marks." Carth. 14, 15.

Mr. Hamilton, who would seem to be more knowing than his neighbours in many things, affects to be more ignorant than every body, of what constitutes a libel; and therefore, although he pretends freely to acknowledge there are such things as libels, yet he insists at the same time, that what his client is charged with, is not one; and if it be not, I will as freely acknowledge there can be no such thing. He desires the Attorney General to favour them with some standard definition of a libel, by which it may be certainly known, whether a writing be a libel, yea or not. And what is this for? Why, truly, to shorten the dispute. But what dispute does he speak of? The only point that could admit of dispute had been given up before by his confessing the matters in issue, and the prosecutor's witnesses being thereupon discharged. As to what he requires, either there was such a definition to be met with in the books, or there was not; if there was, he ought to have known it; if there was not, why should he desire Mr. Attorney to favour him with one? Yet after he had been indulged beyond measure, and a definition was produced from a good author, who besides refers to several others that are unquestionable, all which conclude against his client; is this loquacious advocate contented? No; there are two words to that bargain, as he had said before. He makes it a foundation for further disputes, and according to his wonted ingenuity and candour throughout his reverie, calls the concurrent sense of our books Mr. Attorney's rule, and Mr. Attorney's doctrine.

"But what certain standard rule," quoth he, "have the books laid down, by which we can certainly know whether the words are malicious? Whether they are defamatory? Whether they tend to a breach of the peace? and are a sufficient ground to provoke a man, his family or friends to acts of revenge?" &c. Now, these queries methinks do not so well become the mouth of an advocate, as they might that of his client, when abandoned to his own defence in a desperate cause. But I answer, no rules certainly can be of use to those who are determined to act without any, or in opposition to all rules, in which class our northern barrister must be placed, if we are to frame a judgment of him from the share he bore in this trial. The rule laid down in our books concerning libels (I speak of libels in the strict sense, according to the definition of Mr. Serjeant Hawkins, referred to in the trial, and which alone concerns the present case) is founded on the reason of the thing; and is the same which is to be observed in other matters that depend upon the construction of words and writings, which are signs only, or images of ideas intended to be conveyed to the understanding of the reader. There may, indeed, be divers rules applied, according to the circumstances of the case; and this, among the rest, that where words are capable of two senses, the one faulty, the other innocent, the latter is to be taken, provided such a construction may be made without violence to their natural import and meaning. From whence it will follow, that the same cases may happen that are doubtful, and do not come under any standard rule, on all which occasions honest and upright judges will incline to the favourable side: There may be others again so clear and evident, that a man must resign his reason, or resolve to sacrifice his conscience, that does not discern, or will not allow them to be libellous. But in none of these cases can it come properly to be a question before the jury, whether a libel or not, on the plea of Not Guilty, though it might afterwards be so, before the Court, in arrest of judgment. By what has been said, there appears to be latitude enough for a skilful pen (who notwithstanding must do it at his peril) to lash public and private vices, to caution the people against measures that may be hurtful to them, or to remonstrate against the evil practices even of those in power, without being always exposed to the penalties of the law. Such a liberty of writing and printing, under due restrictions, I own Englishmen ought not, and I hope never will, be deprived of; and where this is dexterously done, it would be ridiculous for private persons to put the cap on

their own heads, and no less impolitic for those in high stations to apply every thing to their administration. When such a work is undertaken by able hands, and with a generous view of serving the public, it is always laudable, and often very useful; but to succeed herein, requires a capacity and talents not to be discovered in Mr. Zenger's news-papers, or his counsel's speech.

I perceive my letter is unawares run to a great length, by the quotations that are interspersed, and which yet I am sensible is the least exceptionable part of it. I shall therefore take notice but of one thing more in this matchless harangue, which indeed ought not to be forgot, because it is made the basis and foundation of the whole; and that is, concerning the "right of freemen to complain when they are hurt." This our lawyer often asserts in general terms, with some variation only of the expression. As to which, I would ask, whether by it he means a right to remonstrate and complain in a legal way, or a right in all cases to appeal to the people by seditious and scandalous libels? If the former, nobody ever denied it, and what he said was not *ad idem;* so that he was fighting with the air, and quarrelling without an adversary: if the latter, he dishonoured his gown, by advancing what is notoriously repugnant to all laws, human and divine. It was ruled in the Court of B. R. Trin. 16 Car. That although a bill be preferred in the Star-Chamber against a judge for corruption, or any other for any great misdemeanor, yet if the plaintiff will tell the effect of his bill in a tavern, or any open place, and by that means scandalize the defendant, the same is punishable in another court. March, Rep. 76, 77. So in the Case of Hole and Mellers, 28 Eliz. in C. B. it was said by the Court, that although the queen is the head and fountain of justice, and therefore it is lawful for all her subjects to resort unto her 'ad faciendam Querimoniam;' yet if a subject, after the bill once exhibited, will divulge the matter therein comprehended, to the disgrace and discredit of the person intended, it is good cause of action, 3 Leon. 138. And to the same purpose, in a much later case, viz. that of Lake and King, reported in many of our books, to which Mr. Serjeant Hawkins refers, it seems agreed, as he observes, that whoever delivers a paper full of reflections on any person, in nature of a petition to a committee of parliament, to any other person except the members of parliament, may be punished as the publisher of a libel, in respect of such a dispersing thereof among those who have nothing to do with it. 1 Hawk. c. 74, § 12.

But our forward barrister, aged and infirm as he represents himself (which compared with his conduct, is the keenest satire that could be suggested of him), ought to be further instructed, that even where complaints are to the king himself, they must be made in a proper and regular manner; a decency is to be observed, and a regard always had to the characters and stations of the persons against whom such complaints are made. In 13 R. 2, Rot. Parliament, N° 45, the Commons desired they might not be troubled for any matter that should be contained in petitions to the king; and the king answered, Let every man complain, so it be with law and reason. It is lawful therefore, no doubt, as it has been resolved, for any subject to petition to the king for redress, in an humble and modest manner, where he finds himself aggrieved by a sentence or judgment; for access to the sovereign must not be shut up, in case of the subjects distresses. But, on the other side, it is not permitted, under colour of a petition and refuge to the king, to rail upon the judge or his sentence, and to make himself judge in his own cause, by prejudging it before a re-hearing. Hob 220. Yet sir Rowland Flaxing was committed, and deeply fined, for reporting to the king, that he could have no indifferency before the Lords of the Council, 7 Feb. 18 Hen. 8. So likewise, in the time of Hen. 7, sir Richard Terrets was committed, fined, sent to the pillory, and adjudged to lose both his ears, for his slanderous complaint exhibited to the king, in a written book, against the chief-justice Fitz-James. Which Cases are cited by chief-justice Montague, in the Case of Waynham (who was severely punished for an offence of the same nature), as may be seen in this Collection, vol. 2, p. 1059. To these may be added, Jeffe's Case in the King's-bench, Mich. 5 Car. Jeffe was indicted for exhibiting an infamous libel, directed to the king, against sir Edward Coke, late chief-justice of the King's-bench, and against the said court, for a judgment given in the said court, in the Case of Magdalen-College, affirming the said judgment to be treason, and calling him therein traitor, perjured judge, and scandalizing all the professors of the law. He fixed this libel upon the great gate at the entrance of Westminster-hall, and in divers other places; and being hereupon arraigned, prayed that counsel might be assigned him, which was granted; and he had them; but would not be ruled to plead as they advised, but put in a scandalous plea; and insisting upon it, affirmed he would not plead otherwise. Whereupon it was adjudged he should be committed to the marshal, and that he should stand upon the pillory at Westminster and Cheapside, with a paper mentioning the offence, and with such a paper be brought to all the courts of Westminster, and be continued in prison until he made his submission in every court; and that he should be bound with sureties to be of good behaviour during his life, and pay 1,000*l.* fine to the king. Cro. Car. 175, 6.

What now shall we say, or what must be thought of one, who, while he pretends to great reading, and a thorough knowledge of these things, could yet, in the face of a court, and in defiance of its authority, and indeed of all authority, presume to justify the publication of the most audacious libels, against that very government under which he was breathing the sedition! A person, who, as a counsellor at law,

boasting at the same time of having seen the practice in very great courts, would dare to call such publication, addressed to the people, the just complaints of a number of men who suffer under a bad administration! Some of the words charged in the information, and which Mr. Hamilton offered to prove, are, That the law was at an end. I can't tell what proof he had to give of this fact; but surely if his doctrine were to prevail, it must soon be the case; and, for my own part, I will confess, I have not hitherto heard of any thing, in that province, which looked so much like it, as that such a behaviour should not only go unpunished, but be attended with public munificence and applause. The truth is, this gentleman, though stiled a barrister at law in the order of the common-council of the city of New York, and which title, therefore, I have likewise given him, seems notwithstanding, instead of maintaining that character, in the trial before us, to be rather possessed with a fit of knight errantry, and to have sallied out from Philadelphia to the other province, with a full resolution to to encounter every thing that was law, and to level all to the ground that stood in his way. Let the reader then be judge, upon the whole, whether he comes within the description of that mischievous animal I mentioned towards the beginning of these sheets.

After all, I flatter myself it will not be imagined, that I was stimulated to these hasty animadversions by a principle of envy to Mr. Hamilton, or any disrespect to those who were pleased to patronize his performance, since they are utter strangers to me, and probably will ever remain so. On the contrary, they may believe me, when I declare, that if the one had really merited what the others were of opinion he did, I should with much more pleasure have signified my approbation of the conduct of both, than I now take in shewing my dislike. It is on this score, Sir, that I cannot conclude, without publicly returning my share of the thanks that are due from the fraternity to your friend, the polite author of the former letter, who has done justice to the bar by his Remarks, which, in my humble apprehension, are worthy of any gentleman at it, either here or elsewhere. I am, &c. INDUS-BRITANNICUS.

With respect to Mr. Hamilton's mention (p. 719), that "as great men as any in Britain have boldly asserted that the mode of prosecuting by information (when a grand jury will not find *Billa vera*), is a national grievance, and greatly inconsistent with that freedom which the subjects of England enjoy in most other cases;" See in a Note to sir William Williams's Case, vol. 13, p. 1369, an account of what passed in parliament at the time of the Revolution respecting informations. See, also, Parl. Debates, vol. 19, 139. 548; vol. 20, p. 596; vol. 23, p. 1069.

The proceedings concerning Informations *ex officio*, which were had in parliament at the time of the Revolution, are noticed in the Letter concerning Libels, Warrants, &c. but I did not recollect this when I prepared sir W. Williams's Case.

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491. The Trial of JOHN OLIPHANT and others, for drinking to the Health of the Pretender, and cursing the King: 1 GEORGE I. A. D. 1715.* [Now first published from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIÆ, S. D. N. Regis, Tenta in prætorio burgi de Edinburgh vigesimo septimo die mensis Junij millesimo septingentesimo decimo quinto, Per honorabiles viros, Adamum Cockburn de Ormistoun Justiciarium Clericum, Dominos Gilbertum Elliot de Minto, Jacobum Mackenzie de Roystoun et Gulielmum Calderwood de Poltoun, Magistros Jacobum Hamilton de Pancaitland et Davidem Erskine de Dun, Commissionarios Justiciarij dict. S. D. N. Regis.

Curia legittime affirmata.

Intran'

John Oliphant, *Alexander Watson*, and Mr. *William Ramsay*, present baillies of Dundee: Mr. *William Lyon*, younger, of Ogill, town treasurer there, and Mr. *Thomas Wilson*, vintner there.

INDICTED and accused at the instance of sir David Dalrymple of Hailes, baronet, his majesties advocate for his highnesses interest, for the crime of drinking the Pretender's health and cursing the king. In manner mentioned in the criminal letters raised against them thereanent. Makeing mention that where, by the laws of Scotland made before the Union, particularly, the 4th act of the 1st session of her majestie queen Anne of blessed memory, her first parliament, intituled, Act anent Leasing-makers and Slanderers, and the acts therein recited, and by the laws of this and all well governed nations, leasing making and uttering of slanderous speeches, tending to excite sedition and alienate the affection of the leidges from his majesties person and government, for to sett up and encourage the falshood

* The transcripts of this and the three following Cases were not obtained in time for insertion in their proper chronological order.

and scandalous pretentions of any person, to the prejudice of his majestie, his estate, his just right and lawful title to the crown of these realms, stireing up thereby his majesties subjects to mislikeing, sedition and disobedience to his majesties just authority, especially when the same or any thing tending thereto, is done by magistrats, and such whose duty it is to punish and repress such practices, are crimes of a hainous nature and severely punishable: as also, by the law of God, of this and all other well governed realms, the cursing of his majestie is a crime of an hainous nature and severely punishable; yet nevertheless the said John Oliphant, Alexander Watson, Mr. William Ramsay, present baillies of the town of Dundie, William Lyon younger of Ogill, town treasurer there, and Mr. Thomas Wilson vintner there, all and each of them, shaking off all fear of God, and regaird to his majesties laws and authority, and in manifest contempt of his majesties just right and title to the crown of these realms, and for advancing and abateing the false and scandalous pretentions of the pretended prince of Wales, who now styles himself king of Great Britain, or king of England by the name of James the third, or king of Scotland, by the name of James the eight,* and to excite and stirr up his majesties subjects to misliking and sedition, and disobedience to his majesties just and lawful authority, did upon the 10th day of June, 1714 years, being the said Pretender's birth day,† go to the cross of Dundie, and there the whole persons above named and each of them, did in a solemn manner drink the said Pretender's health, under the title of king James the eight, thereby asserting his right to the style and title of king of these realms, in opposition to his majestie his sole and undoubted right thereto,‡ and in manifest contempt of his majestie, although the said John Oliphant, Alexander Watson and Mr. William Ramsay were then councellors and office bears in the said burgh of Dundie at the time. As also, upon the 20th of January last by past, 1715, the said day being by his majesty's royal proclamation, appointed to be served as a day of thanksgiving for his majesties peaceable accession to the thron of these realms, when some well affected to his majesties person and government for a farder evidence and demonstration of their joy, had caused ring the bells of the said town after sermon was over, the said John Oliphant present baillie of the said burgh, came to the steeple where the said bells were ringing, and in an insolent and rude manner, asked at those ringing the said bells, in these words, God damn you, who gave you orders to ring the bells? and when it was answered by some, That they were ringing the bells in honour of king George, the said John Oliphant replyed, God damn king George's blood and yours both, and immediately in a violent manner stopt all furder ringing of the said bells. From all which, the said John Oliphant, Alexander Watson, Mr. William Ramsay, William Lyon younger of Ogill, and Mr. Thomas Wilson, were all guilty actors art and part of the forsaid crime of drinking the said Pretender's health, under the title of king James the eight in manner above lybelled. And the said John Oliphant guilty of cursing his majestie also in manner lybelled. Which being found proven by the verdict of an assyse, before the lords justice general, justice clerk, and commissioners of justiciary, they and each of them ought to be punished severely, to the example and terror of others, to commit the like in time coming.

Pursuers.—Sir *James Stewart*, his majesties solicitor for his highness's interest.

Procurators in defence.—Sir *James Nasmith*, Mr. *James Grahame*, Mr. *Charles Erskine*, Advocats.

Informations ordered 28th June 1715.

INFORMATION for his *Majesties Advocat* for his highness interest,

AGAINST

John Oliphant, *Alexander Watson*, and Mr. *William Ramsay*, present baillies of the town of Dundie, *William Lyon* younger of Ogill, town thesaurer there, and Mr. *Thomas Wilson* vintiner there.

The persons above named being indited and accused at the instance of his majesties advocat, upon the law of this and all other well governed realms, and upon the 4th act of the 1st session of her majesties queen Anne's 1st parliament, anent leasing making and slandering, and the acts therein recited, for having upon the 10th of June 1714 years, gone to the cross of Dundee, and there in a solemn manner, drunk the Pretender's health, under the style and tytle of king James the eight, in manifest contempt of the laws and acts above-mentioned, and of his majesties lawful right title and authority. And also the said John Oliphant for having upon the twentieth of January last, in manifest contempt of the law of God, the laws of this, and all other well governed realms, maliciously and wickedly cursed his majestie king George by praying God to damn his blood, as is more particularly contained in the inditement.

It was acknowledged in defence of the pannells, That the first crime lybelled, was not punishable by any other act, than that made since the Union in the sixth of queen Anne, by which act, there being a new punishment introduced for crimes of this nature, viz. per-

* There is a story, that in the days of Jacobitism, a minister of the Kirk of Scotland being in a mixed company called on for a health besitatingly answered, "The tongue is an unruly evil—James third, and eighth."

† See in vol. 12, p. 123, a report of the Proceedings relative to his Birth.

‡ On the 10th of June, 1714, queen Anne was upon the throne; as is stated in the progress of the Case. She died on August 1, in that year.

sons guilty of the crimes lybelled, should incurr the pains of Præmunire, that thereby the acts related to the inditement, must be understood to be repealled, and this statute of the 6th of the queen not being lybelled on, the lybel must fall.

To which it is answered, That the said act of the 6th of the queen, can never be understood in any manner to derogat from the laws and acts of parliament made in Scotland before the Union, anent leasing making and slanderers, and far less to the laws of all nations, as well as of this kingdom, against speeches uttered in contempt of the government, and licenciously reflecting upon its proceedings, which directly tends not only to the disturbance but utter dissolution thereof, for no new law that is consistent with laws formerly made, is ever understood to abrogate former laws, unless such a provision be expressly contained therein, and it can never be alledged, that this act of the sixth of the queen, which properly concerns only one crime, the direct premeditate wilful and malicious denyal of the soveraign's right, and a direct asserting of the right of another, is anywayes inconsistent with the laws and acts of parliament upon which the inditement is founded, which concern all expressions, which either directly or by consequence import a contraverting of the soveraign's title or the government's legal proceedings, and so tend to the raising jealousies betwixt the government and the subject, and to excite the subject to sedition, and are framed in such extensive terms, as do comprehend most of the crimes that are committed by word or wryte against the soveraigne, their crown or dignity, or the peace and quiet of their government, which appears from the very narrative of the fourth act of the first session of queen Ann's first parliament, where the said act narrates, that in respect of the generality of the saids acts therein recited, and the various construction that the same may admitt, therefore the capital punishment is altered to an arbitrary one, which is a plain indication, that the parliament looked upon the saids acts to comprehend many cases not therein exprest; and therefore thought fitt rather to restrict the punishment than to limit the sense and import thereof, to the express cases therein contained, so that it is needless to insist furder upon a matter, so very plain in itself, and what has ever been held as a principal, that no new act of parliament derogates from former acts, except where the last is inconsistent with the former, or expressly rescinds it.

It was again alledged for the pannals, that drinking of the Pretender's health under the style and title of king James the eight, does not fall under any of the acts of parliament anent leasing making, upon which the inditement is founded.

To which it is answered, That the fact here charged against the pannells, is not only punishable though there were no such acts of parliament are lybelled upon, as being an affront and indignity done to the government and standing laws thereof, by asserting the right and title of the crown, to belong to any other than the soveraign, then vested with the exercise of the government, but this crime as lybelled will be found without any streached inferences, to be attended with all the bad consequences that our law has studied so anxiously to prevent by the foresaid acts, for the fact as laid in the lybel, is an express owning of the Pretender as the rightfull king of these realms, by drinking of his health under that title and designation of king, which is not only declared by the standing law to be usurped upon to the dishonour of his present majestie, his just right and title which stands upon the same foundation with that of her late majestie, but is also a little inconsistent and incompatible with his majesties undoubted right and title to the crown of these realms, and a virtual denyal of the same, and charging the government with usurpation and mal-administration of the highest kind, seeing the regal power in monarchial governments, being a *jus individuum*, if the right to govern be not in the person of him that has the exercise of the same, and the right to succeed do not justly belong to him, upon whom the same is settled, both the exercise of the government by the person not justly intituled thereto, and the very deed of settlement itself upon the successor, to witt, his present majestie, cannot be looked upon as any thing else but usurpation, and her late majestie being undoubtedly in the exercise of the royal power, the denying of her right to the same, or asserting the said right to be in the person of another, is by a direct consequence to assert, that her majesties government was usurpation, unjust, and without any right or title, which can never be denyed to be a practice that expressly falls under the laws lybelled on, for what more scandalous and slanderous speech can be uttered against a soveraign and their government, than to tax them with usurpation, which is not only to usurp the right of another, but to assume a power 'vi et fraude,' which they have no right to over a free people.

What can more naturally tend to excite sedition and disturb the quiet and peace of the soveraign and government, than to quarrel and deny their right to the alledgence and obedience of their subjects, and the successor's right to the same alledgiance upon the demise of that soveraigne, or assert the right to belong to another, or can there be a more express setting up and encouraging the false and scandalous pretentions of another, to the prejudice of the soveraign's just right and title, than by owning a person attainted by our laws, as king and soveraigne of these dominions, and drinking his health as such, and that even by magistrats and councellors of a burgh, whose office it is not only to suppress and punish such practices, but by a dutifull and loyal behaviour towards their lawful soveraign to encourage those under their inspection to a due sub-

mission and obedience to their lawful soveraigne.

It was further alledged, that the crime lybelled, of drinking of the Pretender's health, can never be said to be done to the dishonour of his majestie, or to the prejudice of his government, seeing the same is lybelled to have been committed in the late queen's reigne.

Which Defences though very thinn and weak, that it scarce merits any answer; but seeing the procurators for the pannells, did so much insist upon it, It is answered; That it is a known maxime, that the crown never dyes, so that crimes committed by any persons against the honour and dignity thereof, is always punishable by these laws, that fence and screen the same against the facts and deeds of subjects, that may tend to the prejudice thereof, besides the crime lybelled is not of the nature of a personal injury against the soveraigne then reigning, considered in a personal capacity, but is a crime directly against the very right, by which her late majestie was vested with a regal power, and if this defence for the pannell proved any thing, it should prove too much, for by the same rule, a person that in the late queen's time should have write expressly against her title, charging her with unjust usurpation, and arraigning the Acts of Settlement by which she then reigned, and his present majestie does now reigne, would escape all punishment if the defence now proponed was good. 2do. The crime lybelled being expressly aguinst the laws and acts of parliament founded on, the prosecution of the said crime is always competent, seeing the same is not personally against the soveraign, but against the law, the legislative and the whole society itself, and whatever is done in prejudice of her late majesties title, was not only a crime against those who at that time had the exercise of the government, but even against the very settlement and constitution itself, by which his majestie now possesses; and surely none will deny, but that if any person should positively now assert that her late majestie had no right or title to govern, but he would be guilty of a crime, and yet if the defence proponed by the pannells were good, it would hold much stronger in such a case, seeing it might be said, that such a crime was not committed against his majestie, but only concerned a person that was not in being, which at first sight appears so very weak and frivolous, that to insist further upon it, were to undertake to prove that the sun always shines at mid-day. But to conclude, the pannells by committing the crime lybelled, became debitors to the law, which debt can never be understood to be discharged by the death of the soveraigne then reigning.

It was alledged again for the pannells, That the lybell being founded on so many acts of parliament, the same ought to have concluded with the particular pains mentioned in the said acts. But so it is, that the lybel only concludes in general, that the pannels ought to be severely punished, which conclusion is not relevant.

To which it is answered, That the lybel being founded on the pains of nations, to which no particular statutory punishment can be adjected, but there the punishment must be determined 'ex arbitrio judicis,' and upon the acts of leasing making, which now are restricted to an arbitrary punishment, the lybel could have no other conclusion than a general one, seeing the law has left it 'in arbitros judicis,' to inflict a punishment suitable to the demerit of the crime, which is not only judged from the way and manner of committing the same; but likewise by the character and circumstances of the persons by whom the same was committed. And seeing the crimes lybelled are directly a disowning of the soveraign's just right and title to govern, and asserting the said right to be in the person of another, and that by magistrats and public office-bearers in a burgh royal, it's not doubted, but for one part of the punishment, the lords upon their being convict of the said crime, will find it just, for the security of his majesties government, for the peace and quiet of his subjects, and for the vindication of his honour and dignity to punish them by the deprivation of their present offices, and declaring them incapable in all time coming; as having rendered themselves unworthy of such an honour and trust, not only by the affront done to his majestie and the government, but by a practice so contradictory unto, and inconsistent with the solemn oaths and engagements that they are under to the government, by having taken the oaths required by law. In which how sincere they have been, will appear from the proof of the crimes lybelled.

As to that part of the inditement, that relates to John Oliphant having cursed the king, the same as lybelled is so incontestably relevant from the law of God, and of all nations, that all the defences that was offered for him being a denyal of the fact, it is needless here to say any further upon it, but to leave it to the proof. In respect whereof, &c. JAMES STEWART.

INFORMATION for *John Oliphant*, *Alexander Watson*, and Mr. *William Ramsey*, bailies of the town of Dundie; *William Lyon*, younger, of Ogill, town theasurer, and Mr. *Thomas Wilson*, vintner there, Pannells:

AGAINST

His *Majesties Advocat*, for his Highness interest, Pursuer.

His Majestie's Advocate has been pleased to conveen the persons abovenamed, as pannells, upon a lybell, narrating, that by the laws of Scotland, before the Union, leasing making, and uttering of slanderous speeches tending to alienat the affections of the subjects, from his present majesties person and government, setting up the false and scandalous pretensions of any person to the prejudice of his present majestie, his estate and just and lawful title to the crown of these realms, and thereby stirring his majesties subjects to disliking, sedition and dis-

obedience to his present majesties just authority, are crimes of a heinous nature. And subsuming, that the pannells in contempt of his majesties just right and title to the crown, and for advancing the pretensions of the pretended prince of Wales, who now styles himself king of Great Britain, or king of Scotland, by the name of James the eight, and to stirr up his present majesties subjects to misliking and disobedience to his majesties just and lawful authority, did upon the 10th of June one thousand seven hundred and fourteen years, at the Cross of Dundie, in a solemn manner, drink the said Pretender's health, under the title of king James the eight, thereby asserting his right to the stile and title of king of these realms, in opposition to his present majestie his sole and undoubted right thereto, and in manifest contempt of his present majestie.

It affords a great prejudice against lybells of this nature, when the prosecution is so long a time delayed, and when the informers themselves faill to appear as parties. If true zeall for the lawful government, had been the motive of this delation. what hindered the immediat prosecution? The proof of the alleadged fact, would certainly have been clear, the more recent the tryal was; and the informers will not own, that the delay of giving information was to endeavour to make the proof clearer. Neither shall the pannells take up the lords' time, with exposing the practices has been used towards this end; they shall content themselves with denying the lybel, as they have already judicially done, and proceed to examine the relevancy of the same.

The lybel as the lords perceive, is laid upon the statutes touching leasing making, the punishment whereof by our law was capital, as it was likewise declared to be in England, in the reigne of king Henry the eight, Anno 25mo. cap. 22. entituled, "Act concerning the king's Succession," but of late our law with respect to the punishment, has received an alteration before the Union, as appears by the statute upon which this lybel is founded. And that the subjects of both nations might be after the Union under the same laws, which concern public right, policy and civil government in the terms of the eighteenth article of the treaty, and that crimes of this nature and the method of prosecuting might be more ascertained, there was an act made in the parliament of Great Britain, anno sexto Annæ reginæ, whereby it's enacted, That any words spoken against the queen, or towards the abateing the right or title of the pretended prince of Wales, who styles himself by the title of king James the eight of Scotland, must be malicious and direct. And it is provided, that no person shall be prosecute in vertue of that act for any words spoken, unless information of such words be given upon oath within three dayes, and the prosecution be within three months after such information.

It will not be doubted, bnt this act superceeded all former laws in England, against crimes aryseing from words spoken, or slanderous speech, and that after the same past into a law, no person could be indicted upon any former acts, where the punishment might be more rigorous than that of Premunire, annexed to the crimes contained in this act, and if the act made in Scotland, restricting the capital punishment had not passed, it would certainly have appeared very much out of the way, to have brought a lybell upon the crime mentioned in the British act, concluding a capital punishment, from the said old Scots acts. And therefore the pannells did plead, that this British act of parliament did virtually abrogate all former laws touching the crimes therein mentioned, which might have been previously in force in either kingdome. For it cannot be alleadged, that the late Scots act touching leasing making, if it comprehends the crime lybelled, could be preserved from this alteration by the latter British statute, upon account that it introduced a more mild punishment, and if the British statute made an alteration of the former law in either kingdome as to any point, then certainly it altered the whole, particularly with respect to the manner of prosecution, that no person should be indited for words spoken, unless information of such words be given upon oath within three dayes, and the prosecution for such offence within three moneths.

And if it was otherwise, this incongruity must follow, that the subjects of Scotland may be indited for the same crime upon old Scots laws, and likewise upon the British act, whilst the subjects of England could only be tried upon the fact contained in the lybel, by the late British act, which cannot be well supposed.

It was answered for the pursuer, That to the abbrogating of a former law, there is required an express clause in the subsequent.

2do. That the late British act statutes only upon one crime, and so cannot be understood to abbrogate the law against leasing makers and slanderers of the soveraign, which may be done by many other ways and expressions, than these in the British act.

It is replied, That there is no law which requires the alteration of former laws, to be by express words, a contrary practice with us abbrogates a former law, by turning it to desuetude from the implied alteration of the legislators will. "Nam quio interest suffragiis populus voluntatem suam declaret, an rebus ipsis et factis." And what more express declaration of the legislators will can be required for the alteration of a former law, than to statute upon the crimes forbid by these former laws, and introduce a new punishment and manner of prosecution, "Non est novum ut posteriores Leges and priores trahantur ideo, qua anteriores Leges ad posteriores trajusitatum est: Et semper quasi hoc legibus in esse credi, opportet, ut ad eas quoque personas et ad eas res pertinent, quæ quandoque similes erunt," l. 26, et 27, ff. de Legibus. [I have followed the MS.]

And it imports not that leasing making and

slandering of the soveraigne may be by several other words and expressions, than these mentioned in the late statute, and that it is, the pursuers have not controverted, therefore it follows, that as to this crime and expressions from whence it is drawn, the legislative has made an alteration, as to the manner of prosecution, which not being answered, the lybel cannot be sustained.

The second defence proponed for the pannells, was, That the drinking the Pretender's health under the title of king James the eight, does not fall under the description of the acts against leasing making, for this statute 21 Robert the first, is defined to be the inventing of rumours between the king and the people, which the fact lybelled on cannot be said to be; and this will appear from the lybel itself, where the crime is not laid to be in drinking the health, but in pronouncing the words, which properly speaking is no affirmation, but a compellation; and therefore the only argument that can be offered for supporting the lybel, is, that designation of any person by the name of king James the eight, implies an affirmation, that the person so designed has right to the crown of these realms. But then this is only by an innuendo or inference which ought not to be admitted in criminal lybells, and this the pursuers have been so far aware of, that they neither said in their lybel, that the pannells did directly or maliciously or advysedly pronounce these words.

But further, the drinking of any persons health, under whatsoever designation, can never be reckoned the inventing of rumours between the king and his people, nor any false nor slanderous speech of the soveraigne, because there is nothing spoke of the soveraigne, but of a third party.

The pursuers answered that the giving of title of king to any person implies likewise the asserting of his right, and that assertion does again imply, that the rightful soveraigne has no right, than which there can not be a more dangerous rumour and false slander tending to sedition, and stirring up the people to dislyke of his majesties person and government.

It is replied, That crimes are not to be made up by implications, and there is no crime that is more clearly hedged in from streeches and innuendos, than the crime of leasing making, the very law upon which the crimes is founded, complains that the law touching the same have been lyable to streeches; and the declaration of the estates containing the Claim of Right, and offer of the crown to king William and queen Mary, setts it down as one of the articles of king James the seventh his forfaulture, that he caused pursue several persons upon streeches of old and obsolet laws, and the particulars sett down in that article shews, that the streeches there complained of concern the laws against leasing making, so that if the words lybelled upon are no direct slander of the soveraigne to the people, or the inventing of a false rumour of the soveraign, no implication or innuendo can be admitted to make up this crime, and that the fact lybelled does not directly fall under the acts lybelled upon, has already appeared.

The pannells alleadged in the third place, that the lybell is altogether irrelevant and incept, in so far as it mentions the fact to be committed against his present majestie, and to the prejudice of his highness and estate and his just and lawful title to the crown. And in another part of the lybell, it is said to be against his majesties sole and undoubted right, to the crown of these realms; whereas it appears, from the lybell itself, that the crime is said to be committed upon the 10th of June, 1714, before his majesties happy accession, and therefore cannot be said to be committed against his majestie, who at that time had only a presumptive right, and consequently not the sole and undoubted right, which includes possession.

It was answered for the pursuer, That the crown never dies, so that crymes committed against the crown and dignity of the crown, are always punishable; and the crime lybelled not being of the nature of a personal injury to the soveraign reigning, but against the right with which her majestie was vested, the successor his present majestie and officers, are well intitled to prosecute the offences.

2do. It could not be doubted, if any person should now impugn her late majesties right, a lybell could be competently brought, because the successors right depends upon the predecessors right.

To this the pannells reply, That the pursuers mistake their own lybel, which does not proceed as if the crime were committed against the queen, but against his present majestie. And therefore, that the crown dyes not, has no import in this question, which resolves simply into this, whither or not words spoken against the late queen, can be said to be against the king? so as to infer the crime of leasing making, or the inventing or spreading of rumours against his present majestie, who was not king at the time. For this is the lybel, and upon the resolution of this question, the whole lybel depends, for certainly it is not leasing making, as defined by our statutes, to spread rumours or false and slanderous speeches amongst subjects.

And whereas it is alledged, that the lybel bears, that the fact was committed in opposition to his majesties title to the crown, and consequently to the Act of Settlement and his majesties succession.

But this is a very strained inference, and seems to be contradicted by the lybel itself, which mentions his majesties sole and undoubted right to the crown, and consequently could never be meant of his right of succession which was only *in spe*. And elsewhere it is said, that the fact lybelled, does tend to alienate the affection of the subject from his majesties person and government, which could never be applyed but to the soveraigne reigning at committing the fact, and not to his majestie, whose happy accession was some time thereafter.

And the pretence, that speeches against the

late queen and government now uttered might be punished, is nothing to the present purpose, for this their lordships sees is not the fact laid in the lybel.

2dly. The law is plain as to this point, that leasing making may be by slandering the kings progenitors, but then, that slandering must be in the reigne of his majestie, whose officers pursue, and must not aryse from a fact alleadged committed in the suceeding reigne.

3tio. This aryses from the disposition of the common law, touching slanders and injuries, ffor leasing making is nothing but an injurious, scandalous and slanderous speech against the soveraigne; and so is by our lawiers, particularly by sir George Mackenzie, treated under the title *de injuriis:* and although the crime is highly aggravated by the quality of the person against whom it is committed, and the punishment annexed to the crime therefore made more severe, yet it still retains the nature of injuries. And by the common law it's expressly determined, 'injuriarum actio neque heredi neque in hæredem datur" L. 13 hoc tit.: and lib. 4, tit. 12, § 5 Institut. The emperor, speaking of certain crimes says, "Sed hæredibus hujus modi actionis competerit, excepta injuriarum actione, sed si qua alia similis inveniatur," where the words, "Et si qua alia inveniatur" are well to be noticed, as plainly comprehending the present pursuit, which therefore could not have proceeded, even suppose the pursuers had lybelled the fact to have been committed as an offence against the late queen, which is very obvious they have not done, and consequently can never subsume upon the crime of leasing making, nor upon no other crimes as done in contempt of his majestie or his royal authority, and while at the same tyme the lybel evidences his majestie had not succeed the time of the fact lybelled.

And that the lybel is wrongously led in this respect, appears from the other parts thereof, where it is said, that the Pretender now styles himself king of Scotland, by the name of James the 8th, but does not say, that the said Pretender did thus style himself the time of committing the fact, and yet the essence of the crime seems to be laid in this, that the pannells are alleadged to have given the pretended Prince of Wales, the same wrongful designation, which he assumes to himself, and therefore ought to have subsumed, that the said pretended Prince of Wales, gave himself these styles, from which the crime is inferred, at the time of committing of the fact lybelled.

The last defence as to this point of the lybel was, that there is no particular conclusion against the pannells, that they ought to be punished with this or that penalty, which seems to be as requisite, as it is to specifie the fact from whence the conclusion aryses, because if a special conclusion is lybelled, and that conclusion not consonant by the law of the land, to the fact alleadged to infer the conclusion, the pannells have opportunity to dispute the irritancy of the conclusion, and to shew that the penalty lybelled, does not aryse from the alleadged crime, and so if a capital punishment had been concluded, or if escheat of moveables and lyfrent, or if tinsel of office had been specified to be the consequence of the crime, the pannells were cited to appear and prepare their defence against the conclusion, which they are intirely precluded from, by the method which the pursuers has followed, which ought to be nicely guarded against.

For altho the leidges are absolutely secure from streeches, and extending of punishments of crimes under the present constitution, where they have persons of so great learning and integrity to be their judge, yet precedents are to be guarded against for the posterity of posterity, and the subject is not to be deprived of the last opportunity of defence either against the crime or conclusion therefrom, and the pannells do oppone the constant custom and practique in lybelling of criminal inditements, where the particular punishment is specified in the conclusion, or which is the same thing, that the pannells ought to be punished with the pains of law, ffor then the law which declares the crime, directs to the particular conclusion, and the pannel if he is not prepared to defend against the conclusion, is to blame, and not the pursuer; but where a particular penalty is endeavoured to be added at pleading, or by the information, as in this case, the pannel is no more bound to answer, than if the premisses of the sylogism or lybel, from whence the conclusion is drawn, had been general, and the pursuers had condescended on the particular fact inferring the crime at their pleading, or in their information.

The pannel John Oliphant against whom a separate crime is laid, does repeat the immediat last defence, which was proposed against the whole lybel, and does not pretend to dispute the relevancy of the alleadged crime, wherewith he is charged, only it may appear from the lybel itself, that if any such words were spoke by him, which he absolutely denyes, it was done in a tumult and mobb, which he was endeavouring to quell and compesce. The crime of cursing and taking the blessed name of God in vain, is certainly very hainous and a direct violation of the moral law, the fountain and standard of all law whatsomever, which tho' by no law of any nation can never be repealed, yet it may be thereby, as to the punishments augmented or restricted, according as the breach of that law is more or less obnoxious to civil government, and therefore we see, that in all nations there are different penalties annexed to the breach of the several articles of the moral law, and offences against our neighbour, even for very small injuries done to him in his goods, as in the case of theft, more severely punished than these directly committed against the law-giver, the soveraigne Lord of all the world, particularly with respect to cursing, swearing and blaspheming, as appears by Charles the 2nd, parliament 1st, session 1st, cap. 19th, ratified Charles the 2nd, parliament 2nd, session 3d, cap. 22nd,

from which the pannel concludes, that the lybel as to this article which is relevant, cannot in the conclusion as to the punishment be further extended, than the penalties contained in these laws, though the crime should be proven, which in truth it can never be. In respect whereof, &c.

Sic Subscribitur, JAMES GRAHAME.

4th July, 1715.

Intran'

John Oliphant, Alexander Watson, and Mr. *William Ramsay,* present baillies of Dundee: *William Lyon,* younger, of Ogil, treasurer; and Mr. *Thomas Wilson,* vintner, there.

Indicted and accused *ut in die precedenti.*

Pursuer.—Sir *James Stewart,* his Majestie's Solicitor and Advocate depute.

Procurators in Defence.—Sir *James Nasmith,* Mr. *Charles Gray,* and Mr. *James Grahame,* Advocats.

The Lords Justice Clerk, and Commissioners of Justiciary, having considered the lybel at the instance of his majestie's advocat for his highness's interest, against John Oliphant, Alexander Watson, and Mr. William Ramsay, present baillies of the town of Dundie; William Lyon, younger, of Ogil, town-treasurer; and Mr. William [So MS.] Wilson, vintner, there, pannels; with the foregoing debate thereupon. They find the said pannels, all or each of them, their going to the Cross of Dundie on the 10th day of June, 1714 years, and their drinking the Pretender's health, by the name of James the eight, relevant to inferr an arbitrary punishment. As also find the said John Oliphant his cursing king George in the terms lybelled, upon the 20th day of January last, *separatim,* relevant to inferr an arbitrary punishment against the said John Oliphant; and repell the haill defences proponed for the pannells, and remitt them and the lybel as found relevant to the knowledge of an assize.

Sic Subscribitur, AD. COCKBURNE, I. P. D.

ASSYSE.

William Martin, of Harwood.
Sir William Menzies, of Glaidstains.
James Dewar, of Fullertoun.
Walter Murray, of Halmyre, younger.
——— Warrender, of Lochend.
David Seivwright, of Mergatland.
Alexander Clark, of Glendarch.
William Hart, merchant in Edinburgh.
Laurence Anderson, merchant there.
James Louthian, merchant there.
Joseph Reoch, painter there.
Alexander Burton, glazier there.
James Johnstoun, merchant there.
Archibald Campbell, of Racken.
Robert Bull, merchant, in Edinburgh.

The above assyse being all lawfully sworn, and no objection of the law in the contrair.

His *Majestie's Advocate Depute* for probation, adduced the witnesses after deponing, viz.

Thomas Dowie, merchant, in Dundie, aged twenty-six years, or thereby, married, solemnly sworn, purged of malice, prejudice, and partial council, examined upon the lybel and interrogate, depons, That upon the 10th day of June, 1714 years, between eleven and twelve at night, the deponent did see Alexander Watson and Mr. Thomas Wilson, both pannels, at the Cross, at Dundie, with glasses with wine in them, and heard them drink a health to king James the Eight; and after drinking, saw them throw up their glasses and bottles of the wine; and that Alexander Wilson, while drinking the said health, was upon one of his knees, and heard the said two persons repeat the words, Here is to the health of king James the Eight. *Causa scientiæ patet;* and this is the truth as he shall answer to God.

Sic Subscribitur, THOMAS DOWIE.
AD. COCKBURN.

Alexander Low, merchant, in Dundie, aged twenty-eight years, or thereby, married, solemnly sworn, purged, and interrogat *ut supra;* depones, That upon the 10th of June, 1714, about eleven a-clock at night, the deponent was at the Mercat-cross of Dundie, and saw there present, John Oliphant, Alex. Watson, Mr. Wm. Ramsay, William Lyon, and Mr. Thomas Wilson, pannels; and did see them drink a health in glasses of wine, and heard them name the health, to be the health of king James the Eight, and did see a bottle of wine or two thrown in the air, at the place where the health was drunk, when the same was named. *Causa scientiæ patet;* and this is the truth as he shall answer to God. And furder depons, That he heard every one of the said five pannells, name the health of king James the Eight, and saw them drink the samen; and this is the truth as he shall answer to God.

Sic Subscribitur, ALEX. LOW.
GILB. ELIOT.

Wm. Smith, taylor, in Dundie, aged twenty-nyne years, or thereby, married, solemnly sworn, purged of malice, prejudice, and partial council, examined and interrogate, depones, That upon the 10th day of June, 1714 years, about eleven a-clock at night, the deponent saw John Oliphant, Alexander Watson, Mr. William Ramsay, Wm. Lyon, and Mr. Thomas Wilson, pannels, upon the downmost steps of the Cross of Dundie, and saw them drinking healths, and several healths were named, and particularly king James his health; but does not know what king James, and does not know who named the health, nor whither it was named before or after they had drunk the said health. *Causa scientiæ patet;* and this is the truth as he shall answer to God.

Sic Subscribitur, WM. SMITH.
H. CALDERWOOD.

James Miller, weaver, in Dundie, aged twenty years or thereby, unmarried, solemnly

sworn, purged of malice, prejudice and partial council, examined and interrogate; depones, That upon the 20th day of January last, the deponent being standing at the foot of the steeple of Dundie, when the bells were ringing on occasion of the thanksgiving day, for the king's accession to the throne, the deponent did see John Oliphant, pannel, at the foot of the said steeple, and did hear him say these words, God damn king George his blood; *causa scientiæ patet;* and this is the truth as he shall answer to God; and declares he cannot write.

Sic Subscribitur. J. HAMILTON.

Andrew Barron, servitor to the glover trade, in Dundie, aged thirty years, or thereby, married, solemnly sworn, purged and interrogat *ut supra;* depons that he was at the town of Dundie, upon the 20th day of January last, the day appointed for Thanksgiving, on account of his majesties accession to the throne; the which day he the deponent was in the church yeard at the time when there were others that went in to the steeple and toll the bell, and when he the deponent was in the church yeard, he did see baillie Oliphant, pannel, there; and did hear him say, What did the people mean by ringing of the bells? And thereupon further say, 'God damn the king and them both;' and further depons, that before the baillie emitted the foresaid curse and expression, he heard the people tell him, that the ringing of the bells was in honour of king George his accession to the throne; and depons, it was at the foot of the steeple at the door, that he heard people tell the baillie, on what occasion the bells were rung, and that it was at the same place he heard the baillie curse the king as said is. *Causa scientiæ patet;* and this is the truth as he shall answer to God. *Sic Subscribitur,* ANDREW BARRON. DA. ERSKINE.

The Lords Justice Clerk and Commissioners of Justiciary, ordain the assyse presently to inclose, and to return their verdict to-morrow at twelve o'clock, and the haill fifteen to be present, each under the pain of 100 merks.

5th July, 1715.

Intran'
John Oliphant, baillie of Dundie.
Alexander Watson, baillie there.
Mr. *William Ramsay*, baillie, there.
William Lyon, younger, of Ogill, treasurer there, and
Mr. *Thomas Wilson*, vintner there.

Indicted and accused, *ut in die præcedenti.*

The said day, the persons who past upon the assyse of the said pannells, returned their verdict in presence of the said lords, whereof the tenor follows.

EDINBURGH, *July* 4, 1715.

The above Assyse having enclosed, did choyce sir William Menzies of Glaidstains to be their chancellor and Archibald Campbell their clerk; and having considered the lybel at the instance of his majesties advocate for his highnesses interest against John Oliphant, Alexander Watson, Mr. William Ramsay, William Lyon, and Mr. Thomas Wilson, pannels, the lords justice clerk and commissioners of justiciary their interloquitor thereon, and depositions of the witnesses adduced for proving thereof, they all in one voice find the lybel proven against Alexander Watson, and Mr. Thomas Wilson, two of the pannels, their drinking king James the eight his health, place day and year of God lybelled. And finds it proven, that John Oliphant, Mr. William Ramsay, and William Lyon, the other three pannells did drink king James's health the forsaid time and place lybelled; as also, did all in one voice find the lybel proven against the said John Oliphant, viz. his cursing king George in the terms of the lybel and interloquitor. In witness whereof thir presents are subscribed by our said chancellor and clerk in our names place and date foresaid.

Sic Subscribitur, WM. MENZIES, Chanc.
A. CAMPBELL, Clerk.

The Lords Justice Clerk and Commissioners of Justiciary delay the consideration of the said verdict till Monday next at nyne o'clock.

12th July, 1715.

Intran'
John Oliphant.
Alexander Watson, and
Mr. *Wm. Ramsay*, baillies of Dundie.
William Lyon, town treasurer there.
Mr. *Thomas Wilson*, vintner there.

The Lords Justice Clerk and Commissioners of Justiciary, having considered the verdict of assyse returned upon the 5th day of July instant, against the said John Oliphant, Alexander Watson, Mr. William Ramsay, William Lyon, and Mr. Thomas Ramsay, pannels, They, in respect thereof by the mouth of Charles Kinross, macer of court, deprive the said John Oliphant, Alexander Watson, and Mr. William Ramsay, of their offices of baillies of Dundie, and the said William Lyon of his office of treasurer of the said burgh, and declare the said John Oliphant incapable of enjoying any public office or trust within the said burgh, or within that part of Great Britain called Scotland, in all time coming. And declare the said Alexander Watson, and Mr. Thomas Wilson, incapable of enjoying any public office or trust within the said burgh of Dundie, in all time coming. And also declare the said Mr. William Ramsay, and William Lyon, incapable of enjoying any public office or trust within the said burgh, for the space of three years next after the date hereof. And sicklyke the said lords fine and amerciat the said John Oliphant in the sum of 200 merks Scots, and the said Alexander Watson, in the sum of 100*l.* Scots, and the said Mr. Thomas Wilson, in the sum of 100 merks Scots, money

aforesaid, to be paid to his majesties receiver general for his highness use. And ordain the said John Oliphant, Alexander Watson, and Mr. William Ramsay, William Lyon, and Mr. Thomas Wilson, to be carried to the tolbooth of Edinburgh, there to remain until the 10th day of August next inclusive, and the said John Oliphant, Alexander Watson, and Mr. Thomas Wilson, to remain thereafter in the said prison until they make payment of their said respective fines; and ordain the magistrates of Edinburgh to sett the persons of the said Mr. William Ramsay and William Lyon at liberty furth of the said Tolbooth after the said day; and also to sett the persons of the other three pannels at liberty, after elapsing of the said day, upon producing their respective discharges of the said fines; which is pronounced for doom.

Sic Subscribitur, AD. COCKBURNE.—W. CALDERWOOD, GILB. ELIOT, JA. MACKENZIES, J. HAMILTON, DA. ERSKINE.

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492. The Trial* of Mr. GEORGE ROBERTSON, Minister, for neglecting to pray for the King: 1 GEORGE I. A. D. 1715. [Now first published from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIÆ, S. D. N. Regis tenta in prætorio burgi de Edinburgh, undecimo die mensis Julii, millesimo septingentesimo decimo quinto, per honorabiles viros, Adamum Cockburn de Ormistoun Justiciarium Clericum, Dominos Gilbertum Eliot de Minto, Jacobum Mackenzie de Roystoun, Gulielmum Calderwood de Polton, Magistros Jacobum Hamilton de Pancaitland et Davidem Erskine de Dun, Commissionarios Justiciarij dict. S. D. N. Regis.

Curia legittime affirmata.

Intran'

George Robertson, minister of the meeting-house of Killiechangie in the parochine of Logiereat.

INDICTED and accused at the instance of sir David Dalrymple, of Hailes, baronet, his majesties Advocate for his highnes's interest, for the crime of not praying for the king in manner mentioned in the criminal letters raised against him thereanent. Maketh mention, That whereby an act made in the tenth year of his late majestie's reigne, intituled, An Act to prevent† those of the episcopal communion in that part of Great Britain called Scotland, in the exercise of their religious worship, and in the use of the liturgy of the Church of England. It is enacted, That every minister and preacher as well of the Established Church in that part of Great Britain called Scotland, as those of the Episcopal Cummunion protected and allowed by that act, shall at some time during the exercise of divine service in his respective church, congregation or assembly, pray in express words for her most sacred majestie queen Anne, and the most excellent princess Sophia, electress and dutchess dowager of Hanover while living, and all the royal family. And their excellencies the lords justices in council, in pursuance of the foresaid act, upon the 1st of August 1714, ordered, that hereafter every minister or preacher, whether of the Established Church, or those of the Episcopal Cummunion, shall in his respective church, congregation or assembly, pray in express words for his majestie king George, his royal highnes the Prince, and all the royal family. Nevertheless, the said Mr. George Robertson, when performing divine publick worship in his meeting-house at Killiechangie upon Sunday the 5th of June, 1715 years, neglected and omitted to pray in express words for his majestie king George and his royal highness the Prince, and that in manifest contempt of the said act of parliament, and order of the justices. And notwithstanding he was formerly convict and amerciat by the justice court at Perth in their last circuit for the like offence, ffor which he ought again to be punished with the pains of law.

Pursuer.—Sir *James Stewart* his Majesties Advocate depute and Solicitor.

Procurators in Defence.—Mr. *James Grahame*, and Mr. *George M'Kenzie*, Advocates.

The lybel being read, and fully debate *viva voce*, in presence of the said lords, pannell and assizers, the lords justice clerk and commissioners of justiciary, ordain both parties to give in their informations to the clerk of court, the pursuer to give in his, betwixt and Wednesday's night next at six a clock, and the pannel to give in his, betwixt and Friday's night thereafter at six a clock, in order to be recorded, and continued the dyet of the said cause till Monday next at nyne a clock, and ordain assysers and witnesses to attend then, each under the paine of one hundred merks.

July 14th, 1715.

INFORMATION for sir *David Dalrymple* of Hailes his Majesties Advocate,

AGAINST

Mr. *George Robertson*, minister of the meeting-house at Killiechangie, in the parish of Logierate.

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* See the preceding Case and the two following Cases.

† So in the Record. It should be 'protect.' I have beretofore adverted to the strange incorrectness of the Scots Records, which however I have thought it right to retain.

The said Mr. George Robertson, being indited for omitting to pray for his majestie king George in the terms of the act of the tenth of her late majestie queen Ann, and the appointment of their excellencies the lords justices, the 1st of August last, as is at more length concontained in the said inditement, which *brevitatis causa* is here held as repeated.

It's needless to trouble the lords with any answer to the alledgance made for the pannel anent the form of procedure in the said inditement, as that the said order, or appointment of the justices, was not given out with the inditement, &c. That having been answered in Mr. Guthrie's Case now depending, and therefore shall proceed to the other defences for the pannel, and,

1mo. It was alledged, that the act of parliament of the tenth of queen Anne, nor the proclamation of the justices, could not support the relevancy of the inditement, because the said act only appoints prayers to be made for her late majestie queen Anne, the princess Sophia, while living, and all the royal family. And the appointment of the lords justices cannot be lookt upon to be other than a recommendation to all concerned, That publick prayers should be made for his majestie king George, but can never be understood to be of the nature of a law enjoining complyance therewith under a penalty: besides that no penalty is contained in the said proclamation, or appointment of the justices.

To this it is answered, That in regaird the soveraigne in law, is understood never to die, so all acts of parliament relating to this order as such, are in perpetual force and obligation till repealed; so that the act of the tenth of the queen, enjoining her majestie to be prayed for, regairds his present majestie king George, her successor, as well as her then majestie; so that the act is still in force till repealled, in so far as regairds prayers for the soveraigne.

And that is the common sense and understanding of the act, is evident from this, that last year, upon the death of the most excellent princess Sophia, electress and dutchess dowager of Hanover, the privy council of Great Britain did not think any new act of parliament necessary, (which might have easily been obtained the parliament being then sitting) for continuing the force and obligation of the forsaid act, but only by a proclamation appointing his present majestie to be prayed for under the title of elector of Brunswick, tho' he was not *nominatim* named in the said act, but only comprehended under the general terme of the royal family; and none never doubted but the said appointment of the council, after the demise of the said princess Sophia, was binding upon the whole subjects under the penalties contained in the forsaid act, as much as ever the act itself was before the death of the said princess Sophia: ffor, as has been above noticed, the act of parliament lybelled on, regairding prayers to be made for the soveraigne, and the next heir to the crown *nominatim*, and all the royal family in general.

The proclamation of council imports no more than a pointing out to the subjects the person of the royal family, that by the death of the princess Sophia, was become next heir to the crown; so that the proclamation of council is to be understood as a direction to those concerned who the persons are that are to be prayed for *nominatim*, in obedience to the said act in the tenth of queen Ann, rather than an injunction or command to pray for them, that standing already settled by the said act, to which obedience was due, under the penalties therein contained.

And this sufficiently illustrates the nature of the order, or appointment of the lords justices, and also answers the objections that are made against it; for the said appointment of the justices only directs who the persons are that in obedience to the said act, are to be prayed for, as appears by the order or appointment of the justices itself, coppies whereof are hereto subjoined, which are in these words, after having narrated the claims of the said act of parliament appointing prayers to be made for her late majestie queen Anne, and the most excellent princess Sophia, and all the royal family, then follows in pursuance of this act, which excellencies the lords justices in council are pleased to order, and it is hereby ordered, That henceforth, every such minister and preacher shall in his respective church, congregation or assembly, pray in express words for his most sacred majesty king George, his royal highness the Prince and all the royal family.

Whereby it is plain, that the said act was understood by the lords justices to be still in force as to all effects, seeing their order is founded upon it, and expressly declared to be in pursuance of it, so that this order of the justices is not a new act, but only putting a former act in execution, or appointing the manner and order of observing the same.

It was further alledged for the pannel, That the said act of queen Anne, did only enjoin the observation thereof to the established ministers of this Church, and such of the episcopal clergy as should take the benefite of the tolleration granted by the said act: but so it is, that the pannel is not in the terms thereof, he never having, as that act appoints, presented his letters of orders to the justices of the peace, and entered the same on record by the clerk of the said justices, nor obtained licence for erecting a meeting house.

To which it is answered, That this defence made for the panuel is such a metaphisical quibble founded upon the contempt and neglect of the very law, from which he can pretend any right to preach or exercise any part of the ministerial function, that no regaird can be had to it, for the very sum of the defence in other words is this, that the pannel cannot be punished for not observing one point of this law, because he has not observed another part of this law, which he was also obliged to do.

But as such reasoning can never pass with any person of common understanding, much less with the lords, who at first sight must discover the falacy and weakness of such an argument, so on the other hand it would be considered, that the pannel, tho he ought not to take upon him the liberty to preach without having first complyed with what the law requires, in order to entitle him thereto: yet since he thought fitt to neglect that, it cannot excuse him if he take upon him to preach or perform divine publick worship, from not observing what the law enjoins him to do, upon such an occasion, vizt to pray for his majestie king George.

And if such a defence could, with any shaddow of reason be admitted, of what pernicious consequence should it be? And how should the honour authority of the government be trampled upon by every pretending preacher who is allowed upon the faith of and in obedience to this act, to preach without any trouble or mollestation? And when he is called in question for not observing what is therein enjoined, he tells his judges, that he is not obliged to obey that act, because forsooth he has not homologate the same by embracing the benefits thereof, tho' at the same time he has not the least shaddow of a pretence for exercising any part of the ministerial function within this part of the island, but by virtue of the said act: so that this defence being meer banture and first sight so choaking to every man's judgement, it is needless to insist further upon it. In respect whereof, &c.

Sic Subscribitur, Ja. Stewart.

Information for Mr. George Robertson

against

His Majestie's Advocat.

The said Mr. George Robertson is conveened in a criminal process before the lord justice clerk and commissioners of justiciary, at the instance of his majesties advocate for his highness interest, lybelling upon an act of parliament decimo Annæ, intituled Act for preventing disturbance to those of the Episcopal Communion, &c. whereby it is provided, That every minister and preacher, as well of the Established Church as those of the Episcopal Communion, protected and allowed by that act, shall at some during the exercise of divine service, in such respective church, congregation or assembly, pray in express words for her sacred majestie queen Anne, and the princess Sophia and all the royal family, and every such minister or preacher neglecting so to do, shall for his offence, forfeit for the first offence the sum of 20*l* sterling, and for the second, shall forfeit and loose the benefite of this act, and be declared incapable of officiating as pastor of any Episcopal congregation, during the space of three years; as also, lybelling upon an order or proclamation of the justices, enjoining all ministers to pray for his most excellent majestie and the prince of Wales, and all the royal family.

Against the relevancy of this lybel, it was alledged for the pannel, That he could not be convicted upon the foresaid act of parliament, nor incurr the penalties therein mentioned, by reason that his majestie king George and the prince of Wales, were not by the act ordained to be prayed for, and the pannel prayed for all the royal family, which is all the act requires after the demise of the queen, and death of the princess Sophia.

And as to the proclamation of the justices, it was alledged, primo, That the said proclamation being no publick law, by the form of all criminal tryals, a copy thereof ought to have been given out to the pannel, or put into the clerk's hands and referred to as there in the lybel, that the pannel might have prepared for his defence, neither of which being done, he was not bound to answer.

2do. Although all the subjects ought to give obedience to such orders and proclamations of the justices, or the king and council, yet such proclamations have not the force of an act of parliament, as to particular penalties, unless where some law or act of parliament does authorise such penalties to be inflicted upon the failzieing to give obedience to such orders and proclamations of council.

3tio. As the pannel is informed, the proclamation of council contains no certification against such as shall not observe the same, that they shall incurr the penalties in the foresaid act of parliament.

It was answered by the pursuer, That the act of the tenth of queen Anne, in so far as concerns the prayers to be made for the soveraign, is still in force, and the proclamation points out only the successor to the crown, who upon his accession is to be prayed for in like manner as the predecessor, expressly named in the act, so that no new act of parliament was necessary. And this appears from the proclamation of the queen and council upon the death of princess Sophia, whereby his present majesty elector of Brunswick, was ordained to be prayed for under that title, though not expressly named in the act of parliament; and it was never questioned but such who contravened this order of council were lyable to the penalties of the act.

But this the lords will perceive, is to assert and not to answer either from law, reason or precedent. The act of parliament annexes the penalty for not praying for the late queen and princess Sophia, but neither that law nor any other, so far as the pannel knows, impowers the justices to ordain the successor to be prayed for, under the penalties contained in the law, upon such as should neglect, neither indeed do the pursuers alledge, that the proclamation of the justices contains any such certification, and the instance given of the former proclamation by the queen and council touching the praying for his majestie, under the title of the elector of Brunswick after the death of princess Sophia, is nothing to the purpose, unless an in-

stance could likewise be given that a person neglecting to pray in the terms of that proclamation had been likewise convict by the sentence of any judicatory within the united kingdom, which the pursuer has not alledged upon. And therefore this defence stands relevant in its whole heads as proponed.

The pannel further alledged, that he could not be convicted upon the statute lybelled, because he was not within the description of the same, neither being minister of the Established Church, nor having the benefite introduced by the act, in favours of the ministers of the Episcopal Cummunion, and this seems very evident from the penalty enacted, that the persons convicted upon the law should forfeit the benefite thereof, which of necessity must pre-imply, that the party to be convicted was intituled to the benefite which by the law he was to forfeit and loose.

To this the pursuers answered, that the preaching or performing divine worship, without observing the requisites enjoined by that law was unlawful of itself. And therefore the pannel could not excuse himself of the neglect in not praying for his majestie, as that law directs.

But this is not to argue from the pursuers lybel, to which the pannel is called to answer, but to insist on a new lybell, which hitherto has not appeared; and to which therefore the pannel is not bound to answer. The single question here is whither a person who is nether minister of the Established Church, nor intitled to the benefite of the Act of Toleration, is subjected to the penalties introduced by that act, only against such as are ministers of the Established Church, or being of the Episcopal Cummunion, are intituled to the benefite of performing divine worship in a meeting-house, and its very obvious from the simple position without further arguing, that such persons cannot be convict upon this law, and the pursuers have lybelled no other. In respect whereof, &c.

Sic Subscribitur, JAMES GRAHAME.

18*th July*, 1715.

Intran'

Mr. *George Robertson*, minister of the meeting-house at Killichangie, indicted and accused *ut in die precedenti.*

The Lords Justice Clerk, and Commissioners of Justiciary, having considered the lybel at the instance of his majesties Advocat for his highness interest against the said Mr. George Robertson, pannel, with the debate thereupon, they find the said Mr. George Robertson pannel his neglecting and omitting, when publickly performing divine worship, to pray in express terms for his majestie king George at the time and place lybelled, relevant to inferr an arbitrary punishment. And repell the haill defences proponed for the pannell, and remitt him and the lybel as found relevant to the knowledge of an assize.

Sic Subscribitur, AD. COCKBURNE, I. P. D.

ASSIZE.

William Waddell, merchant in Edinburgh.
Alexander Finlayson, merchant there.
Archibald Murray, merchant there.
John Thomson, merchant there.
Robert Philp, merchant there.
James Mitchelson, jeweller there.
John Taylor, merchant there.
David Nicoll, merchant there.
George Beech, merchant there.
Robert Willison, merchant there.
John Miller, merchant there.
John Hutton, merchant there.
James Simpson, merchant there.
John Lesley, merchant there.
Patrick Gibson, merchant there.

The above assize being all lawfully sworn, and no objection of the law in the contrair.

The Pursuer for probation adduced the witnesses after deponing, viz.

Alexander Robertson of Faskallie aged 26 years or thereby, married, solemnly sworn, purged of malice, prejudice and partial council, examined upon the lybell and interrogat, depons that he was at the meeting-house of Killiechangie upon the 5th day of June last, being a Sunday, and did hear Mr. George Robertson the pannel pray in English, and then preach in English, and did not hear him pray that day, during the time of divine service, in express words for king George. Depons that he came out of the meeting-house immediately after his English sermon, the pannel being thereafter to preach in Irish, and that there was no longer time betwixt the two sermons than the singing of some verses of a salm, *causa scientiæ patet*; and this is the truth as he shall answer to God.

Sic Subscribitur, A. ROBERTSON, AD. COCKBURNE.

James Stewart, son to Charles Stewart of Balleachan, aged 20 years or thereby, unmarried, solemnly sworn, purged, and interrogate, *ut supra*, depones, that he was present at the meeting-house at Killiechangie near Logierait, upon Sunday the 5th day of June, and heard Mr. George Robertson pannel say prayers in English to his congregation that day, before his English sermon, and did not hear him in the said prayer pray for king George by name, the pannel being to preach in Irish in the afternoon, the deponent came away from the meeting-house after the English sermon was over; depons he did not hear the pannel pray for any public person in his prayers before sermon; and depons, that he heard Mr. Robertson frequently, and that it was not usual for him to pray for the king in his public prayer before sermon, but in his Irish prayer after sermon, he has heard him pray for king George by name. But it was before he received sentence at Perth in May last. *Causa scientiæ patet*, and this is the truth as shall answer to God.

Sic Subscribitur, JAMES STEWART, GILB. ELIOT.

Malcolm Reid, indweller in Logierate, aged 45 years or thereby, married, solemnly sworn, purged and interrogate, *ut supra*, depons, that he was present at the meeting-house at Killiechangie upon Sunday the 5th day of June last, and heard the pannel Mr. George Robertson preach and pray that day in the said meeting-house. And depons, that he heard the said Mr. George Robertson in his prayer, pray for the supream in authority who sits upon the royal thron, and for all the royal family; but does not remember that he prayed for king George by name; depons, that the said sermon and prayer were in Irish, and the said witness not understanding the English language, Alexander Ross, deputy clerk, was sworn, that he should faithfully interprete betwixt him and the other witnesses in this process and the court, what should be asked and deponed, as he shall answer to God.

Sic Subscribitur, ALEX. ROSS.
JA. MACKENZIE.

Adam Reid, indweller, in Killiechangie, aged 40 years and upwards, married, solemnly sworn, purged and interogate, *ut supra*, by the interpreter above-named, depons he was at the meeting house at Killiechangie the 5th day of June last, and heard the pannel Mr. George Robertson, preach and pray that day in Irish in the said meeting house. And depons he heard him pray for the supream in authority, who then sat upon the royal thron, and for all the royal family, but does not remember that he prayed for king George by name. *Causa scientiæ patet*, and this is the truth as he shall answer to God. And depons he cannot write.

Sic Subscribitur, ALEXANDER ROSS.
W. CALDERWOOD.

James Robertson, indweller, in Logieraite aged 24 years or thereby, married, solemnly sworn, purged and interrogate, by the foresaid interpreter *ut supra*; depons, conformis præcedenti in omnibus, reddens eandem causam scientiæ; and this is the truth as he shall answer to God, and depons he cannot write.

Sic Subscribitur, ALEXANDER ROSS.
J. HAMILTON.

19*th July*, 1715.

Intran^{r}

Mr. *George Robertson.*

Indicted and accused, *ut in die præcedenti.*

The persons who past upon the assize of the said pannel, returned their verdict in presence of the said lords whereof the tenor follows:

EDINBURGH, *July* 18, 1715.

The above assyse having inclosed, did choyse James Simpson, merchant, their chancellor, and Robert Philp, merchant, their clerk, and having considered the lybel at the instance of his majesties advocate for his highnes interest, against Mr. George Robertson, pannel, the lords justice clerk and commissioners of justiciary their interloquitor thereon, and depositions of the witnesses adduced for proving thereof, they all in one voice ffind Mr. George Robertson not to have prayed for his majestie king George in express words, but finds it proven, that he prayed for the supream in authority who sits upon the royal throne, and for all the royal family. In witness whereof thir presents are subscribed by me, James Simpson, chancellor, and Robert Philp, clerk, in our names, place and date foresaid.

Sic Subscribitur, JA. SIMPSON, Chanc.
RO. PHILP, Clerk.

25*th July*, 1715.

Intran^{r}

Mr. *George Robertson.*

The lords justice clerk and commissioners of justiciary, having considered the verdict of assyse returned upon the 19th day of July instant, against the said, Mr. George Robertson, pannel, they in respect thereof, by the mouth of Charles Kinross, macer of court, decern and ordain the said Mr. George Robertson, pannel, to desist and cease from preaching or exercising any part of his ministerial function, within the meeting-house at Killiechangie, or within any part of the parish of Logierait, for the space of three years, next after the date hereof, under the penalty of 500 merks Scots for each contravention, by and attour observance of this present sentence which is pronounced for doom.

Sic Subscribitur, AD. COCKBURNE.—GILB. ELIOT, JA. MACKENZIE, W. CALDERWOOD, J. HAMILTON, D. ERSKINE.

493. The Trial* of ALEXANDER STEWART, for maintaining the Title of the Pretender: 1 GEORGE I. A. D. 1715. [Now first published from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIA S. D. N. Regis, Tenta in prætorio burgi de Edinburgh, Decimo Octavo die Mensis Julij Millesimo Septingentesimo decimo quinto Per Honorabiles Viros, Adamum Cockburn de Ormistoun Justiciarum Clericum, Dominos Gilbertum Eliot de Minto, Jacobum M'Kenzie de Roystoun et Gulielmum Calderwood de Polton, Magistros Jacobum Hamilton de Pancaitland et Davidem Erskine de Dun Commissionarios Justiciarij Dict. S. D. N. Regis.

Curia legittime affirmata.

Intran'

Alexander Stewart, drover, in the Brae of Forth, now prisoner in the Tolbooth of Edinburgh.

INDICTED and accused at the instance of sir David Dalrymple of Hailes, baronet, his majesties advocate for his highnes interest, for the crime of asserting the Pretender's title in manner mentioned in his inditement raised against him thereanent; making mention, that where by the laws of this, and of all other well governed kingdoms, the denying and questioning his majesties just and undoubted right and title to the crown of these realms, and asserting the same to belong to any other, or owning and affirming the right of any other person to the title of king of these realms, and designing them as such, in prejudice and contempt of his majesties foresaid just right and title, and challenging and threatening his majesties dutifull and loyal subjects with hostile and invasive weapons, to deny and refuse his majesties said just right and title, and their alledgance to him, and to own the right and title of king of these realms to belong to any other person, and to acknowledge alledgiance to him are crimes highly and severely punishable, more especially, whereas by an act of the parliament of Great Britain, made in the 6th year of the reign of her late majestie queen Anne, intituled, An Act for the security of her majestie's person and government, and of the succession to the crown of Britain in the Protestant line, it is amongst other things enacted, that if person or persons, shall maliciously and directly by preaching, teaching, and advysed speaking, declair, maintain, and affirm, that the pretended prince of Wales, who now styles himself king of Great Britain, or king of England, by the name of James the third, or king of Scotland by the name of James the eight, has any right or title to the crown of these realms, every such person or persons, shall incurr the danger and penalty of Premunire, mentioned in the statute of Premunire made in England in the 16th year of the reigne of Richard the second. Yet nevertheless, he the said Alexander Stuart, shaking off all fear of God, and regaird to his majesties laws and authority, and in contempt of his just and undoubted right and title to the crown of these realms, did on the 10th day of June 1715 years, or one or other of the days of the said moneth, betwixt the hours of ten and twelve at night or thereby, a little above the weigh house of Edinburgh, on the high street thereof, going before a considerable number of people with his sword drawn in his hand, flourishing the same, did in a very insolent and insulting manner challenge those you mett with, saying, Whom are you for, and particularly William Aytoun one of the constables of the city of Edinburgh, asking him as above mentioned with his sword pointed at his breast, Whom are you for, are you for king James, and adding I am for king James, whereupon he was presently apprehended, and the day thereafter upon a precognition* of his said crime taken by the magistrates of Edinburgh, committed him† to their prison. From which facts above lybelled, he is guilty actor art and part of the whole or one or other of the crimes above mentioned, which being found proven by the verdict of an assyse, before the lords justice general, justice clerk and commissioners of justiciary, he ought to be severely punished. And particularly in the terms of the said statute of Premunire, conform to the act above lybelled, to the example and terror of others to commit the like in time coming.—*Sic Subscribitur*, JA. STEWART.

Informations ordered.

July 19th, 1715.

INFORMATION for his *Majesties Advocate*
AGAINST
Alexander Stewart drover in the Brae of Forth, now prisoner in the Tolbooth of Edinburgh.

The said *Alexander Stewart* being indited and accused at the instance of his majesty's Advocat, for the denying and questioning his majesties just and undoubted title to the crown of these realms, and asserting the same to belong to the Pretender, who takes to himself the title of king James the 3d of England and Great Britain, and of king James the eight of Scotland, and owning and affirming the right

* See the preceding and following Cases.

* As to precognition see vol. 10, p. 782.

† So the Record, see p. 793.

of the said Pretender thereto. And particularly, upon the act made in the parliament of Great Britain in the 6th year of the reigne of her late majestie queen Anne, entituled An Act for the security of her majesties person and government, and of the succession to the crown of Britain in the Protestant line, as in the said inditement more fully contains.

It was offered in defence for the pannel, that in so far as the inditement was founded upon the said act of parliament, of the 6th of queen Anne, the lybel did not subsume in the terms thereof, in regaird that the words of the act are, that if any person shall maliciously and directly by preaching, teaching, or advysed speaking, declair, maintain and affirm, which words are to be taken jointly, yet the inditement does not lybel the fact contained therein, to be done maliciously and advysedly, nor can the words lybelled to be spoken by the pannel, be said to be a declining, maintaining, and affirming.

To which it was answered, that where any fact or words in themselves, and in the nature and propriety thereof, imply malice, the addition of that circumstance to a lybel, that the same was maliciously done, is altogether superfluous, and the words of the act can import no more, than a denying of his majesties right and title to the crown of these realms, or asserting the same to belong to another, with a designe to deny and assert as aforesaid, ffor therein consists the malice, and cannot be otherwise understood, than as a malicious reflection against the soveraigne, to say, that he has no right to govern, or that any other than he has a right to govern.

2do. As to the words 'declare, maintain and affirm,' the lybel is sufficiently relevant upon that head, seeing whosoever owns any other person than his present majestie, as king of these realms, does expressly declare, maintain and affirm, that that person has the sole right and title to the crown of these realms, and as expressly denys, that his present majestie has any right or title whatsoever, seeing the exercise of the regal power and right thereto cannot be separate.

It was furder alledged for the pannel, that the indictment did not proceed in the terms of the said act of parliament, the said act requiring, that no person should be prosecute for words spoken, unless information thereof were made upon oath, within three days after the words were emitted.

To which it was answered, that the inditement bears expressly that information was taken thereof by the magistrates of Edinburgh the very next day after the same happened, upon which the pannel was imprisoned, and this is sufficient to support the inditement in the terms of the said statute, seeing that the acts of parliament of Great Britain, are alwayes to be understood, to be fully execute, when observed in such manner as is consistent, and conform to our forms and manner of procedure in the like cases, and it being certain, that no information at never so great distance of time, in matters criminal, is admitted against any person in England, except the same be given in upon oath, the foresaid clause of the act of parliament founded upon cannot be understood to extend furder, than the fixing a precise short time, within which information shall be exhibite against persons offending against the said act. Whereby its plain, that information being given within the said space, in the manner that our law prescribes, comes fully up to what is required by the said act. And it were absurd to think, that an information given in such manner as to be a sufficient ground for imprisoning the offender, shall not also be sufficient for founding a prosecution against him for his offence.

But further giving, but not granting, that the lybel were not relevantly founded upon the said act of parliament, yet still the fact as lybelled, is sufficiently relevant upon the generall grounds of the laws of this, and all other well governed realms, to inferr an arbitrary punishment, and his majesties advocat thinks the inditement might stand sufficiently relevant upon that foot, as well as the above cited act. In respect whereof, &c.

Sic Subscribitur, Ja. Stewart.

Information for *Alexander Stewart*
against
His Majesties Advocate.

The said Alexander Stewart is conveened in a criminal process before the Lords of Justiciary, at the instance of his majesties advocate lybelling on the act of parliament of Great Britain, Sexto Reginæ Annæ, entituled An Act for the security of her majesties person and government, &c. Which provided, that whoever maliciously and directly shall maintain and affirm, that he who now styles himself king of England, by the name of James the third, or king of Scotland by the name of James the eight, hath any right or title to the crown, shall incurr the penalty of Præmunire.

Against the relevancy of this inditement as founded upon the act of parliament, it was alledged for the pannel, that the lybel does not subsume in the terms thereof, that the pannell did maliciously and directly affirm, and by advysed speaking, did declare mantain and affirm, any person's right to the crown, but only made use of the words king James, which could not be called a malicious declairing the Pretender's right.

It was answered, That the words lybelled in their own nature and propriety, imply malice, and therefore, it was altogether superfluous to lybel that they were; and that the words of the act, can import no more than denying his majesties right and title to the crown, or asserting the same to belong to another.

2. The words 'declare, maintain and affirm,' need not expressly be contained in the lybel, seeing whoever owns any other person's right

as king of these realms, except his present majesties, he does sufficiently declaire, maintain and affirm, that that person has the solemn right.

This the Lords would readily perceive, is using a greater freedome with the act, than it will permitt. The statute introduces a new crime, and the legislator being sensible that it might be the foundation of several prosecutions, to prevent vexatious and troublesome pursuits for every light or mistaken expression, does upon this account fence the act with several expressions which seem absolutely necessary to found a crime upon it, so that these words are not idle and of no signification, but in order to found the crime mentioned in that act, it is necessary that it should bear, that the pannel used words that maliciously and directly mantain and affirm a right to the crown in opposition to his majestie, which the using of the words king James does not import.

For if the legislator had meaned any such thing, it had been easy where the statute mentions the pretended Prince of Wales, who now styles himself king of England, by the name of James the 3d, to have expressly made the using the words of king James the 3d, or king James the 8th criminal, but the statute means no such thing when it requires, that it shall be maintained, that the persons who designs himself so hath a right and title, and therefore the defence stands relevant.

It was furder offered for the pannel, that the lybel does not bear an information to have been given to a justice of peace, within three days after such words had been spoken, which the act necessarily requires.

To this it was answered, that the lybel bears a precognition to have been taken by the magistrates of Edinburgh, the day after the words were spoke, which is sufficient, and the acts of Great Britain are fully satisfied, when observed in such a manner, as is consistent with our forms and manner of procedure.

But this is still to turn the act into whatever shape the pursuer pleases, the words of the statute are express and universal binding in pursuits of this sort, and the law is not to be satisfied in any other manner than what is prescribed, and therefore a precognition is not sufficient, and it is certain, that criminal statutes nether ought nor can be justly extended. And the reason why an information is required, seems to be that the pannel in case of his being found innocent, may have access against the informer for the damnage and expence of his unjust prosecution, and therefore seeing the lybel bears no information to have been given, the defence upon this part of the act of parliament seems well founded.

It was likewise urged for the pannel, that at the time lybelled he was seized with drink, which seems sufficient to exculpate any foolish expressions he might have been guilty of. It is certain there is no excess a man can committ that brings such a damp upon the understanding, as that of drinking, which never failis, according to the different constitutions of men, to work upon the mind by dulling it, and making it less fit for any reasonable thinking, or by making it too light and airy, apt to rediculous mirth, which shows itself either by appish gestures or more foolish rapsodes of the tongue; and this it is, which makes lawiers consider persons in drink, under the same class with such as are furious; and therefore demanding the same degree of compassion and pity. This Gigas in his treatise, de Crimine legæ Majestatis, says, "Ebrietas mentis exilium inducit, Et ubi est ebrietas, ubi est furor." And therefore brings drunkards under the sanction of the law; 14 sec. "De officio præsidis quod satis furori ipso puniantur." This ground of exculpation the pannel hops will be sustained by their lordships, especially since drunken expressions are but like the dreams of children without designe and of no import, and ever attended with folly, but never with malice or dole, which is the substance of all crimes. And Clarus paragrapho finali quæst. 60 num. 11, cites the example of Pisistratus one of the famous tyrants of Athens, who when his curtiors instigate him to cause kill a drunken man for powering reproches upon him, on account of his cruelty, answered, "non magis sed illi quæm si quis obligatis occulis in se occurrisset." The tongue is an unruly member [See p. 765] at any time, but it were out of measure hard to make every idle thoughtless word a crime.

The lybel only concluding upon the act sexto Reginæ, there needs no notice to be taken of any thing else contained in the inditement. In respect whereof, &c.

Sic Subscribitur, GEO. MACKENZIE.

July 21, 1715.

The Lords Justice Clerk and Commissioners of Justiciary, having considered the lybel at the instance of his majesties Advocate for his hignes's interest, against the said Alexander Stewart pannel, with the foregoing debate thereupon; they find the lybel as founded on the act of the 6th year of queen Anne, intituled An Act for security of her majesties person and government, and of the succession to the crown of Great Britain in the Protestant line, not relevant to inferr the pain of Præmunire mentioned in the said act, in respect the lybel does not bear the information to be taken on oath in the terms of the said act, but ffinds the pannel at the tyme and place lybelled, his having a drawn sword in his hand, and challenging persons with whom he mett, to declare for whom they were for, and declairing himself to be for king James, relevant to inferr an arbitrary punishment, and repell the defences proposed against that part of the lybel found relevant, and remitt the pannel and lybel as found relevant to the knowledge of an assyse.

Sic Subscribitur, AD. COCKBURNE, I. P. D.

ASSYSE.

John Chrystie, indweller in Edinburgh.
Henry Burd, weaver there.

George Thorburn, impolsterer there.
Robert Brown, wig-maker there.
John Baillie, brewer there.
James Beatson, wright there.
John Clark, glazier there.
William Reoch, wright there.
David Ramsay, merchant there.
Charles Bruce, glazier there.
Hugh Pringle, wig-maker there.
John Thomson, masson there.
Andrew Tarrence, wright there.
Robert Denholm, wright there.
John Hutton, weaver there.

The above assyse having inclosed, and no objection of the law in the contrair.

His Majesties Advocat, Depute and Solicitor for probation, adduced the witnesses after deponing, viz.

John Grant, merchant in Edinburgh, aged 55 years or thereby, married, solemnly sworn, purged of malice, prejudice and partial council, examined upon the lybel and interrogate, depons, That he did see the pannel the time and place lybelled, with a drawn sword in his hand, flourishing it towards William Ayton's breast, and heard him repeat several times these words, Whom are you for? but does not remember the words that William Ayton answered, but heard the pannel reply, I am for king James. *Causa scientiæ*, he was standing at the pannels back at the time, and heard and saw as he has deponed, and this is the truth as he shall answer to God.

Sic Subscribitur, JOHN GRANT.
AD. COCKBURNE.

William Ayton, merchant in Edinburgh, aged fourty years or thereby, married, solemnly sworn, purged of malice, prejudice and partial council, examined and interrogate, depons, That upon the 10th of June last about eleven a clock at night, the deponent saw Alexander Stewart the pannel with a drawn sword in his hand upon the street before the coach-houses, toward the Castle-hill, with a company of other persons behind him, and the pannel pointed his sword several times towards the deponent saying, Are you for him? Are you for him? but does not remember what answer the pannel gave himself when the deponent asked, whom should he be for. *Causa scientiæ patet*, and this is the truth as he should answer to God.

Sic Subscribitur, WILL. AYTON.
GILB. ELIOT.

The Lords ordain the assyse presently to inclose, and to return their verdict to-morrow at twelve a clock, and the baill fifteen to be present, each under the pain of 100 merks, and ordain the pannel to be carried back to prison.

July 26th, 1715.

Intran'

Alexander Stewart, prisoner in the Tolbooth of Edinburgh.

The said day, the persons who past upon the assyse of the said pannel, returned their verdict in presence of the said lords, whereof the tenor follows:

EDINBURGH, *25th July* 1715.

The above assyse having inclosed, made choyse of Robert Denholme, wright, to be their chancellor, and John Baillie, brewer, to be their clerk, and having considered the lybel at the instance of his majesties Advocate for his highnesses interest, against Alexander Stewart pannel, the Lords Justice Clerk and Commissioners of Justiciary, their interloquitor thereupon, and depositions of the witnesses adduced for proving thereof, all in one voice finds proven, about the tyme lybelled, that the pannel had a drawn sword in his hand flourishing towards William Ayton's breast, and finds it not proven, that he named king James. In witness whereof thir presents are subscribed by our said chancellor and clerk in our names place and date foresaid.

Sic Subscribitur, ROBERT DENHOLME, Chanc.
JOHN BAILLIE, Clerk.

The Lords Justice Clerk and Commissioners of Justiciary, in respect of the foregoing verdict of assyse, assoilzie the pannel, and dismiss him from the bar.

Sic Subscribitur, AD. COCKBURNE, I. P. D.

With respect to the allegation (see p. 795) of drunkenness in extenuation of offences, see in this Collection vol. 15, p. 604; and the Case of Maclaughlan, arising out of the Porteous mob.—In p. 796, I have, as usual, preserved the latinity of the record. Upon looking into Clarus, I do not, in loc. cit., find any thing about Pisistratus. Gigas de Crimine Læsæ Majestatis, I believe, I have never seen.

494. The Trial* of JAMES GEDDES and JOHN CRAWFOORD (Servants of Lord Southesk,†) for drinking the Health of the Pretender, and cursing the King: 1 GEORGE I. A. D. 1715. [Now first published from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIA, S. D. N. Regis, tenta in Pretorio Burgi de Edinburgh, vigesimo quinto die mensis Julij millesimo septingentesimo decimo quinto, Per honorabiles viros, Adamum Cockburn de Ormistoun, Justiciarium Clericum Dominos Gilbertum Eliot de Minto, Jacobum Mackenzie de Royston et Gulielmum Calderwood de Polton, et Magistros Jacobum Hamilton de Pancaitland et Davidem Erskine de Dun Commissionarios Justiciarij Dict. S. D. N. Regis.

Curia legittime affirmata.

THE said day anent the criminal letters raised at the instance of sir David Dalrymple of Hailes, baronet, his majesties Advocat for his majesties interest, against James Geddes and John Crawfoord servants to the earl of Southesque—makeing mention, That where, by the laws of this, and all other well governed realms, the uttering of speeches tending to excite sedition and alienat the affection of his majesties person and government, by questioning or denying his majesties just and undoubted right and title to the crown of these realms, or by setting up or asserting the right of any other person thereto, are crimes of a high nature and severely punishable. As also, that by the law of God, the laws of this, and all other well governed nations, the cursing of his majestie, and imprecating evils upon him, the cursing and imprecating evils upon any of his subjects, and threatening evils to them, for their just and jutiful owning of, and adhering to his undoubted right and title to the crown of these realms. As also, the importuning and pressing any of his majesties leidges, to pertake of the said crimes above mentioned, and violently and cruelly beating, cutting and wounding any person, when in an dutiful and inoffensive manner admonishing and diswading from the commission of the crimes above mentioned, are crimes of a high nature, tending to the disquiet and dishonour of all civil and well established government, and severely punishable especially when committed in an open insolent and insulting manner in the face of the sun, in publick places of towns, and at the time of publick meetings of the people, from the neighbourhood, in manifest contempt and defyance of his majesties laws and authority, to the scandal and reproach of all civil government and Christian society. Yet nevertheless, the said James Geddes and John Crawfoord, servants to the earl of Southesque, were guilty actors art and part of the haill or one or other of the crimes above mentioned. In so far as, the said John Crawfoord and James Geddes, did upon the tenth or one or other of the dayes of June 1715 years, in the afternoon, come to the town of Breechine, where many people from different places were gathered together, upon occasion of the Trinity fair holden there the said day, and having called for wine out of the house of John Knox vintner there to his close head in the public street of the said town, there and then in the view and hearing of many people, the said James Geddes and John Crawfoord did drink the Pretender's health, under the title of king James the eight, and that with a loud and audible voice, thereby setting up and asserting the said Pretender's right and title to the crown of these realms, in manifest opposition to, and denyal of his majesties just and undoubted title thereto. As also, the said James Geddes and John Crawfoord, or either of them, did imprecate many curses upon his majestie king George, the Presbiterians, and all the friends and adherents to his majesties just right and title, frequently imprecating, that God might damn his majestie, and the devil might burn him, and they or either of them prayed, that many evils might befal themselves, if they or any of them, would not make collops of the Presbiterians and all his majesties friends and adherents, and make branders of their ribs to rost their soulls on in hell, and would ripe them up, and use them as the do the swine, and many other such malicious expressions, attended with horrid oaths curses and threatenings. As also they or either of them urged and pressed severals to drink the foresaid Pretender's health, under the title of king James the eight, publickly boasting, that they would go and drink the said Pretender's health under the title of king James the eight, at the Cross of the said burgh, though they should be hanged for it; and accordingly the said James Geddes and John Crawfoord, did go to the Cross of Breechine, takeing several bottles of wine with them, and there publickly and before many spectators, did again renew the drinking of the said Pre-

* See the three preceding Cases.

† The earl of Southesk took a part in the rebellion of 1715, for which he was attainted. He escaped to France, and died there in 1729. Bishop Burnet (Own Times, vol. 1, p. 319, 8vo ed. of 1809) relates a curious anecdote concerning king James 2, when duke of York, and an earl of Southesk, who I believe was grandfather of the lord mentioned in the text.

tender's health, under the title of king James the eight, with repeated curses and imprecations against his majestie, and those that adhere to his just right and title. Thereafter the said day, the said James Geddes and John Crawfoord went from the Cross to the bridgend of Breechine, and then renewed their drinking of the said Pretender's health in manner foresaid, under the title of king James the eight, and when admonished and reproved for the same by a boy, called John Lammie, son to Mr. John Lammie of Littlefilthie, the said James Geddes and John Crawfoord, did cruelly and in a barbarous manner, beat the said John Lammie with their hands and feet. And particularly the said James Geddes did cutt and wound him the said John Lammie in several places of his body, with a durk or shable to the great effusion of his blood, and in manifest danger of his lyfe. And also, the said James Geddes with the forsaid weapon in his hand did threaten and wound some who offered to rescue or interpose in behalf of the said John Lammie, from which facts above-mentioned, the said James Geddes and John Crawfoord or either of them, were guilty actors, art and part of all or one or other of the crimes above-mentioned, which being found proven by the verdict of an assize, before the lords justice general, justice clerk and commissioners of justiciary, the said James Geddes and John Crawfoord ought to be severely punished, to the example and terror of others to commit the like in time coming, and the said James Geddes and John Crawfoord, being oft and diverse times called to have compeared this day and place, as they who were lawfully cited for that effect, lawful time of day bidden, and they not enterand nor appearand, the lords justice clerk and commissioners of justiciary, decerne and adjudge the above named James Geddes and John Crawfoord, servants to the earl of Southesque, to be outlaws and fugitives from his majesties laws, and ordain them to be put to the horn, and all their moveable goods and gear, to be escheat and inbrought to his majesties use, for their not compearing to underly the law for the crimes above mentioned.

Sic Subscribitur,

AD. COCKBURNE, I. P. D.

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495. Case of the KING against GIBBON :* 8 GEORGE II. A. D. 1734.

Upon an Information, in the Nature of a QUO WARRANTO, by the King's Coroner and Attorney, against the Defendant, to shew by what Authority he claimed to be a Freeman of the Town and Port of New-Romney, at the Relation of William Jarvis. Tried at Kent Assizes, held at Maidstone, the 6th of August 1734, before the Right Hon. the Lord Chief Justice Eyre.

Mr. *Smith*. MAY it please your lordship, and you gentlemen of the jury; this is an information, in the nature of a Quo Warranto, against the defendant Gibbon, to shew by what authority he claims to be a freeman of the town and port of New Romney, in this county: and the information sets forth, That the town and port of New Romney is an ancient town and port; and that the mayor, jurats, and commonalty of the said town and port are, and for ten years last past, and long before, were, one body corporate and politic, by the name of mayor, jurats, and commonalty of the town and port of New Romney in Kent; and that the office of freeman of the said town and port is a public office, and an office of great trust and preeminence within the same town and port, concerning the good rule and government of the same, and the administration of public justice: and that the defendant Gibbon, of the said town and port, innholder, on the 25th of March, in the seventh year of his present majesty, and from thence continually, hitherto, at the town and port aforesaid, hath used and exercised without any lawful warrant, the said office, and claims to be one of the freemen of the same town and port, and to have all the privileges, liberties, and franchises thereof: of which office the said defendant Gibbon, for all the time aforesaid, upon his majesty hath usurped, in contempt of his majesty, and to the great damage and prejudice of his royal prerogative, and against his crown and dignity: whereupon he prays process, &c.

To this the defendant has pleaded, that the said town and port is an ancient town and port, and the office of freeman thereof a public office.

And says, That the late queen Elizabeth, by her letters patent, dated at Northaw, the 4th of August, in the 5th year of her reign, did will and grant that the barons and inhabitants of the said town and port (who before that time had been incorporated, by the name of jurats and commonalty) should for ever after be one body incorporate, by the name of mayor, jurats, and commonalty of the town and port of New Romney.

* See Kyd on Corporations.

And that they, and their successors, and all other the barons and inhabitants of the said town and port, their heirs and successors, should for ever after be, in all matters whatever, as free as the mayor, jurats, and commonalty of the town and port of Sandwich, or any other town and port of her said Cinque Ports.

And the defendant by his plea further sets forth a custom in Sandwich, one of the said Cinque Ports, that if a man marries the daughter of any freeman of that town, such daughter being born after the swearing and admission of her father into the office of freeman, and being resiant and inhabiting within the town, has a right to be sworn and admitted a freeman of Sandwich.

And alleges the like custom in Dover, another of the Cinque Ports.

And that the sole right of swearing and admitting freemen of New Romney is, and at the time of swearing and admitting of him, the said John Gibbon was, in the mayor and jurats, or in the mayor and any two jurats.

That the defendant Gibbon, on the 1st of May, 1727, married Elizabeth Smith, daughter of William Smith, a freeman of the said town and port; and thereby, and by virtue of the said letters patent, became entituled to be sworn and admitted a freeman of the said town and port; and having such right and being so entitled, was, on the 25th of March last, sworn and admitted by John Coates, the then mayor, and Humphrey Wightwick and Edward Batchelor, then two of the jurats of the said town and port, being there assembled in due manner for that purpose; by reason of which he says, he is a freeman..

The king replies, That Gibbon, by marrying the said Elizabeth Smith, did not become entituled to be sworn and admitted a freeman.

To which there is a demurrer, for the opinion of the Court upon the words of the charter.

So that, gentlemen, the first issue you are to try is, whether the sole right of swearing and admitting freemen of the town and port of New Romney be in the mayor and jurats, or in the mayor and any two jurats: and if we prove to you, that the commonalty have always had and exercised a concurrent right with the mayor and jurats, you will please, gentlemen, to find for the king.

Mr. *Marsh.* May it please your lordship, and you gentlemen of the jury; I am counsel for the defendant Gibbon. You observe, by the opening, that this is an information, in the nature of a Quo Warranto, against him, to shew by what authority he claims to be a freeman of New Romney: and the only points that come before you now to be tried, are, first, Whether the right of swearing and admitting freemen of this corporation be in the mayor and jurats, or in the mayor and two jurats? And, secondly, Whether the defendant Gibbon has been duly sworn and admitted a freeman? There being a demurrer as to the right, that is to be determined by the judges of the court of King's-bench: and in order to make out this right, we shall produce to you the books of the corporation, as well as living witnesses; whereby it will appear, that the right of swearing and admitting freemen of this corporation is in the mayor and jurats, or in the mayor and two jurats; and that every one of the present members of the corporation was sworn and admitted by the mayor and jurats, or the mayor and two jurats: and by an entry in the same books it will likewise appear, the defendant was duly sworn and admitted a freeman; and when this appears, gentlemen, you will find a verdict for the defendant.

Mr. *Lacy.* Mr. Wellard, please to produce the corporation books. (Which were produced accordingly.)

Serj. *Darnell.* My lord, we insist, the sole right of admitting and swearing freemen of this corporation is not in the mayor and jurats, but in the mayor, jurats, and commonalty.

L. C. J. *Eyre.* It is swearing and admitting.

Serj. *Darnell.* Gibbon being called on by the court of King's-bench, to shew by what authority he claimed to be a freeman of the town and port of New Romney, has demurred, and thereby waived the foundation of his claim.

L. C. J. What! Is that waiving it? What concerned his right comes not now in issue, and was left undetermined by the Court. If he had a right, the question is, Whether he be duly admitted? And in order to that, he must be elected: And then the question is, Whether he be admitted according to the constitutions of the town and port of New Romney?

Serj. *Darnell.* My lord, a right is here claimed by the defendant; I have a right by marrying a freeman's daughter; and if I have a right, the question is, as to the method of coming to this right. The defendant says, the sole right of swearing is in the mayor and jurats: But we say, though they have a right, the whole body must admit, though the swearing be by the mayor and jurats.

L. C. J. Swearing and admitting is the same thing, brother Darnell. Where a man is chosen mayor of a corporation, the swearing and admitting him is the same thing. All persons are admitted by swearing, and taking the oath is the admission. A man admitted is to be sworn: and there is no corporation in the kingdom, but where swearing and admitting is the same thing; and yet you would make them two distinct acts.

Mr. *Lacy.* We shall prove to your lordship and the jury, that the sole right of swearing and admitting is in the mayor and jurats: and the first instance we shall shew is in 1679, Peter Martin was admitted and sworn by the mayor and jurats.—Read the entry of the 8th of March, 1679.

Witness sworn to prove an Assembly-book.

L. C. J. I think it proper to be read as a Court-book.

Associate reads:

"March 8, 1679. Romney. At a common assembly of the mayor, jurats, and commonalty of the town and port of New-Romney, in the common place held there, 32 Car. 2, Present, John Hunt, mayor; Thomas Durrant, John Mascall, John Cockman, William Green, and Mr. Isaac Rutton, freemen of the said town; Peter Martin an inhabitant of our member of Orleston, in Old Romney, was elected a freeman; and this assembly doth appoint him to be sworn a freeman by the mayor and any two jurats of this corporation."

L. C. J. Peter Martin elected and sworn, 32 Car. 2, 1679.

Mr. *Marsh.* Now read his admission and swearing.

Associate reads:

"At the court holden before John Hunt, the mayor, and jurats of same port, 15 March, 1679, Peter Martin testified his free consent for observing the orders, charters, and ordinances, &c. of the Cinque Ports, and of this town in particular; and is hereby declared and admitted a freeman of this corporation; and took the oaths appointed."

Mr. *Lacy.* Read the entry, fol. 738, of Stephen Brett's admission.

Associate reads:

"New Romney. Whereas the mayor, jurats, and commonalty of the town and port of New Romney aforesaid, at their common assembly, holden in the common place of the said town and port, did elect and choose Mr. Stephen Brett, being free-born; Thomas Short, born at Smeeth in the county of Kent; Robert Easton, born at Battle in the county of Sussex; and John Coates, grazier; all free-born, to be freemen of the said town and port, the 15th day of May last: Now be it remembered, that at a court of record holden in the Guildhall of the same town and port, this 3d day of December, Anno Domini 1694, the said Stephen Brett, Thomas Short, Robert Easton, and John Coates, testifying their free consents for the observing and maintaining the charters, franchises, decrees, privileges, customs, and usages of the Cinque Ports, two ancient towns, and their members, and particularly of this town and port of New Romney, have severally taken the oaths of freemen of the same town and port according to the customal there, and are admitted into the franchises of the town and port aforesaid; and did also, at the same time, here take the several oaths appointed by an act of parliament, intituled, An Act for abrogating the Oaths of Allegiance and Supremacy and appointing other Oaths," &c.

Mr. *Marsh.* Read the entry, fol. 770.

"New Romney. At a court of record, holden in the Guildhall of the same town and port, the 16th of May, 1698. Whereas the mayor, jurats, and commonalty, at a common assembly, holden in the common place, on Thursday the 17th of March, 1697, did elect Robert Mascall, free-born, Thomas Lancaster, and Thomas Edwards, free-born; having testified their free consents to observe the ancient orders, charters, ordinances, &c. were then admitted into the freedom of the said town: Be it remembered, that the said Robert Mascall, Thomas Lancaster, and Thomas Edwards, having testified their free consents to observe the orders, &c. aforesaid, have taken the oath, according to the customal, and are admitted into the franchises of the town and port aforesaid, and took the several oaths appointed."

L. C. J. A court of record, and this court held before the mayor and jurats.

Mr. *Marsh.* My lord, there is not a single member of the corporation but is sworn in this manner.

Serj. *Darnell.* We admit, my lord, that no man can be sworn but by the mayor and jurats; but none but freemen can consent there shall be freemen among them.

L. C. J. If the precedents are admitted by the other side, there is no occasion for proving them.

Mr. *Marsh.* My lord, if they admit them according to the last entry, there is no occasion; but if not, it is necessary to call a living witness.

L. C. J. It is all one to me what you do. It is admitted on all sides, there are many of these entries since 1679.

Mr. *Marsh.* Read the admission of Isaac Rutton and others, 7 February, 1708.

Associate reads:

"New Romney. At a court of record holden in the Guildhall of the same town and port, the 7th of February, 1708. Whereas the mayor and jurats, at a common assembly, elected the several persons following: Be it remembered, the persons under-written, testifying their consents to observe the ancient orders, &c. have taken the oaths of freemen, and are admitted into the freedoms."

L. C. J. Who are the people admitted?

Associate reads:

"Isaac Rutton, John Bassett, John Minnis, John Tooke."

Mr. *Lacy.* Now turn to fol. 100. Read the admission of Nicholas Durrant, and others.

Associate reads:

"June 13, 1715. Whereas the mayor and jurats did elect Nicholas Durrant, Isaac Warren, Daniel Warquin, and John Cosby, to be freemen: Be it remembered, that they, testifying their consent to observe the ancient orders, &c. are admitted into the freedoms of this town and port, and took the several oaths appointed, and subscribed the declaration following."

Mr. *Knowler.* Read the admission of John Widcomb, and Richard Howard, fol. 116.

Associate reads:

"August 26, 1717. Whereas the mayor and jurats, at the last common assembly, did elect

the several persons, whose names are hereunto subscribed, to be freemen: Be it remembered, this 26th of August, 1717, the persons underwritten, testifying their consent to observe the ancient orders, &c. and taking the oaths, are admitted into the freedoms of this town and port.

"JOHN WIDCOMB,
"RICHARD HOWARD."

Mr. *Marsh.* Turn to fol. 125. Read the admission of Thomas Wilson.

Associate reads:

"November 18, 1727. Whereas the mayor, jurats, and commonalty elected Thomas Wilson, within this town, to be a freeman: Be it remembered, that he, testifying his consent to observe the ancient orders, &c. and taking the oath, is admitted into the freedoms of this town and port.

"Born at Lydd in Kent."

Mr. *Lacy.* Now read the admission of William Gray, the 7th of June, 1731.

"June 7, 1731. Whereas the mayor and jurats, at the last election of mayor, did admit William Gray, a freeman: Be it remembered, that he, testifying his consent to observe the ancient orders, &c. has taken the oath, and is admitted into the freedoms of this town and port."

Mr. *Marsh.* My lord, we submit our case here.

Serj. *Darnell.* The word 'admitted' is used both at the common assembly——

L. C. J. But only there in that instance.

Serj. *Darnell.* May it please your lordship, and you gentlemen of the jury; I am for the king against Gibbon: and this issue is only a part of a question in relation to the franchises and privileges of the town and port of New Romney, where of late there have been many illicit practices in order to overthrow the constitutions of the town; and thereupon application was made to the Court of King's-bench, in two several causes, against Gibbon and Darby, who were to shew by what authority they claimed their freedoms; and they insisted they had married the daughters of freemen, and therefore had a right to their freedoms; and also against one Wightwick, who was to shew by what authority he claimed to be mayor of New Romney.

Gentlemen, the election of the mayor depending on the right of Gibbon and Darby, the Court, by rule, directed the information against Gibbon first to be tried; and if he had no right, Darby was to take the fate of that trial, and to disclaim.

Gentlemen, as the election turned upon the right of Gibbon and Darby, if this issue be found for them, then Wightwick is the mayor. But instead of coming to the question, Whether a man has a right to a freedom by marrying a freeman's daughter? they have demurred: and now the question is, Who is to admit the freemen? and I humbly apprehend, my lord, where a number of freemen have the freedom of a town, nobody can be let in without their consent; for, if the mayor and jurats are to admit solely, they may set up as many freemen as they please.

My lord, and gentlemen of the jury, the last instances they have produced out of the assembly-books, are, I humbly apprehend, very strong in our favour; for it appears from those instances, that when the body have agreed upon the choice of a freeman, the mayor and jurats swear him; and I take the swearing to be a thing of course; but the admission is in the whole body, as appears by every instance they have read. A freeman is elected by the mayor, jurats, and commonalty, and then he is ordered to be sworn in by the mayor and jurats: sure there can be no doubt in the question. Swearing and admitting I take to be the same thing; they are synonymous: without swearing no man can be admitted; but the swearing does not admit. Suppose twenty freemen sworn in by the mayor and jurats, the franchise of the town is worth nothing——

L. C. J. You take admitting to be the election; it is not *so*: but admitting to the exercise of the right. Admitting is not conferring the right. The defendant has a right by his marriage: admitting must be construed the receiving him into the office, and admitting him to the exercise of that right, and therefore is synonymous. You go upon a wrong issue: who were the persons intituled to administer the oath of office?

Serj. *Darnell.* Admission gives the right.

L. C. J. I think it would be proper to admit the issue to be, Who ought to administer the oath?—I don't understand the customs of the Cinque Ports.

Serj. *Darnell.* If sworn, whether duly elected? or it signifies nothing.

L. C. J. Suppose Gibbon to have a right: an oath administered to a man that has no right is of no avail: a man must have a right to an office, and must be admitted into that office by swearing; and the question now is, Who is to administer that oath?

Serj. *Darnell.* We are to support the right of the whole body to elect and admit; or the Court of King's-bench will think this matter not tried.

L. C. J. The Court of King's-bench would think me a trifling fellow to try the right of the election.

Serj. *Darnell.* The rule is, that Gibbon's issue should be tried first, and Darby abide the fate of that; to which they have demurred.

Serj. *Baynes.* May it please your lordship, and you gentlemen of the jury; I am also of counsel in this case for the king. The sense of the Court of King's-bench was, in relation to a right set up by Gybbon and Darby; and the question was, Whether a person marrying a freeman's daughter was intituled to his freedom? And the Court was of opinion, that *ought* principally to be tried; and to make an end

of the whole, if Gibbon and Darby had a right, Wightwick was to be mayor; if not, then Elles was to be mayor. But they have evaded this question; and when an issue was tendered to try the right, they demurred; and thereby the sole reason of granting these informations is entirely eluded: and now the question is, Whether the sole right of admitting freemen belongs to the corporation, or to the mayor and jurats, or to the mayor and two jurats? But, gentlemen, we contend that the right of admission is in the court of assembly.

The gentlemen of the other side have produced some instances to shew the right to be in the mayor and jurats, and that they have accordingly taken upon them to swear in some persons, and swearing is a completion of the person's right to be admitted.

My lord, the admission of freemen is to be made on Lady-day: after the election the bell tolls; and the persons having a right come before the general assembly, and say, they claim to be admitted, for servitude, or as freeborn, &c. And they judge of these facts, and thereupon admit; though the freedom is not completed till the person be sworn.

Gentlemen, the evidence the other side have produced go no higher than 1679: whereas we have instances, long before that time, of admissions by both; and a new institution, lately practised, we humbly hope shall not set aside an ancient custom. Strange! that this power of admitting should be in a part of the body! a mayor and two jurats cannot admit, contrary to the general assembly; when they have approved a claim, the right is to be completed by swearing before the mayor and jurats. They are two distinct rights; and we shall produce to your lordship and the jury unquestionable instances, that this is the constant use, for the persons claiming to be freemen to make out their right to the assembly, and afterwards to be sworn by the mayor and jurats. A high constable is named by the justices in sessions, and then is sent by them to a justice of peace to be sworn; as, in the present case, a freeman is elected by the common assembly, and then is sent to the mayor and jurats to be sworn: and therefore, gentlemen, we hope you will find a verdict for the king.

Mr. *Wynne*. My lord, the single question before the Court of King's-bench was, Whether Gibbon and Darby had a right to freedoms by marrying freemen's daughters? By the rules of practice, it is impossible for any part of this question to come before this Court; the subsequent proceedings in the Crown-office must shew this; and nothing could be done by the Court of King's-bench, the pleadings being brought into the Crown-office after the term.

My lord, it is endeavoured by the gentlemen of the other side to take away the distinction between the admission and swearing; and it is true, they are by distinct bodies.

Gentlemen, the claim is first to be made to the general assembly on Lady-day, on tolling a bell: when that has been considered, and allowed, and admitted by the general body, then, by delegacy, it has been sent to the mayor and jurats to swear the person, and is merely a ministerial act; and what they have done has been in case of themselves, in delegacy to them. It will appear from the ancient entries, (their highest entry being 1679) and it is at an assembly of mayor and jurats, Peter Martin was ordered to be sworn by the mayor and two jurats; but not to part with any right they had, as will fully appear, when our evidences are compared in point of time with the others.

You will please therefore, gentlemen, to consider, that the admission is the act of the general assembly, but the swearing the act of the mayor and jurats.

Serj. *Darnell*. My lord, we humbly insist, the sole right is not in the mayor and jurats.

L. C. J. I am of opinion, this is an admission.

Serj. *Darnell*. In all the instances, till 1679, they were admitted at the general assembly; and in 1699 they have read one instance. We insist, therefore, that our evidence is equally strong.

Mr. *Knowler*. My lord, we have a rule to produce all the Corporation-books at the trial, and Mr. Wellard refuses us the books.

Mr. *Wellard*. My lord, we have brought the books hither at a great expence. Mr. Wightwick must be paid for them.

Mr. *Knowler*. Mr. Wellard has had four guineas on that account.

Mr. *Wellard*. The mayor has been at more than four guineas expences already, and there are several other charges to be paid.

L. C. J. You should agree to pay what the master of the Crown-office shall think reasonable more than four guineas, and enter into a rule for that purpose. (Which was done accordingly.)

Mr. *Lacy*. My lord, we submit, whether this is proper evidence on the issue? the plea is, that the sole right of swearing and admitting is, and at the time of swearing and admitting Gibbon was, in the mayor and jurats, or in the mayor and two jurats, of the town and port of New-Romney; and the issue is taken upon that, *Is, and at the time was*—

L. C. J. I think it proper evidence, to shew what has been the usage by the books. You must prove an ancient right; for Gibbon's right must be determined by the ancient usage.

[Here a great dispute arose about the Corporation-books between Mr. Wellard and Mr. Knowler, &c. Mr. Wellard being in fear he should lose them.]

L. C. J. Give them all in, and call for them one by one. You have them, and make no use of them.

Serj. *Darnell*. Fol.—Read the election of mayor and jurats—

Associate begins to read, but could not go on; when the Chief-Justice took the book out of his hands.

L. C. J. Give me the book; I can read it. [Attempts to read, but does it very indistinctly and with great difficulty; and then throws down the book, not being able to go on.]

Mr. Wellard reads: "The election of mayor and jurats of the town and port of New-Romney, 1571. According to patent, appeared John Stevens and others, in number fourteen; by their consent, Mercer and others chosen jurats."

L. C. J. Admission and election are synonymous. Let it be shewn, that any person was sworn at this assembly from an entry.

Mr. *Wynne.* Read the admission and swearing of John Amersham.

Mr. *Wellard* reads:

"25 March, 1571. John Amersham, natus apud admissus et juratus ad *franchis*".

L. C. J. Shew that he was elected before: this is very material evidence.

Serj. *Darnell.* Read the entry of Thomas Bastard's admission in 1671.

Mr. *Wellard* reads:

"Election of mayor and jurats of the town and port of New-Romney, 1671. According to patent, appeared John Chessman, and Laurence Fane, Thomas Wall, and others;

"Thomas Bastard, natus apud Yalden, admissus ad franchis' et sol' feod'."

Serj. *Baynes.* Read the admission of William Southland, the 9th August, 33 Elizæ.

Mr. *Wellard* reads:

"Gulielmus Southland, natus apud
9 August, 33 Elizæ, admiss' per Major', Jur', et Com' ad franchis', et sol' inde feod', et juratus."

Mr. *Wynne.* Read the admission and swearing of Thomas Master, and five others, Lady-day, 1579.

Mr. *Wellard* reads:

"Lady-Day, 1579. Appeared William Hyett, John Chessman, Richard Hoppen, and others, commoners and freemen; were elected and chosen;

"Thomas Master, admiss' et jur' fol.' feod'.

"Habbakuk Thomas, adm' et jur'.

"Gul' Taylor, admiss' ad franchis', et jur', et sol' feod'.

"James Gardner,—Thomas Wymond,—Johannes Southern, adm' et jur' et sol' feod'."

Now turn to the admission and swearing of John Smith, and others.

"New-Romney. Election of mayor and jurats, 25th March, 22d James 1st, 1624. Appeared Bedell, mayor; Lancaster, and others, comnoners and freemen;

"John Smith, admiss' ad franchis' et sol' pro jur.'

"Geo. Labden, adm' ad franchis', et sol' 3s. 4d. et jur'.

"Daniel Duke, admiss' et jur'."

Serj. *Darnell.* Read the entry of the 25th March, 1627.

"Election 25 March, 1627. Appeared Fell, mayor; Lancaster, and others;

"John Plomer, free born, admiss' in franchis'."

N. B. It does not appear he was sworn.

Serj. *Baynes.* Read on the entries in 1659, 1660, and 1666.

"25 March, 1659. John Wyvill admitted and sworn.

"15 October, 1660. Four persons admitted and sworn.

"29 May, 18 Car. 2. 1666. Mayor and jurats, at a common place;

"Richard Strode admitted into the franchises, subscribed the declaration, and took the oath of a freeman, according to the customal."

Mr. *Wynne.* Turn to the admission and swearing of John Gray, the 2d of October, 1699.

Mr. *Wellard* reads:

"2d October, 11 Wil. 3, 1699. Mayor and jurats, at a common place, commoners and freemen;

"John Gray, being free-born, was admitted and sworn according to the customal."

Mr. *Knowler.* Read on till you come to Mr. Furnese and Mr. Papillon's admission and swearing.

"4 July, 1683. Mayor, jurats and commoners, at a common place;

"John Walker, free-born, Thomas Edwards, Richard Kent, and William Pidd, were sworn according to the customal, and admitted according to the election, at a common assembly.

"4 November, 3 Q. Anne, 1704. Mayor, jurats and commoners;

"Walter Whitfield admitted and sworn.

"10 October, 1710. Robert Coates, mayor, jurats and commoners;

"Robert Furnese admitted and sworn according to the customal.

"20 April, 1713. Mayor, jurats, and commoners;

"Edward Watson admitted and sworn.

"23 March, 1721. Mayor, jurats, and commoners;

"David Papillon admitted and sworn according to the customal."

Serj. *Darnell.* We submit it to your lordship, whether here is any colour to say, that here is a right in the mayor and jurats solely.

Mr. *Knowler.* My lord, on the 28th of November, 1727, John Mascall being before chosen, the Court made an order, that he should not be sworn.

L. C. J. A very strong evidence, that the right is in the mayor, jurats, and commonalty. They have shewn only from 1679: I desire to know, if they can shew any thing before the Restoration.

Mr *Wellard* reads:

"18 March, 1668. The corporation considering the small number of freemen, pursuant

to a decree of brotherhood and ghuestling, have chosen John Shoesmith and others to be freemen, and ordered them to be summoned to take the oath according to the customal."

Fol. 614. "They were afterwards declared free, and sworn before the mayor and jurats."

L. C. J. The mayor and jurats have not the sole power of swearing and admitting. Reading ten or twenty instances will not prove the sole right of swearing to be in them.

Mr. *Wellard* reads:

"34 Car. 2, 1683. Mayor and jurats; Mascall mayor, no commoner present;

"A freeman sworn."

L. C. J. One or two instances will not alter the case.

Mr. *Marsh.* My lord, the issue now before your lordship and the jury is, Whether the sole right of swearing and admitting freemen be in the mayor and jurats, or not? And the gentlemen of the other side have produced evidences to shew, that notwithstanding what we contend for may in some instances be true, the contrary custom has likewise been practised, and will destroy our right. They have begun early with evidences, (I think as far back as 1571) and carried it down to the Restoration: and the stile of that assembly does appear to be, "At the election of the mayor and jurats," though it was a general assembly when the persons were chosen freemen. It expresses, that they were admitted and sworn: admission may signify election: if they are elected, the entry goes on and says, they were sworn. But I submit it to your lordships whether, though they the commons joined in electing, yet when the swearing comes to be performed, that being a distinct act, is not solely in the mayor and jurats?

My lord, it is alleged by the gentlemen of the other side, that though the name of the assembly is often altered, yet the persons were there who made up the whole corporation. But the modern instances given, and some ancient ones, say, the election was according to the customal: so that all from 1679 say so. These are ancient entries; and therefore I submit it to your lordship, when from these entries it does appear plainly that they were admitted and sworn in general, whether it be necessary to make that more plain? And also, whether these modern instances in 1668 and 1683 do not explain what was the usage before? For, if the right was in the freemen with the mayor and jurats, they would never part with it; and yet we find, they did order this swearing to be by the mayor and jurats; and they would not have parted with their right, if they had not been conscious there was no right in them. As to the evidence given that refers to the customal, when sir Robert Furnese, Mr. Papillon, and Mr. Wellard, were admitted; if the reference is to the customal, that customal we have, and it takes notice particularly of their being to be sworn before the mayor and jurats, and that the commoners should not be excluded before they had the setting of the price. Your lordship was pleased to say, you did not understand the customs of the Cinque Ports; where we find many ancient entries, that the freemen should be sworn according to the decrees of brotherhood and ghuestling; which is an assembly or parliament of the Cinque Ports, when they meet and make orders and rules; they extend to other ports in point of example, influence, and power, if not in point of authority. We hope, my lord, to produce and give in evidence these acts of assembly; and if these are so, we doubt not but the jury will find for us.

Mr. *Wellard* reads:

"The Old Customal.

"New-Romney, Henry VII.

"Item, it is used, that, if a stranger of good name and conversation be dwelling within the town, and desireth to be a freeman of the town, the jurats may grant the franchises, paying to the commons as they may accord; and when they be accorded, he shall be charged in a book, for to maintain the franchises with his body and cattle, and for to be true in all points, and for to keep all the commons counsel, and to be obedient as another freeman to the commons, and to have a proper place, of the price of 40*s.* within the town, within the next year ensuing, by which he may be distreyned and justified, upon pain of forfeiture of his franchise: And when he is thus sworn, the common clerk shall enter his name in paper of the common, for to witness the said grant; and all his children, freely gotten after the same day of grant, may claim and enjoy the franchise by the same grant: But, if he have any children before the day of grant, or else that he get any child otherwise than in sponsal, he shall not have the same franchise by the same grant; but if he be of new grant, and it is to wit, that the jurats may not grant the franchise to no stranger-man, if he be not resiant within the franchise."

Mr. *Lacy.* My lord, the jurats shall grant the franchises, and the commons are to set the price.

Mr. *Smith.* Grant the franchises must be to put them in possession, which cannot be till they are sworn; and the commons are to set the price.

Mr. *Lacy.* All the modern entries mention, according to the Customal.

L. C. J. It is taking the oath according to the customal. Is there the oath of office of a freeman, according to the customal? If there is, let it be read.

Associate reads the freeman's oath.

Mr. *Marsh.* Now read an Act of Ghuestling:

L. C. J. We'll have no brotherhood and ghuestling: I know nothing of it. Let Mr. Town-Clerk explain it.

Mr. *Wellard* reads—

"At a Brotherhood held at New-Romney, the 8th of July, 1603.

"Whereas there are, in many of the towns and members of the Cinque Ports, men of wealth, staid, and of good government, dwelling within the same, who enjoy much benefit of their so dwelling, viz, free from payment of fifteenths and tenths, and from being returned to appear at assizes or sessions in the county where they inhabit; and receive many other privileges and benefits, by reason of their so inhabiting within the said Cinque Ports, ancient towns, or members, which otherwise they could not enjoy; and yet refuse to be freemen of the same town and port where they dwell, and enjoy the said benefit and privileges; by reason whereof, divers of the said towns, ports, and members, are unfurnished and unprovided of sufficient and able men to execute and discharge such offices and services, as they are, by the charters and customs of the said Cinque Ports, towns, and members, bound to do: It is therefore, at this assembly fully consented and decreed, that, if the mayor, jurats, and commonalty, or the more part of them, in any of the said Cinque Ports, towns, and their members, (or bailiff, jurats, and commonalty, where no mayor is, or the most part of them) shall think any inhabitant or inhabitants dwelling amongst them, and in that port, town, or member, which such mayor and jurats, or bailiff and jurats do govern, and shall by the more voice of mayor, jurats, and commons, (or bailiff, jurats, and commons, where no mayor is) chuse such their inhabitant or inhabitants to be freeman or freemen of the said town where they so govern, and shall call the said inhabitant and inhabitants, so to be chosen a freeman or freemen of the said town, to their court-hall, and there, in full and open court, acquaint him and them, so chosen to be freeman or freemen, of their said choice and election, and do then and there require such person or persons, so chosen for a freeman or freemen, to take the usual oath of a freeman in that place, and he or they, so chosen, shall not then and there, without further delay, take the said oath, and become a freeman of the same place, shall forfeit, to the use of the said town and corporation where such default or neglect shall happen, a fine of 10*l.* of lawful money of England. And so often as the mayor and jurats, (or bailiff and jurats, where no mayor is) after such election or choice of a freeman or freemen, as aforesaid, shall in full court, there to be holden, proffer the oath of a freeman there used to such person or persons so chosen as aforesaid, and he or they, to whom such oath shall be proffered, do not take the same oath, and become a freeman as other freemen of the said place, shall forfeit for a fine, to the use of the said corporation where such neglect shall be, for every such neglect, and not taking of his or their oath, 10*l.* of lawful money of England; to be levied upon such person and persons, so neglecting to take their oaths, as fines in the said place are used to be levied."

Mr. *Lacy.* My lord, we humbly submit, we are intituled to the sole right. Instances have been produced, to shew that the commons have a right with the mayor and jurats; for all the entries they have produced refer to the book of brotherhood and ghuestling, and all the choices in that book are by the mayor and jurats, who are to offer the oath of a freeman. Read the Act of Ghuestling of the 21st of July, 1668.

Mr. *Wellard* reads:

"Brotherhood, or Ghuestling, held at the said town and port of New-Romney, 21st July, 1668.

"Whereas, by a decree of brotherhood, made in the year of our Lord 1603, it is consented to and decreed, that if the mayor, jurats, and commonalty, (or bailiff, jurats, and commonalty, where no mayor is) shall, by major voice of such mayor, jurats, and commons, (or bailiff, jurats, and commons, where no mayor is) elect and chuse any inhabitant or inhabitants, in their respective corporations, to be freeman or freemen of the said town, and shall call the said inhabitant or inhabitants, so chosen a freeman or freemen of the said town, to their court-hall, and there, in full and open court, acquaint him and them of such election, and shall then and there require such person or persons, so chosen to take the usual oath of a freeman in that place, and he or they shall not then and there, without further delay, take the said oath, and become a freeman of that place, shall forfeit to the use of the corporation where such default or neglect shall happen, for a fine, the sum of 10*l.* And that, so often as any inhabitant or inhabitants, so elected freeman or freemen in any of the said towns, ports, or members, shall refuse or neglect, (the said oath being tendered to him or them in manner aforesaid) every such inhabitant shall forfeit the like sum of 10*l.* to be levied as in the said decree is directed, and as by the said decree may more fully appear. Now, for that this assembly doth find that the said decree is not so effectual to compel such inhabitants to be made free in their respective corporations where they do inhabit, but that several persons do evade the same, and the penalty therein contained, by refusing to appear in full and open court, where the said oath is to be required and tendered, as aforesaid, and by divers other subtle devices; wherefore, for preventing such evasions and devices for time to come, and for the better upholding of several corporations of the said ports, towns, and members, which otherwise may cease and be annihilated, it is now by this assembly fully decreed and ordered, that the said penalty of 10*l.* mentioned in the said recited decree, is, and shall be, by virtue hereof, imposed and levied upon every inhabitant of any of the said ports, towns, or members, who shall be elected a freeman of such respective corporation wherein he is inhabitant, according to the said ancient decree; in

cause such inhabitant or inhabitants, so elected, shall refuse or neglect to be and appear at the next court of Record to be holden in such corporation wherein he dwelleth, upon verbal or other summons from the mayor or bailiff of such corporation, to be made by himself, his serjeant, or other officer; or, upon appearance at such court, shall refuse or neglect to take the oath of a freeman in manner aforesaid: and that, so often as such inhabitant or inhabitants, so elected free, shall refuse or neglect to appear at any court to be holden in such town, port, or member, where he or they inhabit, upon like summons, as is last above-mentioned, or appearing, shall not take the oath as aforesaid, they and every of them shall forfeit, for every such offence contrary to the intent of this decree, the like sum of 10*l.*; which several fines shall be levied by warrant under the seal of office of mayoralty or balliage of each town or member where the same shall be forfeited, or in such other manner as fines in that place are usually levied."

L. C. J. If the mayor and jurats call the man, and he refuse, they may set a fine upon him.

Mr. *Lacy*. My lord, we humbly insist, the sole right of swearing and admitting is in the mayor and jurats, or in the mayor and two jurats. Their evidence is of admitting at a common assembly; and the issue is not confined to the mayor and jurats only. The first evidence we began with, was an order of the mayor, jurats, and commonalty, for the mayor and jurats to swear in a freeman, and they did swear him in accordingly. The other evidences given are of instances where the mayor, jurats, and commonalty, all swore in. And we submit it to your lordship, whether the evidence of swearing in at the common assembly is not a concurrent proof, that the sole right is in the mayor and jurats; because the mayor and jurats must be part of the common assembly: and if so, though the commoners are not gone, yet the swearing shall be construed to be before the mayor and jurats; *Reddendo singula singulis.* Your lordship sits judge of Nisi Prius, and takes a fine; it is not as judge of Nisi Prius—

L. C. J. The common assembly, as mayor, jurats, and commonalty, cannot hold a court of record. An assembly can act only as that assembly. If a select number take upon them to do an act of the corporation, that will be a void act.

Mr. *Marsh.* My lord, the second issue is, Whether Gibbon was sworn and admitted before the mayor and two jurats?

L. C. J. Gibbon's plea is, That he was intituled, as having married the daughter of a freeman; that the mayor and jurats had a right to swear; and that he was sworn in accordingly.

Serj. *Darnell.* The defendant was not sworn and admitted as by the plea is alleged. Read the plea.

Associate reads Gibbon's plea, as before opened.

L. C. J. The question is, Whether this be the due manner and form alleged in the plea?

Mr. *Lacy*. We have a right, but not a sole right.

Serj. *Darnell.* You have pleaded, you have a right by marrying a freeman's daughter; and that the mayor and jurats have the sole right of swearing and admitting you to that right; and that you were sworn and admitted in due form: therefore you were admitted by the mayor and jurats, who had the sole right.

Serj. *Baynes.* The question is, Whether they were duly admitted and sworn by Coates and two jurats? And if they were, the right must be in the mayor and two jurats only. Read the plea.

Associate reads Gibbon's plea, as before.

L. C. J. That he was admitted in due manner and form; so the plea is.

Serj. *Darnell.* My lord, by the plea, he alleges the sole right to be in the mayor and jurats, and that he was admitted in due manner and form; which must be by the mayor and jurats, who had the sole right.

Mr. *Wynne.* My lord, the second issue is, Whether, having a right, he was admitted in due manner and form? The replication answers, That he was not admitted and sworn in manner and form as by the plea is alleged; which would make this an absurd or immaterial issue; and therefore, in construction of law, it is only one issue.

Mr. *Marsh.* We submit it to your lordship, whether the second issue involves any matter of right? The matter is before the jury; and if so, we are not at liberty to go to the second issue, and the fact of completing remains still; and it is necessary to prove that issue. It may be thought immaterial by the gentlemen of the other side; but, if the first issue is for us, the other will be absolutely necessary.

Mr. *Lacy*. My lord, the first issue is, Whether Gibbon was sworn and admitted in due manner and form before the mayor and two jurats?

L. C. J. If was not in due manner and form, unless they had a right.

Mr. *Lacy*. My lord, we humbly hope we have given a sufficient evidence, that there is a sufficient right in the mayor and two jurats; and therefore have proved, that Gibbon was duly admitted.

Mr. *Smith.* If the first issue should be found against us, will it not be true, that there is a right, if not a sole right, in the mayor and jurats? And if so, the defendant Gibbon was sworn in that manner, and so he insists upon it.

Mr. *Marsh.* My lord, it is plain there was a right in the mayor and two jurats. The plea saying it was a sole right, we submit it to your lordship, Whether that contradictory evidence could destroy our issue, which had tied it down? But this surely cannot in any sort affect the second issue, Whether it was in due manner and form? And, if we prove he was sworn in any due manner, we hope the jury will find for us.

L. C. J. It must be in the due manner you have set forth by your plea, which must be according to the right asserted to be in the issue. We must not suppose there are two rights. It must be in the due manner upon the construction of the plea; and I shall leave it upon my own sense of the matter; I shall not lump it.

Gentlemen of the Jury, this is an information against Gibbon, in the nature of a Quo Warranto, for exercising of the office of a freeman in New Romney, to which he was not intituled; and for usurping the exercise of that office.

To this he pleads, he is intituled to hold the same, and to exercise this office, because he had married the daughter of a freeman, and in her, by the custom, is intituled; and that the right of admitting and swearing is in the mayor and two jurats, and that by them he was duly admitted into this office. To this plea there has been a replication, which ends in a demurrer; so not brought to be tried.

The king replies, that the sole right of swearing and admitting is not in the mayor and jurats; and therefore the defendant is not duly admitted to the right of a freeman.

The right Gibbon has is not now in any issue; but, supposing he had such a right, Whether he should be sworn by the mayor and two jurats, exclusive of any other people? And the other issue is about the defendant's being duly admitted. If the mayor and jurats have a sole right to admit, then Gibbon is duly admitted; and if they have not that sole right, then he is not duly admitted, in the sense of this plea.

To prove the sole right to be in the mayor and jurats, the defendant has produced several books; by which it appears, several freemen have been admitted by the mayor and jurats solely. He particularly instances,

March 8, 1679, at a common assembly of the mayor and jurats and commonalty of the town and port of New Romney, in the common place, Peter Martin is elected, and ordered to be sworn in by the mayor and jurats.

December 3, 1694, another instance of a freeman admitted and sworn by the mayor and jurats.

May 16, 1698, another.

Another February 7, 1708.

Another June 13, 1715.

August 6, 1717, one Widcomb and another.

November 18, 1727, Thomas Wilson.

June 7, 1731, William Gray.

And there are other instances, the 18th of March, 1668, and the 22d of July, 1683.

So here are people sworn and admitted by the mayor and jurats, but the election is at a common assembly; and people elected have been chosen at such an assembly, and must be so elected, unless they have another right. But the common assembly have not a right to swear these people; but the sole right, Gibbon says, (for swearing and admitting are synonymous) is in the mayor and jurats.

The other side say, it should be by the common assembly, rather than by the mayor and jurats only; and to shew you this, they have called for several books, and shewn more instances of admitting by the mayor, jurats, and common assembly, than by the mayor and jurats alone; and many instances of admitting by the common assembly.

And this swearing is a prescriptive right, no directions being in the charter about it.

And the crown says, that, by ancient usage, he ought to be admitted by the common assembly, and not by the mayor and jurats solely; 1679 is the only admittance.

But they instance, at Lady Day 1571, at a common assembly, at the election of mayor and jurats, several people, John Amersham and others, were admitted; 'admissus et juratus.'

Soon after, 1579, at another common assembly, Thomas Master 'admissus ad franchis', et juratus.'

In book N° 7, and in book N° 4, is an election on the 25th of March, 22 Jac. 1, and there certain men were admitted and sworn, one Smith, Labden, and one Duke paid his 3*s.* 4*d.*

Another instance, in 1627, of a person admitted and sworn at this common assembly.

By their admittance I understand elected.

Another, in 1659, admitted to the franchise, and sworn.

Another, October 15, 1660, four persons admitted to the franchise then.

Another, May 29, 1666, Richard Strode having taken the oath of freedom, according to the customal.

October 2, 1699, John Gray, free-born, was admitted, and took the oath: though he was not intituled by their election, but was free-born, yet the common assembly swore him.

July 4, 1683, at the common assembly, John Walker, free-born, and three others; they swore him and the others, and they were admitted.

November 4, 1704, Whitfield was admitted, and took the oath.

October 10, 1710, Robert Furnese was admitted.

April 20, 1713, Mr. Watson admitted.

March 23, 1721, Mr. Papillon was admitted in the same manner.

Which shews, the sole right was not in the mayor and jurats; because the common assembly exercised this at the same time, and did it before the mayor and jurats.

In 1679, a person elected was ordered to be sworn by the mayor and jurats: but sure they have not the sole right, there being more precedents against the sole right than for it.

The ancient practice has been to swear them by the common assembly, and no modern practice can take away that right.

If you think the sole right is in the mayor and jurats, then you must find for the defendant.

But, if you think it to be a concurrent right with the common assembly, then the issue is against the defendant; for the mayor and jurats have not the sole right.

The second issue is, Whether the defendant

was sworn by the mayor and jurats? But this depends on the former issue; for after the mayor and jurats right is set forth to be the sole right, and the defendant says he was duly admitted, it is, he was admitted according to the right insisted on by the plea. And if the mayor and jurats have not the sole right, we are not to suppose they have any other right; for the defendant has confined himself to the sole right. He says, he was duly admitted; which must be by the right set forth by the plea, which is the right of swearing solely by the mayor and jurats.

The question therefore is, Whether the mayor and jurats have the sole right?

If you find for the king, or for the defendant, in the first issue, you must find the second issue in the same manner.

Verdict for the king in both issues.

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496. Case of the KING against RICHARD ELLES:* 8 GEORGE II. A. D. 1734.

Upon an Information, in the Nature of a QUO WARRANTO, by the King's Coroner and Attorney, against the Defendant, to shew by what Authority he claims to be Mayor of the Town and Port of NEW-ROMNEY, at the Relation of Benjamin Man. Tried at Kent Assizes, held at Maidstone, the 6th of August, 1734, before the Right Hon. the Lord Chief Justice Eyre.

Mr. *Knowler.* MAY it please your lordship, and you gentlemen of the jury; this is an information, in the nature of a Quo Warranto, against the defendant Elles, to shew by what authority he claims to be mayor of the town and port of New-Romney: and the information sets forth, That the town and port of New-Romney is an ancient town and port, and one of the five ancient ports of this kingdom; and that the barons and inhabitants of the said town and port are, and for ten years last past, and long before, were, and have been, one body corporate and politic, in deed and in name, by the name of the mayor, jurats, and commonalty of the town and port of New-Romney, in the county of Kent; and that the office of mayor of the said town and port is, and for and during all the time aforesaid hath been, a public office, and an office of great trust and pre-eminence, within the said town and port, touching the rule and government of the said town and port, and the administration of public justice within the same town and port; and that Richard Elles, of the town and port of New-Romney aforesaid, yeoman, on the 19th of April, in the seventh year of his present majesty, at the town and port of New-Romney aforesaid, did use and exercise, and from thence continually, to the time of filing the information, hath used and exercised, and yet doth there use and exercise, without any legal warrant, royal grant, or right whatsoever, the office of mayor of the said town and port, and to have, use, and enjoy all the liberties, privileges, and franchises thereof; which the said Richard Elles upon his majesty, hath usurped, in contempt of his majesty, and to the great damage and prejudice of his royal prerogative, and also against his crown and dignity: whereupon he prays process, &c.

To this the defendant has pleaded, That the said town and port is an ancient town and port, and one of the five ancient ports of this kingdom; and that the barons and inhabitants of the said town and port are, and for the space of ten years last past, and long before, were, and have been, one body corporate and politic, by the name of mayor, jurats, and commonalty of the town and port of New-Romney, in the county of Kent; and the office of mayor to be a public office, and an office of great trust and pre-eminence, as by the information is supposed.

And that the late queen Elizabeth, by her letters patent, dated at Northaw, the 4th of August, in the fifth year of her reign, did will and grant, that the barons and inhabitants of the said town and port (who before were incorporated by the name of jurats and commonalty, as she was informed) from thenceforth, for ever should and might be one body in itself incorporate, in deed and name, by the name of mayor, jurats, and commonalty of the town and port of New-Romney, in the county of Kent.

And thereby made and ordained John Chessman, then one of the said jurats, mayor of the said town and port, to have and exercise that office until Lady-day then next ensuing, if he should so long live; and did thereby make, ordain, approve, and confirm John Percker, William Ipse, George Holton, Laurence Fane, and Jeffery Tomkin, then jurats of the said town and port, to have and exercise that office during their respective lives, in manner and form as the jurats of the said town before that time exercised their said offices.

And thereby willed and granted, that upon

* See 2 Strange, 994; and Kyd on Corporations.

Lady-day then next ensuing, in the parish church of St. Nicholas, within the said town and port, one of the jurats of the said town and port should and might be chosen mayor, by the jurats and commonalty of the said town and port, for one whole year then next ensuing; which said jurat, so elected to be mayor, if he should be present, should take his corporal oath, for the due execution of his office, before his predecessor, in like manner and form as the mayor of the town and port of Sandwich used to take it; and if such person so elected, should not be present, then at the next court to be holden within the said town and port: and so from year to year, and from time to time, the mayor shall be chosen for ever.

And that every one of the jurats, from time to time, from thenceforth for ever, should be chosen by the commonalty, or the greater part of them there present, out of themselves, in like manner and form as before that time they had been used to be chosen there; yet so that the jurats at one time should not be, in the whole, above the number of twelve, besides the mayor.

And the defendant by his plea further saith, That upon the 25th of March last, and long before, he was, and still is, one of the jurats of the said town and port: and so being a jurat as aforesaid, and John Coates, esq. then being mayor, and then one of the jurats, the then jurats and commonalty assembled themselves together in the parish church of St. Nicholas, within the said town and port, for the year then next ensuing, according to the tenor of the said letters patent; and being so assembled, then and there, at that assembly, the major part of the said jurats and commonalty then present there (of which said jurats the said John Coates, the then mayor, then was one, and present there) chose him the said Richard Elles, then being one of the jurats as aforesaid, to be mayor of the said town and port for the year then next ensuing, according to the form and effect of the said letters patent: and the said Richard Elles being so chosen into the place and office of mayor of the said town and port as aforesaid, after his said election, to wit, then and there, at the same assembly in the parish-church aforesaid, he the said Richard Elles was duly sworn into his said office by Robert Loftie, then town-clerk of the said town and port, before the said John Coates, being the last predecessor of the said Richard Elles in the office of mayor of the said town and port; and the said Richard Elles, then and there, at the said assembly, took his corporal oath, for the due execution of his said office of mayor of the said town and port, before the said John Coates, his last predecessor as aforesaid, the said oath being administered by the said town-clerk as aforesaid, (the same being the like manner and form, in which the mayor of the town and port of Sandwich, in the said letters patent named, at the time of making the said letters patent, was, and ever since hath been, and been used and accustomed to be sworn into the said office of mayor of the said town and port of Sandwich) according to the form and effect of the letters patent aforesaid: and by virtue thereof, the said Richard Elles, after his election and swearing aforesaid, upon the said 25th of March last, and from thence continually afterwards, until the time of exhibiting the information, at the town and port aforesaid, was, and still is mayor, and by that warrant claims to be mayor of the said town and port; and traverses the usurpation.

The king replies, That the said Richard Elles was not one of the jurats of the said town and port, in manner and form as he hath alleged by pleading; and prayeth that this may be enquired of by the country; and the said Elles prayeth the like.

So that, gentlemen, the first issue you are to try is, Whether the said Richard Elles was one of the jurats of the town and port of New-Romney, in manner and form as he hath alleged by his plea?

And the second issue is, Whether the major part of the jurats and commonalty of the said town and port did chuse the said Richard Elles to be mayor of the said town and port for the year then next ensuing, according to the form and effect of the said letters patent, in manner and form as the said Elles hath also alleged by pleading?

Gentlemen, the third issue is, Whether the said Richard Elles was duly sworn into the office of mayor of the said town and port, in manner and form as he hath alleged by pleading?

And the fourth issue is, Whether the said Richard Elles did take his corporal oath, for the due execution of the said office of mayor of the said town and port, according to the form and effect of the letters patent aforesaid, in the manner and form as he hath alleged by pleading?

And, gentlemen, the fifth issue you are to try is, Whether the manner and form, in which the said Richard Elles hath alleged himself in his plea to have been sworn into the office of mayor of the said town and port of New-Romney, be the like manner and form, in which the mayor of the town and port of Sandwich, in the said letters patent named, at the time of making the said letters patent, was, and ever since hath been, and been used and accustomed to be sworn into the said office of mayor of Sandwich aforesaid, in manner and form as he hath alleged by pleading?

If therefore, gentlemen, evidence is laid before you, to prove that the defendant Elles, being one of the jurats of this town and port, was duly elected and sworn into the office of mayor, then, gentlemen, you will find a verdict for him.

Serj. *Darnell* May it please your lordship, and you gentlemen of the jury; I am counsel for the defendant Elles; and you will please to observe, that, by very great art, these issues are all turned upon the defendant to prove. By his plea he sets forth the constitutions of the town and port of New-Romney; that he

was duly chosen into the office of mayor, and had taken the oaths. But the other side turn every thing upon him by proof: they say, he was not a jurat; that the major part of the jurats and commonalty did not chuse him; and then, merely to multiply issues, and for delay, say, you are not a jurat; the major part of the jurats and commonalty did not chuse you; you are not duly sworn; that he did not take his oath of office according to the form of the letters patent; that the manner and form, in which the said Richard Elles is alleged by his plea to be sworn into his office, is not according to the customs of Sandwich.

My lord, and gentlemen of the jury, there has lately been a very great contest in the Court of King's-bench about the officers of this town; and there were two candidates for this office of mayor, one Wightwick, and the defendant Elles; and upon the poll it appeared, that Elles had eleven votes, and Wightwick ten; so that Elles was chosen mayor by the majority of one voice: but the presiding officer said, he had a man who was appointed to take the poll; by which poll it appeared, that Gibbon and Darby, who had never been allowed to be freemen, had polled; and then, upon that poll, there were twelve votes for Wightwick, and eleven for Elles: upon which the oath of office was administered, and both candidates were sworn.

Gentlemen, on application to the Court of King's-bench, Elles by affidavits made it appear, that Gibbon and Darby had no right to freedoms; on which the Court declared, the point would turn on Gibbon's right; and then the question was, Whether persons marrying freemen's daughters had a right to freedoms? and Darby's right was to abide the fate of that. But they have declined this, and turn all the circumstances of proving upon us. We shall therefore, gentlemen, fully prove every one of these issues to you by witnesses; in the course of which evidence, you will hear, gentlemen, of very great sums of money offered to engage those freemen, who were in Elles's interest, to vote for Wightwick. We shall prove to you, gentlemen, that 100*l.* was offered for one vote, and even so large a sum as 1,000*l.* for another, in order to procure Wightwick to be mayor.

Under these circumstances, gentlemen, two Mandamus's issued from the Court of King's-bench to admit these two men; for they all agreed there was no right by marrying; and then these two persons were sworn in by virtue of these Mandamus's.

If therefore, gentlemen, we shew there was a majority for Elles upon the poll as taken by the town-clerk; notwithstanding the pocket-poll they have set up; we hope you'll take it upon the foot of the town-clerk's poll, and find a verdict for the defendant accordingly.

Serj. *Baynes*. May it please your lordship, and you gentlemen of the jury; I am counsel in this case with the defendant: and this is an information granted by the Court of King's-bench, in order to procure peace in Romney, where there were two acting mayors at one and the same time; and the Court granted this information, to try which of them was duly elected. Upon this five issues are joined: and the first issue you are to try, gentlemen, is, Whether Elles was a jurat? And we shall shew he was first elected a freeman, and then, in due manner and form, a jurat. The second issue is, Whether the mayor, jurats, and commonalty of the town and port of New-Romney, did chuse the defendant Elles mayor? Gentlemen, in this town, we see, there are twenty-one voters: Wightwick stood in opposition to Elles; the town clerk took the poll; and on casting it up, there appeared to be for Elles eleven votes, and for Wightwick ten; so that Elles was duly chosen mayor. But another person pretended to take the poll, and set down such persons as he thought fit, and amongst them Gibbon and Darby, as voters for Wightwick; and that cast the majority of voters on Wightwick: but Darby and Gibbon's votes ought not to have been taken, their right being by marrying freemen's daughters; whereas there is no such custom, nor ever was, nor ever attempted till the year 1728, when it was set up by this Gibbon: and thereupon the Corporation ordered it to be entered in their books, that he was not to be admitted, for that there was no such custom; which we shall call our witnesses, and fully prove to you.

The third issue, gentlemen, is, Whether the defendant Elles was duly sworn into the office of mayor, in manner and form as by his plea he hath alleged? And we shall shew you, that he was sworn by the town-clerk, before the mayor.

The fourth issue is, Whether Elles took his corporal oath, for the due execution of the office of mayor, according to the form and effect of the letters patent?

The fifth issue is, Whether the defendant Elles was sworn according to the manner and form as the mayor of Sandwich is sworn?

Gentlemen, we shall call our witnesses, and make it plainly appear, that these issues are for the defendant Elles; and then we hope you will find a verdict for him accordingly.

Mr. *Marsh*. My lord, in order to be a jurat he must be a freeman.

L. C. J. *Eyre*. Was he a jurat?

Mr. *Knowler*. He acted as a jurat.

Serj. *Darnell*. His acting as a jurat is evidence, *prima facie*, that he was a freeman.

L. C. J. Will you admit he was a jurat?

Mr. *Marsh*. They may go on; I shall make no bargains.

Serj. *Darnell*. Swear Mr. Loftie. (Which was done.)

Mr. *Marsh*. What do they call him to? We object to him.

Serj. *Darnell*. To prove an assembly-book. Mr. Loftie, is that the entry of Elles's election to be a jurat?—*Loftie*. Yes.

Serj. *Darnell*. Read it,

Associate reads:

"John Tooke, mayor. At a common assembly held the 23d December, 1730, mayor, jurats, and commonalty duly elected Edward Batchelor and Richard Elles to be jurats."

Mr. *Lacy*. The election-day is the 25th of March.

L. C. J. This proves an election the 23d of December, 1730. Was he duly sworn?

Serj. *Baynes*. Yes, my lord. Read his swearing.

Associate reads:

"4 January, 1730, Batchelor and Elles took the oath of jurats."

L. C. J. Go on, issue by issue: first, Whether Elles was a jurat? They insist, by custom, the jurats must be sworn every year: prove it.

Serj. *Darnell*. My lord, they have given us notice, that every qualification of the jurats and freemen would be objected to.

Mr. *Knowler*. A jurat (so MS. Q. mayor) is said to be an annual officer. We shall prove, my lord, that Elles was chosen for the year 1734.

L. C. J. Mr. Wellard, you must not talk more than necessary.

Mr. *Marsh*. It is necessary to be a freeman, in order to be a jurat.

Serj. *Darnell*. A man is a jurat; is it necessary he be a freeman, in order to be qualified for a jurat?

Mr. *Marsh*. If the entry be sufficient, it is needless to go on.

L. C. J. The qualifications of a jurat are, a jurat he must be, to be a mayor; for a jurat, he must be a freeman.

Mr. *Marsh*. These points are often disputed.

L. C. J. Dispute what you will; but he was owned a freeman by the corporation when he was made a jurat.

Mr. *Marsh*. He was sworn before the mayor and jurats only.

L. C. J. The entries are all so. Nothing has been read to shew they might not swear him. If he was sworn by the mayor and jurats, that must be proved: we had nothing of that in the last cause.

Serj. *Darnell*. The question is, Whether the major part of the mayor, jurats, and commonalty, did duly chuse him mayor, according to the form and effect of the letters patent? and in order to prove that he was duly chosen, we are to shew what were the number of jurats and freemen that voted for Elles; for which purpose I shall call Mr. Loftie.

Mr. *Marsh*. We object to Loftie: he was one of the persons who voted for Elles, and therefore has given his opinion already.

L. C. J. I never knew it denied a corporation-man that voted; he is a legal witness.

Serj. *Darnell*. Mr. Loftie, were you present at the last election of a mayor for Romney?

Loftie. Yes.

Serj. *Darnell*. Where was it made?

Loftie. At St. Nicholas.

Serj. *Darnell*. What number of freemen were present and voted?—*Loftie*. Twenty-one.

Mr. *Lacy*. Are you town-clerk of Romney? Do you keep a book?—*Loftie*. Yes.

Mr. *Lacy*. Where is that book?

Loftie. Mr. Wellard took it away.

Mr. *Wellard*. Here it is.

Loftie. Mr. Wellard and Mr. Wightwick took away the books, and Mr. Wightwick has entered the proceedings of that day himself.

L. C. J. Are there any entries made by you of the proceedings of that day?

Loftie. I have a copy of the poll, my lord.

L. C. J. Why were they not entered?

Loftie. Because Coates insisted I should take the poll according to the minutes they had taken.

L. C. J. And you did not think it right?

Loftie. No, my lord; because they had taken Gibbon and Darby's votes, who, I thought, had no right to vote.

Serj. *Darnell*. You take an oath; what is that oath?

Loftie. To enter faithfully and right all the proceedings of the corporation.

L. C. J. You did not make an entry of the poll, because every body did not agree to it; but you took a copy of the poll. Read the oath of the town-clerk.

Associate reads:

Mr. *Knowler*. Read the poll again.

Loftie. "Wightwick and Elles—The votes for mayor—

"For *Wightwick*:—John Coates, esq. Wightwick, Batchelor, Rutton, Bassett, Joshua Coates, Odiham Coates, Wilson, Haffenden, Dree."

These were all that voted for Wightwick, but Gibbon and Darby, who, I apprehended, had no right to vote; and therefore I did not insert their names.

"For *Elles*:—Himself, Robert Mascall, Norman, Tookey, Smith, John Mascall, Weeden, Langdon, Loftie, Benjamin Cobb, William Gray.

Mr. *Marsh*. Darby and Gibbon were there, but you did not take their votes.—Was nobody else there? Did not Mr. Papillon and Wellard send, that they might be admitted to come to exercise their franchise of voting?

Mr. *Lacy*. I desire to see the poll-paper, the very paper you took in the church, Mr. Loftie.

Mr. *Loftie* produces the poll-paper, as before.

Mr. *Lacy*. Did not you take another list or poll?

Mr. *Loftie* produces another.

Mr. *Lacy*. He took one list, and then, by Elles's direction, took another. Read it.

Mr. *Loftie* reads another poll.

"For *Wightwick*:—John Coates, esq. Wightwick, Batchelor, Rutton, Bassett Joshua Coates, Odiham Coates, Wilson, Haffenden, Dree, John Darby, John Gibbon, Papillon, Wellard."

"For *Elles*:—Elles, Robert Mascall, Norman, Tookey, Smith, John Mascall, Weeden, Langden, Loftie, Benjamin Cobb, William Gray."

Mr. *Marsh*. Where does this assembly meet?

Loftie. In the south chancel of St. Nicholas.

Serj. *Darnell*. Is the door usually kept open, or shut?

Loftie. Shut, to prevent people coming in, who have no business.

Mr. *Smith*. Which of the two polls did you minute down first?

Loftie. The last-delivered.

Mr. *Marsh*. My lord, this is the principal issue; and we object to the evidence of this person who voted for this mayor. He has given his opinion already; and therefore I submit it to your lordship, whether he is a legal evidence? Or otherwise we insist, the persons taken down as pollers, that they are more in number than he has given an account of. According to his list, they are but ten; but there must be four votes more added, two of which are persons not numbered by him.

My lord, Darby's and Gibbon's rights to vote depend upon their being free of this corporation; and if we shew they are free, and are admitted, it will be sufficient reason for putting them on the poll for Wightwick; and then Elles cannot be mayor. Besides there is Mr. Papillon's right, who was not in the church, because the door was shut within-side; and Mr. Wellard was also a freeman, and he could not come in, the door being shut. We shall shew you, gentlemen, their qualification, and that they could not get into the church; that they went to the door, but there was no admission to be had; that they sent in a letter to the mayor, and demanded admittance; and if they had been let in, they had voted for Mr. Wightwick; and they having a right, and asserting that right, these votes ought to be allowed to them.

In the first of the late king, there was the case of the mayor of Hythe tried before my lord Macclesfield at this place. Two persons offered their votes at the poll, and being refused by the presiding officer, the Court was of opinion, they were good votes. And therefore we humbly hope your lordship will allow these to be good votes, and, in consequence, that the jury will find for us.

Mr. *Lacy*. The issue now before your lordship is, whether the major part of the jurats and commonalty did, or did not, chuse the defendant Elles mayor? By Loftie's poll it appears, there were eleven votes for Elles, and ten for Wightwick: so that, if either of the four votes disallowed by him shall appear to be good, then, gentlemen of the jury, they do not prove their issue. As to Mr. Papillon, he is a freeman, admitted and sworn; and though his vote was refused, he tendered it, and sent in a note in writing, signifying to the mayor that he voted for Wightwick, and is therefore a good vote. And as to Darby and Gibbon, we submit, whether, being sworn, they are not in the exercise of their office, and ought to be allowed good votes. We shall call our witnesses, and shew the entries of Gibbon and Darby.—Mr. Loftie, look upon the book; is it your hand-writing?

Loftie. Yes. Reads:

"J. Coates, mayor. Be it remembered, at a court of record held the 25th of March, 1734, the corporation having been served with a writ of Mandamus, Gibbon and Darby, demanding their freedoms, were admitted and sworn."

Mr. *Marsh*. Where is Mr. Papillon and Mr. Wellard's entry?

L. C. J. Gibbon and Darby were admitted before the election?—*Loftie*. Yes, my lord.

L. C. J. How came you, then, to refuse their votes?

Loftie. Because I thought there was an order made, that they should not be admitted to vote.

L. C. J. Were they elected by the mayor and jurats?—*Loftie*. Never, my lord.

Mr. *Wellard*. Read my election, and then read my swearing.

Associate reads:

"Nicholas Durrant, mayor. At a common assembly of the town and port of New-Romney, in the common place, October 20, 1720, Nicholas Durrant, mayor, &c. elected Charles Wellard, an inhabitant and town-clerk, to be a freeman of this town and port; and he was ordered to be sworn, *more solito*, according to brotherhood and ghuestling."

"December 19, 1720, he was sworn and admitted."

Serj. *Darnell*. Is that the assembly-book?

Mr. *Wellard*. Yes.

Serj. *Darnell*. My lord, all the entries of swearing these people are in the assembly-book, and therefore it is but a delegated power.

Mr. *Lacy*. Read the mandate for chusing two barons to send to parliament.

Associate reads:

"Whereas a mandate for chusing two barons was read, the mayor and jurats——"

Mr. *Marsh*. Read Mr. Papillon's election and swearing.

Associate reads:

"New-Romney, *ss.* mayor. At a common assembly of the said town and port of New-Romney, held in the common place there, the 23rd of March, 1731, elected David Papillon a freeman of this town and port; and he was sworn and admitted, *more solito*, according to brotherhood and ghuestling."

Mr. *Dodd* called and sworn.

Mr. *Marsh*. Were you present at the last election for mayor?—*Dodd*. Yes.

Mr. *Marsh*. Was Mr. Papillon there?

Dodd. Yes; but he was not in the church.

Mr. *Marsh*. And how came he not to get in?

Dodd. Because the door was locked.

Mr. *Marsh.* Did he try to get in?——

Here the Chief Justice was told by a by-stander, that a person was taking Notes; on which he asked,

L. C. J. Who is it?—Who employed you? Give me the paper. [On which the Notes were delivered to him; and, after turning them over, he said, with some warmth,] I observe my name in it: whom were you employed by to take those Notes?

Short-hand Writer. My lord, I was employed by a gentleman concerned in the event of these issues.

L. C. J. Who?

Short-hand Writer. Mr. Papillon desired me to attend and take Notes.

Then the Chief Justice called cross the Court to Mr. Papillon:

L. C. J. Mr. Papillon, here is a man taking Notes, that says you employed him.

Mr. *Papillon.* Yes, my lord, I desired him to attend, and take Notes.

L. C. J. Who is he? I observe my name in several places. I suppose, I shall next week have my name in print.

Mr. *Papillon.* My lord, it is no common short-hand writer; it is Mr. I never knew it was a crime to take Notes in a court where your lordship sat.

L. C. J. Well, I hope you are the better for them.

Mr. *Papillon.* I think I am, my lord; and on some occasions they have been of great use to me.

L. C. J. I am glad to hear that.

Mr. *Papillon.* Your lordship presides here; so do with the papers what your lordship pleases.

L. C. J. No, no. Now I know it is done by authority, if I see any thing in print, I shall know where to apply.

Mr. *Papillon.* It is no reason to suppose, it should come from me, if your lordship does; there are great numbers now taking Notes, as well as Mr. and it may sure come as well from any of them. My lord, I never was a libeller, nor ever in my life encouraged a publication of this sort. We are all liable to accusations of this sort: I have seen many falshoods printed, but never thought them worth my notice. My lord, I am not answerable: do with the Notes what you will.

L. C. J. No; since it is your writer, let the man have his paper, and go on.

The Notes being out of the Short-hand Writer's possession, he could not take down what was said.

L. C. J. There, take down that, and print it too, if you will; I don't care; though I don't say it is law, nor will justify it as such.

Mr. *Papillon.* Here, give me the Notes: let my lord have them, since they give offence.

L. C. J. No, I will not have them. Let the man have his paper again, since it is done by authority.

Mr. *Papillon.* My lord, pray do what you please with them; cut them to pieces, or put them in the fire.

L. C. J. No, no. Let him go on, since he is your writer.

Mr. *Papillon.* Then pray let him go on without reflections.

Mr. *Lacy.* Pray, Mr. Dodd, where did they assemble?

Dodd. They went from Mr. Coates's.

Serj. *Darnell.* Did Mr. Papillon and Mr. Wellard go with the people to the church?

Dodd. No.

Mr. *Marsh.* Was Mr. Papillon there?

Dodd. Yes.

Serj. *Darnell.* Why could not he go into the church, as well as Coates and the rest?

Dodd. I do not know.

Serj. *Darnell.* Did you see the mayor go from the house?—*Dodd.* Yes.

Serj. *Darnell.* What time did they go?

Dodd. At two o'clock.

Mr. *Marsh.* Is that the usual time?

Dodd. Yes.

Mr. *Marsh.* How long was the door locked before Mr. Papillon and Mr. Wellard came?

L. C. J. Did the mayor and jurats see them coming?—*Dodd.* I do not know.

Serj. *Darnell.* Is it not usual to lock the door on such occasions?

Dodd. Yes; and not to open it till the election is over.

Serj. *Darnell.* Did Coates or Wightwick give orders to shut out Mr. Papillon or Wellard?—*Dodd.* I do not know.

Serj. *Darnell.* Was any body shut out besides?—*Dodd.* Several.

Mr. *Knowler.* How long was Mr. Wellard in town before the election?

Dodd. About five weeks.

Mr. *Knowler.* Whose house was he at during that time?—*Dodd.* At Gibbon's.

Mr. *Knowler.* How long was it after the door was shut, that Mr. Papillon and Mr. Wellard came to apply to get in?

Dodd. A minute or two.

Mr. *Knowler.* Why did they not apply to the door-keeper to be let in?

Dodd. I do not know.

Mr. *Marsh.* Did you ever know a freeman refused, that came and applied to be let in, a little after the door was shut?

Dodd. Yes.

Serj. *Baynes.* Was any particular message sent to the mayor by Mr. Papillon or Mr. Wellard?—*Dodd.* Not that I know of.

Mr. *Wellard* sworn.

Mr. *Marsh.* Mr. Wellard, you were with Mr. Papillon: Pray, give an account of his going to church, and his demand to come in.

Wellard. I went with him to the church, where the election was, in order to vote for Wightwick. As we were going, we saw the witness last examined, and desired him to take

notice we went for that purpose. We went up to the doors, and found them fastened within.

Mr. *Marsh.* Did you observe any body about the doors?

Wellard. Yes, the mayor's servant and others. I knocked and pushed at the door, but nobody came, or gave any answer.

Mr. *Marsh.* And by what method did you acquaint the assembly that you were there, and desired admission, in order to give your votes?

Wellard. We sent in letters to the mayor, to acquaint him we were at the door. We gave the letters to Mr. Wightwick, and desired him to deliver them to the mayor. We expected to be denied, and therefore gave letters to Wightwick, to deliver to the mayor.

L. C. J. Mr. Wellard,—If you will not hear, I cannot help it. They went to the church; you came after, and tried to get in. You sent in a letter to the mayor by Wightwick; how could that be? because he was gone into the church before.

Wellard. My lord, I gave Mr. Wightwick my letter to carry in with him, before he went.

L. C. J. It was to acquaint him, you were ready to come in, and give your vote?—Can you tell whether Wightwick delivered that letter or not?

Wellard. Yes, my lord; he told me, after the election was over, he had delivered it.

Mr. *Marsh.* Did you not, on the day of the election, dine with Coates? Did not the mayor, and all the jurats and freemen, dine there, and go from thence? And if you had had a mind, could you not have got in with them?

Wellard. No; the mayor told us, if we had a mind, we should not come in.

Mr. *Knowler.* Were you not in the church before the business was over? Did not you come into the chancel?

Wellard. Not till after the mayor was sworn, and had possession of the staff.

Mr. *Knowler.* Did you then tender yourself to vote?—*Wellard.* No; it was all over.

Serj. *Darnell.* You dined with Coates; did you prognosticate there would be a shutting of the door, and a refusal?

Wellard. Yes; because the mayor had told us, we should not come in.

Serj. *Darnell.* Did you write word Mr. Papillon was with you?

Wellard. I sent in the following letter: (Produces and reads it.)

"Mr. Mayor;—I am at the church, and demand to be admitted, to give my vote as others for mayor. If I am denied, pray take notice, that I give my vote for Mr. Humphry Wightwick to be mayor for the year ensuing, I being at this time a resiant in this town.

"C. Wellard."

Serj. *Darnell.* Whose advice did you write that letter by?

Wellard. I demur to that question. In point of law I ought not to answer it.

L. C. J. I think, Mr. Wellard, you should answer the question, because it is an indifferent question.

Wellard. Mr. Papillon and I concerted it, in order to preserve our rights.

L. C. J. You thought they would not let you in; therefore you wrote this letter, and sent it?—*Wellard.* Yes, my lord.

Mr. *Lacy.* Did Mr. Papillon write this letter?

Wellard. I know his hand; I saw him write it, and deliver it to Wightwick.

Associate reads:

"Mr. Mayor; I am at the church, and demand to be admitted, to give my vote, as others, for mayor. If I am denied, pray take notice, that I give my vote for Mr. Humphry Wightwick to be mayor for the year ensuing, I being at this time a resiant in this town.

"D. Papillon."

Mr. *Batchelor* called and sworn.

Mr. *Lacy.* Look upon the two papers signed Papillon and Wellard; were they delivered by Mr. Wightwick to the mayor?

Batchelor. I saw Wightwick deliver them to Coates, the mayor.

Mr. *Lacy.* Was it before or after the choice?

Batchelor. It was before; and the mayor said, he would admit no foreigners to come in. The mayor shewed the letters about, and gave them to me to read, and said, he would admit no foreigners in.

Mr. *Lacy.* Had the freemen given their votes?

Batchelor. No; they were gone to the chancel to vote, but had not voted.

Mr. *Lacy.* Did you see the letters delivered to Wightwick?—*Batchelor.* No.

Mr. *Lacy.* How do you know them to be the same?

Batchelor. Because they were open. I saw Coates sign at the bottom, "This was brought me at the time of the election of mayor, and we refused it."

Mr. *Knowler.* Did Coates acquaint the assembly he had received such letters, and resolved not to admit them?—*Batchelor.* Yes.

Mr. *Knowler.* Did any other person demand to be admitted?—*Batchelor.* No.

Mr. *Knowler.* Did you ever know any foreigners vote for mayor?—*Batchelor.* No.

Mr. *Marsh.* Was there time for them to have given their votes, if they had been let in as soon as the letters were delivered?

Batchelor. Yes; they were just gone out, and hardly got into the chancel, before Wightwick delivered them.

L. C. J. Did you ever know any one let in after the door was shut?

Batchelor. No, my lord.

Mr. *Lacy.* After they are let into the church, and the door shut, cannot a freeman be let in?

Batchelor. I never knew or remember it in my life, after the church door shut.

L. C. J. Did you ever know or hear, that

Coates was to make the election void, as their friend, by refusing to let them in? Coates voted for Wightwick, and knew that on refusal it would be a void election. If people that had a right were excluded, I think it a void election.

Mr. *Lacy.* My lord, they all joined to exclude foreiguers.

Mr. *Papillon* called; and, whilst swearing,

Serj. *Darnell.* So they were to serve, or swear for one another.

Wellard. I don't know what you mean by that insinuation: we regard an oath as much as you do.

Serj. *Darnell.* My lord, Mr. Wellard says, I insinuated Mr. Papillon would assert a falsehood. I scorn it; I said no such thing.

Mr. *Marsh.* Pray, Sir, give an account what passed on or before the day of election.

Papillon. There was an insinuation, that I designed to vote at the election for mayor; on which they applied to the mayor, to know if he would admit me. He told them, No; and it was refused at the instance of the gentlemen of the other side. I do not know that I thought of voting before; but then I asked the mayor about it, and he refused me, because I was their member, and therefore ought not to meddle. I did not chuse to make any disturbance, and therefore wrote the letter, and then followed myself, as soon as I could. I delivered the letter to Wightwick, to give it to the mayor. I desired him to take notice, I insisted on my vote. I waited all the time of the election at the church-door, but could not get in. Coates has put me to much trouble, and was always my enemy.

Serj. *Darnell.* Did not Coates vote for Wightwick?—*Papillon.* The poll will tell you.

Serj. *Darnell.* He voted on your side. Read the letter.

Associate reads:

"Mr. Mayor, I am at the church-door, &c." *verbatim* as Mr. Wellard's letter.

Serj. *Baynes.* Did you see the men go to vote?

Papillon. I cannot be sure; but I thought the properest time to be refused was when they were assembled. I did not design to make a disturbance, and therefore delivered a letter to Mr. Wightwick; and afterwards I knocked at the door, which was shut. The proclamation was ready to be read; for there was great reason to think there would be a disturbance created.

Serj. *Baynes.* Might you not, upon your oath, have gone in with the other gentlemen, if you had thought fit?

Papillon. I believe not, upon my oath; because Coates told me, he would not admit me.

Mr. *Knowler,* Did you not stay in Coates's parlour purposely, when he went out, that the church-door might be shut?

Papillon. I cannot tell.

Mr. *Knowler.* Pray, Sir, recollect yourself.

Papillon. Upon my oath, I cannot recollect whether I was then in the house; I think not.

Mr. *Knowler.* Was there any disturbance at the election?

Papillon. No; they knew the proclamation was ready.

Mr. *Knowler.* Were there not other gentlemen resiant, as well as you, refused?

Papillon. I believe not.

Mr. *Knowler.* How long had you been a resiant? Did not you come the day before the election?

Papillon. I cannot recollect as to the day.

Serj. *Darnell.* You say in your letter, you were resiant; pray, Sir, how long had you been so?

Papillon. I cannot recollect. If you allow my letter is a good demand, I will explain it.

Mr. *Smith.* Would there not have been a disturbance, if you had rushed into the church?

Papillon. Upon my oath, I believe there would.

Mr. *Lacy.* My lord, we submit this issue here.

Serj. *Darnell.* May it please your lordship, and you gentlemen of the jury; this, my lord, is the principal issue; and the gentlemen of the other side, in order to prove that a majority did not chuse the defendant Elles mayor, say, that this poll was not a majority of the whole, and have endeavoured to shew, that other people had a right to vote, besides the persons who appear upon the poll; that Gibbon and Darby were admitted freemen, and their votes not taken; therefore, instead of the one majority for Elles, if they had been admitted, there would have been a majority of one for Wightwick. Now, my lord, it appears from the evidence, that Gibbon and Darby were admitted the very morning of the election, not by the mayor, jurats, and commonalty, but by other persons, at another place, and upon producing Mandamus's. We shall shew you, gentlemen, that when the Mandamus's were brought, though this matter had been a great while kept private, it was unanimously resolved, at a common assembly, That no freeman's daughter should by marrying entitle her husband; and that they would contest any such claim at law. We shall shew you, gentlemen, that, the day before the election came on, one hundred guineas were offered to one man, a thousand guineas to another: but, when neither would do, being both absolutely refused, then the Mandamus was produced, and two men sworn in the very morning before the election. I appeal to the common sense of every man; is there any pretence of right for this? The swearing and admitting can give no right; the man must be legally chosen by the body: but this was not at all the case; instead of this, an order was made by the assembly, and entered in their books, that the Mandamus should be controverted.

After this, they offered Mr. Papillon and Mr. Wellard as voters; and their proceeding in this is as extraordinary as the Mandamus. It

is true, they were freemen; but no man not resiant, can be admitted to vote; and therefore they were refused by the body.

But, gentlemen, they tell you, we have done all we could; we sent in letters to the mayor, and came to the church door, in order to get in, and were refused; and therefore their votes ought not to be objected to, as they stand on the poll.

Please, gentlemen, to observe how this affair has been cooked up between Mr. Papillon and Mr. Wellard. Wellard tells you, the letters were written before dinner on the day of the election; they are word for word the same, letter for letter. The subscription is exactly in the same words: "We refused it, John Coates, mayor." Coates had proposed it to the body, and they refused it. But Coates is in Mr. Papillon's interest, and votes for him: can he say this, We refused this? No, it is only to give a handle of complaint, that men have been unjustly refused, and that therefore the election is void: though I never yet heard that a man was to be admitted to vote by letter, or that a vote was to be put into a pocket.

As to the case of Hythe, the men were actually there at the poll, and offered their votes for the candidates, and were actually refused by the presiding officer; and if he refuses, the person has his remedy: but I never before heard of a vote put into a pocket. If this is to be admitted, there can be no certainty in any election. A corporate body assembled, are not to be broke in upon, after the doors are locked, and the keys taken in (as in the House of Commons) to prevent confusion; and therefore all right of voting is excluded, when this body is once assembled. Besides, they dined with Coates, and might have gone in with him, and the rest of the freemen, if they would: but, instead of that, for particular purposes, they say, No; we will not claim it in person, we will demand it by letter.

Upon the whole circumstances of this case, we hope, gentlemen, it has been clearly made out to you, that Elles had the majority; that the eleven that voted for him were legal votes, and that but ten legal votes voted for Wightwick; and therefore, gentlemen, that you will find a verdict for us.

Serj. Baynes. My lord, the gentlemen of the other side have endeavoured to make out, that four legal voters were excluded; and that, Gibbon and Darby being sworn in, though they were rejected by the assembly, they are to be looked on as if they had given their votes.

The right of voting is, to be elected by the mayor, and jurats, and commonalty: but they were never elected, or duly sworn in, by the mayor and jurats; it was done by Mandamus: and though it was agreed and resolved, at a common assembly, to contest it, yet the mayor and two jurats swore them in; and therefore it was right to refuse them their votes; and then there is plainly a majority for Elles.

And, gentlemen, as to Mr. Papillon and Wellard's votes, if there be any fraud or collusion in that matter, their votes are to be set aside; and they came for their right, after the church door was shut. It is agreed, that, on the election of a mayor, the keys of the church are laid down on the table, and the doors are shut: this, gentlemen, is the constitution of the town. The evidences tell you, they were all met at Coates's, and went after dinner to church, to vote for Wightwick; but the mayor would not admit them. How could this create a disturbance? But he did not admit them for fear of a disturbance, and they were kept out; and any part of the assembly are to be excluded, if they come too late, as in the House of Commons.

But the gentlemen of the other side say, their offer to vote should be looked on in the same manner as if they had voted. And this, gentlemen, we admit, is law in the House of Commons, but was never determined to be law in any of the courts in Westminster-hall: it is the practice there, but never at common law. So that, gentlemen, there is a plain majority of those assembled for the defendant Elles; and therefore we hope you will find that he is duly elected.

Mr. Knowler. My lord, there is an entry upon the assembly-book, where Gibbon's and Darby's right were taken into consideration by the whole body; and it was unanimously resolved, that they had no right; and, to make it the more solemn, the mayor, jurats, and commonalty subscribed it; and Coates, and the others who admitted them, have also subscribed it. Read the entry of the 1st of March, 1728.

L. C. J. It signifies nothing, an act in 1728: they gave their judgment, what signifies it?

Mr. Knowler. Read the entry.

Associate reads:

"New Romney, March 1, 1733. Reciting that Gibbon and Darby had threatened to bring their Mandamus, to be admitted to the freedom of this town and port; it was resolved to return as counsel shall advise, and the suit to be defended at the charge of this corporation."

Mr. Marsh. I hope, my lord, we are proper to reply.

L. C. J. You are not regular to reply. You laid down a rule the beginning of this circuit, and now you do not keep to it: but I will hear you, regular or irregular.

Mr. Marsh. My lord, we humbly insist, the last entry is no evidence.

L. C. J. You are the master of order; I submit to you.

Mr. Marsh. My lord, I had not objected, but that four people who voted for Wightwick, that had no disqualification, are left out of their poll. By their own evidence it appears, that this was upon a right, in having married a freeman's daughter; and I submit it to your lordship, that a resolution to contest that right surely can never take it away, especially if afterwards it appears to be a right not contested——

L. C. J. It should be a custom proved as a foundation for this right.

Mr. *Marsh.* My lord, a point of law depending on the demurrer, we submit, whether your lordship will not save it, in case we lay proper evidence before your lordship to support it: for, if the charter puts them on the same freedom with Sandwich, and the custom there is, that the daughter of a freeman, by marrying, entitles the man to a freedom; then it will be a point, whether the charter warrants that custom? A pretence of right, however, they have; the entry of Gibbon and Darby is by their own officer, and they were sworn in by the mayor and jurats.

And, my lord, it is admitted on all sides, that Mr. Papillon and Wellard are freemen; and if they did all they could to get into the church and vote, then, my lord, we humbly insist, they are as much voters as if they had been at the poll, and were actually in the case of the men of Hythe mentioned before.

Therefore, gentlemen, if the mayor told Mr. Papillon and Mr. Wellard, that if they came to the church, they would not be admitted; and said to Mr. Papillon, You are our member, do not insist upon it; and when they offered themselves to vote, refused them; we humbly insist, they are as good voters, as if they had been at the poll, and actually voted.

And as to Gibbon and Darby, they had this right by marrying, and were warranted by the charter.

L. C. J. It is not regular.

Mr. *Lucy.* My lord, the gentlemen of the other side object to the fact laid by us in point of law, that we do not come up to what we contend for by our plea, as to the sole right: but if Darby and Gibbon had a right, other than by election, where they are sworn in, I would submit it to your lordship, whether, till disqualified, they are not in the complete exercise of that franchise? There may be rights that come not in by election. Mr. Serjeant Darnell says, that the majority of those present are to chuse the mayor: but, my lord, if we did all we could to get in, as has been fully proved to your lordship and the jury; we humbly insist, we are entitled to a vote as much, as if we had been actually present at the poll, and had given our votes.

It has been said, that, when the business is begun, nobody is to interfere: but, my lord, we were present by letter before: and if they read it not, that was not our fault.

Mr. *Smith.* My lord, we admit, that all persons are to be chosen by a majority of freemen present; and we humbly insist, Mr. Papillon and Mr. Wellard were present in point of law; and in fact, in the House of Commons it never was otherwise.

My lord, in the case of Ashby and White,* the question was, whether an action would lie for refusing a vote? It was resolved that it would, because the common remedy in the House of Commons would give no relief. And the authority of the men of Hythe's case was fully with us: Darby and Gibbon being admitted, we apprehend, when they voted, they were in the exercise of their franchise, and are therefore good votes.

L. C. J. Gentlemen of the jury, the question upon this issue is, whether the defendant Elles was duly elected by a majority of the jurats and commonalty of the town and port of New Romney? And it appears from the evidence, that 21 freemen being assembled, Wightwick had 10 voices, Elles had 11; and that two people were present, whose votes were not taken, Darby and Gibbon. It was on the 25th of March; and these two people were admitted by the mayor and jurats, on producing a Mandamus, which is a precept from a superior court; but that confers no right, nor mends the thing, if there be no evidence of a prior right.

They tell you, on one side, that Darby and Gibbon being sworn in by the mayor and jurats, they are put in possession of their office, and are to be regarded as people that have a right in the election of mayor: but, unless some such right be proved, such as birth, election, or some other right, the Mandamus confers none.

But they tell you, this is a particular right, supported by a particular custom: and therefore the question is, Whether this admittance can give a right?

Now, admittance and swearing can give no right, without a previous right. A Mandamus may be brought, when they were never elected; and such admittance will do nothing of itself.

But no such custom has been proved, and the corporation has protested against it; and therefore Darby and Gibbon had no right to vote.

But they say, Mr. Papillon and Wellard had a right; and if one more vote be added to the poll, then Wightwick had it.

They were certainly freemen; but yet they could not send in their votes by letter, or vote otherwise than personally; they must be *corporaliter congregati.*

Mr. Papillon was told, the mayor would not admit him—What then? Should he not then have endeavoured to go in with the rest? I think he ought, if he will give his vote; there can be no reasonable excuse.

The mayor having told him, they would not admit a foreigner; they tell you they sent in letters, and did what they could to get in.

But they have not done what they could: for they should have attended the mayor, and gone to the church, and got in with him and the rest: but they do not come till after the church-door is shut; and the evidences all say, that, after the church-door is shut, nobody can be admitted; and that, when they go in, they lock the door, take up the keys, and then nobody is ever admitted. If they do not come in time, therefore, they exclude themselves.

* See it in this Collection, vol. 14, p. 695.

They must be there, and come at the usual time; and if they did not, they excluded themselves: and is the law, or the method of elections, to be changed for them?

Mr. Papillon's— (I would not insinuate—) sending the letters is attended with odd circumstances. The letters are given to Wightwick, and he is to deliver them to Coates; then they are refused by the assembly; and afterwards the letters are returned into their hands again, with a note, "We have received this letter, and it has been refused."

Gentlemen, I think the letter will do nothing; they were wrong in their judgment; and not coming in time, they ought not to be let in, any more than any body else. A man cannot send in his vote by letter; he must be present in the assembly.

And therefore neither of these four gentlemen had any right to vote, in my opinion; and then the majority is for Elles, and he is duly elected.

Verdict for the defendant.

Serj. *Darnell.* My lord, the next issue is, that he was not duly sworn.—Mr. Loftie, Do you know whether Mr. Elles was sworn in mayor of Romney?

Loftie. Yes; he was sworn in by me in the church, in the manner as other mayors are sworn.

Mr. *Marsh.* As to the oath to be taken by the mayor, you are only ministerial: did not the mayor say to you, Wightwick was the man that was to be sworn in mayor? Did not Coates tell you, "I administer the oath to Wightwick," and strike Elles's hand off the book?

Loftie. No, not that I heard.

Mr. *Lacy.* Did not he order you to swear Wightwick?

Loftie. He ordered me to swear the mayor.

Mr. *Lacy.* Did he not order you to swear Mr. Elles?

Loftie. Not to my knowledge.

Mr. *Smith.* Did Coates say who he thought was mayor?

Loftie. Yes; he said Wightwick had the majority.

L. C. J. Where two people are sworn in, the right must be in the man that had the possession of the staff.

Mr. *Batchelor* sworn.

Mr. *Marsh.* Were you present in the church the day the mayor was chosen?

Batchelor Yes.

Mr. *Marsh.* What declaration was made by Coates, as to the person chosen mayor?

Batchelor. He told the town clerk, Wightwick was mayor; and said, "I would have you set down Darby and Gibbon as voters for Wightwick," and called them over: but Loftie would not set them down, because it was against his inclination. Coates gave the staff to Wightwick; and said, "I resign this to you; you shall be the mayor; you had the most votes."

Mr. *Marsh.* Who then called for the oath?

Batchelor. The old mayor.

Mr. *Marsh.* Did he call on any one to administer the oath?

Batchelor. Yes; he bid Loftie administer the oath to Wightwick; and then Wightwick and Elles laid their hands on the book, and Coates said, He would swear Wightwick only, and shoved Elles's hand off the book twice.

L. C. J. Read the clause in the charter that relates to the chusing of a mayor; the question being, Whether the mayor or town-clerk should administer the oath?

Associate reads:

"The said late queen by letters patent granted, that on Lady Day, in the chancel of St. Nicholas, one of the jurats should be chosen into the mayoralty for the year ensuing, and should take his oath, in manner as the mayor of Sandwich takes it."

L. C. J. The mayor must administer the oath.

Serj. *Darnell.* My lord, the oath is always read by the town-clerk; and I humbly apprehend, it is taking the oath, when it is read by him in presence of the mayor.

L. C. J. The mayor must consent to the oath; he is the judge, whether the proper person be sworn, or not. The oath is to be administered by the old mayor; and it appears it was against his consent; he thought another elected, and struck Elles's hand off the book.

Serj. *Darnell.* Suppose a man to take an oath to qualify him for an office; shall a justice of the peace refuse it?

L. C. J. Can a man take an oath that is not administered to him? The town-clerk has no more to do with it than you or I. A man is guilty of perjury, if a clerk will administer an oath, when a court forbid him. Besides, the mayor delivered the ensigns of his power to Wightwick.

Benjamin Cobb sworn.

Mr. *Marsh.* Were you present at the election of the mayor?—*Cobb.* Yes.

Mr. *Marsh.* Did you see the oath administered?—*Cobb.* Yes.

Mr. *Knowler.* Was Elles sworn?

Cobb. No.

L. C. J. Did not the mayor deliver his staff into the hands of Wightwick?

Cobb. Yes, my lord.

Mr. *Langdon* sworn.

Mr. *Lacy.* Were you present at the election of the mayor?—*Langdon.* Yes.

Mr. *Lacy.* Was the oath administered to Wightwick?—*Langdon.* Yes.

Mr. *Lacy.* Did Coates make any objection to the swearing Elles?

L. C. J. Did Coates think Elles was chosen mayor?—*Langdon.* I believe not.

L. C. J. Who did Coates think was mayor?

Langdon. My lord, he said Wightwick was mayor, on account of Darby and Gibbon.

Mr. *Marsh.* Did Wightwick take the staff, or did Coates deliver it to Elles?

Langdon. Wightwick had the staff, and went home with the staff.

Mr. *Wynne.* Did Elles walk as near the staff as the other.

Langdon. I believe he did.

Mr. *Gray* sworn.

Serj. *Baynes.* Were you present at the choice of mayor? Did Coates say any thing, or strike Elles's hand off the book? Was you near?

Gray. I was present; he never touched his hand.

Mr. *Lacy.* Did not Coates order Wightwick to be sworn?

Gray. I do not know he ordered any body to be sworn.

L. C. J. Had Wightwick the staff in his hand, when he was sworn?

Gray. No.

L. C. J. Where was it?

Gray. It lay down upon a tomb-stone:

L. C. J. I take it, he ordered the mayor to be sworn.

Gray. I do not know his thoughts.

Mr. *Marsh.* Is it usual for the mayor to have the staff in his hand, when sworn?

Gray. I do not know.

Mr. *Marsh.* Whom did he name?

Gray. I heard him mention nobody.

Mr. *Lacy.* Whom was Wightwick declared mayor by?

Gray. By Mr. Coates.

Mr. *Lacy.* When did the mayor say this?

Gray. At the time of the election.

Mr. *Lacy.* Mr. Loftie, was you near Coates, when the mayor was sworn? Did he strike Elles's hand off the book?

Loftie. Not that I saw.

Mr. *Tookey* sworn.

Mr. *Lacy.* Were you present at the election of the mayor?

Tookey. Yes; I was very close to Mr. Coates. I did not hear him declare Wightwick mayor, or see him strike Elles's hand off the book. He mentioned Wightwick, and said, Wightwick should be sworn.

Mr. *Marsh.* Did he order him to be sworn, or deliver to him his staff.

Tookey. He said, he should be sworn; but I did not see him deliver his staff to him.

Mr. *Halfenden* sworn.

Mr. *Marsh.* Were you present at the swearing Mr. Wightwick mayor?

Halfenden. Yes, I was present, and saw Coates shove Elles's hand from the book. I heard him say he would not swear Elles, and saw him, after swearing, deliver the staff to Wightwick; and I saw Elles's hand struck off twice.

Mr. *Marsh.* Did Elles walk even with the mayor?—*Halfenden.* I cannot tell.

Mr. *Gibbon* sworn.

Mr. *Marsh.* Were you present at the swearing in the mayor by Coates?

Gibbon. Yes; he gave orders to take the poll; and after it was taken, he asked, Who was mayor? Loftie told him, Elles; Wilson said, Wightwick. Then Coates said, that Wightwick was chosen mayor, and should be sworn; and then Coates delivered the staff to Wightwick. I saw it delivered, and saw Coates shove Elles's hand off the book, and heard him say, "Mind, I swear Wightwick mayor."

Mr. *Marsh.* We shall trouble your lordship no more.

L. C. J. Gentlemen of the jury, the question on this issue is, whether the defendant Elles was sworn mayor or not?

It must be done by his predecessor.

Loftie says, that Coates ordered him to swear the mayor, and that he read the oath: If this was done by Coates's order, then he was well sworn.

But, if it was done contrary to his order, and he declared another man, and shoved Elles's hand off the book, and said, "Take notice, I swear Wightwick mayor," and not the other, and delivered the staff to him, and did all he could to oppose the swearing Elles; then Elles was not sworn mayor.

The town-clerk cannot swear the mayor; and the evidence is strong that Coates opposed swearing Elles. The man that has the right, he is the man that must be sworn; but none but the former mayor can swear him.

The question therefore is, whether he was sworn by a proper authority?

If you think him sworn by a proper authority, and that Coates meant that Elles should be the mayor, then you must find for him.

But if you think he meant Wightwick should be sworn mayor, then you must find for Wightwick.

Verdict for the King.

497. Case of Henry Moore,* Plaintiff, against the Mayor, Jurats, and Commonalty of the Town and Port of Hastings, in the County of Sussex, Defendants: 10 George II. A. D. 1736.

[Tried on Tuesday, July the 20th, at the sittings after Trinity Term, 1736, before the Right Honourable Philip Lord Hardwicke, Lord Chief Justice of his Majesty's Court of King's-Bench, on a Mandamus for admitting the Plaintiff to be a Freeman of Hastings, in pursuance of a custom there; which custom the Defendants by their return deny, and thereupon issue is joined.]

Pleas before our lord the king at Westminster, of Hillary Term, in the 9th year of the reign of our sovereign lord George the 2d, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith.

Amongst the Pleas of the King-Roll.

Middlesex. Some time ago, that is to say, upon the 28th day of November, in the 9th year of the reign of our sovereign lord George the 2d, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, before our said lord the king, at Westminster, the same lord the king commanded, to the mayor, jurats, and commonalty of his town and port of Hastings, in his county of Sussex, his writ closed, in these words; that is to say, "George the 2d, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith; to the mayor, jurats, and commonalty of the town and port of Hastings, in our county of Sussex, greeting: Whereas the said town and port is an ancient town and port, and one of the five ancient ports of this kingdom: and whereas there is, and time out of mind hath been, a certain ancient and laudable custom, used and approved within the said town and port, that every person, being the eldest son of any freeman of the said town and port, and born within the said town and port, after the admission and swearing of his father into the place and office of one of the freemen of the said town and port, hath a right, in respect thereof, and also upon paying a reasonable fine, to be admitted and sworn into the place and office of one of the freemen of the said town and port, and ought by you to be admitted and sworn into the place and office of one of the freemen of the said town and port, according to the custom of the said town and port: and whereas one Henry Moore is the eldest son of Samuel Moore, one of the freemen of the said town and port, and was born within the said town and port, after the admission and swearing of his father into the place and office of one of the freemen of the said town and port: and whereas the said Henry Moore, by virtue thereof, and upon paying a reasonable fine according to the said custom, ought by you so to be admitted and sworn into the place and office of one of the freemen of the said town and port; yet you, well knowing the premisses, but not regarding your duty in this behalf, have not as yet admitted the said Henry Moore into the said place and office of one of the freemen of the said town and port; nor have you administered the oaths to the said Henry Moore, which are in that case usually administered and taken, although you often have been requested so to do, by the said Henry Moore; but have refused, and yet do refuse, to admit and swear the said Henry Moore into the said place and office of one of the freemen of the said town and port, although the said Henry Moore has tendered to you a reasonable fine on that behalf; in contempt of us, and to the no small damage and grievance of him the said Henry Moore, and to the manifest injury of his estate as we have been informed from his complaint to us: we therefore being willing that due and speedy justice be done to the said Henry Moore in this behalf, (as it is reasonable) do command you, by firmly injoining, that, immediately after the receipt of this our writ, you do without delay, upon the said Henry Moore's paying a reasonable fine, admit, or cause to be admitted, the said Henry Moore into the said place and office of one of the freemen of the said town and port, together with all the liberties, privileges, franchises, emoluments, and commodities, to a freeman of the said town and port belonging and appertaining; and that you administer, or cause to be administered, to the said Henry Moore, the oaths which are in that case usually administered and taken according to the said custom; or shew to us cause to the contrary thereof, that the same complaint may not, by your default, be repeated to us. And how you shall have executed this our writ, make it appear to

* See 2 Stra. 1070. Ann. 353. 362. and Kyd on Corporations.

In this Borough of Hastings arose the Case of Milward *v.* Thatcher, (2 Term Rep. 81) in which it was decided, that where a person, being in possession of a corporate office, accepted another office incompatible therewith, the former office by such acceptance became vacant. And as to this it seems to be immaterial whether the office last accepted be or be not of superior rank or value, to that which was previously possessed. See also, Rex *v.* Sir William Trelawney, 3 Burrow, 1615; and Kyd on Corporations, vol. 1, chap. 3, § 3. It was also decided in Milward *v.* Thatcher, that the offices of jurat and town clerk of Hastings were incompatible.

us at Westminster, on Friday next, after the octave of St. Hillary, returning then to us this our writ. And this you are not to omit, upon peril that may fall thereon. Witness Philip lord Hardwicke, at Westminster, the 28th day of November in the 9th year of our reign."

Upon which said Friday next after the octave of St. Hillary, before our said lord the king at Westminster, the said mayor, jurats, and commonalty of the said town and port of Hastings, in the said county of Sussex, returned the said writ as followeth; that is to say, "The answer of the mayor, jurats, and commonalty of the town and port of Hastings, within mentioned, to this writ, appears in a certain schedule to this writ annexed: We, the mayor, jurats, and commonalty of the town and port of Hastings, mentioned in the writ, hereunto annexed, do, according to the command of the said writ, humbly certify to our sovereign lord the king, that there is not, nor time out of mind hath been, any such ancient and laudable custom, used and approved within the said town and port, that every person, being the eldest son of any freeman of the said town and port, and born within the said town and port, after the admission and swearing of his father into the place and office of one of the freemen of the said town and port, hath a right, in respect thereof, and also upon paying a reasonable fine, to be admitted and sworn into the place and office of one of the freemen of the said town and port, as in the said writ is alleged: and, for this cause, we, the said mayor, jurats, and commonalty of the said town and port of Hastings, have not admitted, nor caused to be admitted, neither ought we to admit, or cause to be admitted, Henry Moore, in the said writ named, into the place and office of one of the freemen of the said town and port, together with all the liberties, privileges, franchises, emoluments, and commodities to a freeman of the said town and port belonging and appertaining; neither have we administered, nor caused to be administered, nor ought we to administer, or cause to be administered, to the said Henry Moore, the oaths which are in that case usually administered and taken, as by the said writ we are commanded to do."

And hereupon, upon the same Friday next after the said octave of St. Hilary, before our said lord the king at Westminster, came as well the said Henry Moore, in the said writ and return named, by Henry Masterman his attorney, as the said mayor, jurats, and commonalty of the said town and port of Hastings, in the said county of Sussex, in the same writ and return mentioned, by Henry Walrond their attorney. And the said Henry Moore, having had Over of the said writ and return, saith, That for any thing above alleged by them, the said mayor, jurats, and commonalty, in their said return to the said writ of Mandamus, he the said Henry Moore ought not to be barred from having a peremptory writ of Mandamus, in order to be admitted and sworn into the said place and office of one of the freemen of the said town and port; because he saith, that there is, and time out of mind hath been, such ancient and laudable custom, used and approved within the said town and port, that every person, being the eldest son of any freeman of the said town and port, and born within the said town and port, after the admission and swearing of his father into the place and office of one of the freemen of the said town and port, hath a right, in respect thereof, and also upon paying a reasonable fine, to be admitted and sworn into the place and office of one of the freemen of the said town and port, in manner and form as in the said writ of Mandamus is above alleged. And the said Henry Moore prayeth, that this may be inquired into by the country; and the said mayor, jurats, and commonalty pray the like.

Mr. *Clarke*. May it please your lordship, and you gentlemen of the jury; Henry Moore is the plaintiff; and the mayor, jurats, and commonalty of the town and port of Hastings, are the defendants. And, gentlemen, this is a Mandamus, directed to the defendants, the mayor and jurats of that town and port, to admit and swear in the plaintiff Henry Moore into the place and office of one of the freemen of this town.

And, gentlemen, the Mandamus sets forth, That the town and port of Hastings is an ancient town and port, and one of the five ancient ports of this kingdom; and that there is, and for time out of mind has been, a certain and ancient laudable custom, used and approved within that town and port, that every person being the eldest son of any freeman there, and born within the said town, after the admission and swearing of his father into the place and office of one of the freemen of the said town and port, has a right, in respect thereof, and also upon paying a reasonable fine, to be admitted and sworn into the place and office of one of the freemen there, according to the custom of that town and port.

Gentlemen, the Mandamus further sets forth, That the plaintiff Henry Moore is the eldest son of Samuel Moore, one of the freemen of the said town and port, and was born within the town, after the admission and swearing of his father into the place and office of freeman; and that the plaintiff, by virtue thereof, and upon paying a reasonable fine according to the custom, ought to have been admitted and sworn by the defendants into the place and office of a freeman; but that the defendants, contrary to their duty in this case, have refused, and still refuse, to admit and swear him, although he has tendered to them a reasonable fine on that behalf.

And this, gentlemen, the defendants are said to have done in contempt of the king, to the great damage and grievance of the plaintiff, and to the manifest injury of his estate.

And therefore the writ proceeds to command the defendants, immediately, upon the plaintiff's paying a reasonable fine, to admit and

swear him into the place of a freeman, or to shew cause why they do not.

To this writ, gentlemen, the mayor, jurats, and commonalty have returned for answer, That there neither is, nor for time out of mind has been, any such ancient and laudable custom, used and approved, within the town and port of Hastings, as is alleged in the writ; and this, they say, is the reason they have not admitted the plaintiff.

Gentlemen, upon this issue is joined; and the only question you are now to try, is, Whether there be such a custom in the town and port of Hastings, as the plaintiff has laid in the Mandamus? If therefore, gentlemen, evidence is laid before you, that there is, and time out of mind has been, such a custom, you will please, gentlemen, to find a verdict for the plaintiff.

Sir *Thomas Abney*. May it please your lordship, and you gentlemen of the jury; I am also of counsel of the same side with the plaintiff; and you will please, gentlemen, to observe, that the single issue you are to try is, whether there now is, and time out of mind has been, an ancient and laudable custom in the town and port of Hastings, in the county of Sussex, that every person, being the eldest son of a freeman of the said town and port, and born within the said town and port, after the admission and swearing of his father into the place and office of one of the freemen of the said town and port, hath a right in respect thereof, and also upon paying a reasonable fine, to be admitted and sworn into the place and office of one of the freemen of the said town and port?

This, gentlemen, is the issue you are now to try; and it will not, I believe, be necessary to trouble you with an account of the Cinque Ports, and their privileges and customs.

But, gentlemen, the matters of proof we shall lay before you will be of three kinds.

And the first which offers itself to your consideration, arises from a very ancient record, called the Customal; which is a very ancient deed, without any date; it being an usual thing for ancient deeds and evidences to be without any date; and this Customal is the rule and law of all the Cinque Ports.

Gentlemen, this Customal is so old, and goes so far back as the year 1573; it contains 59 Articles. Our right arises upon this Customal; and therefore I will beg leave to read the title, and some passages out of it, to you.

"Hic sequuntur Consuetudines Quinque Portuum, et eorum Membrorum, à tempore quo non extat memor' hom' usitat' et approbat'."

Gentlemen of the jury, the words we ground our right upon are these:

Art. 34. "Possunt Majores et Jurati, Ballivi et Jurati, et Jurati, in quolibet Portu et Membro ubi Major et Ballivus de communi electione non fuerit, in præsentia Communitatis, recipere et facere liberos tribus modis:

"Uno modo, per Nativitatem infra Libertatem suam, si pater suus, tempore nativitatis suæ, fuit liber:

"Alio modo, per Liberum Tenementum perquisit':

"Tertio, per Emptionem.

"Et notand', quod nullus gaudebit libertatem alicujus Portus, sive Membri, quousque sacramentum suum præstitit, quod esse debet, à die illo, usque ad finem vitæ suæ, bonus et fidelis Domino nostro Regi Angliæ, et hæredibus suis; statutaque et libertates Quinque Portuum, et specialiter illius Portus sive Membri ubi commoratur, pro posse suo maintenebit; obediensque Majori et Juratis, Ballivo et Juratis, vel Juratis, semper erit; semper paratus tam ad scottand' et lottand', si quæ taxat' pro communi utilitate fuerint, quam in armis pro defensione inimicorum Domini Regis, cum per Gubernatores ipsius Portus sive Membri habuerit in mandatis; et quod non audiat aliquod ad deteriorationem libertat' prædict', sive ad reprobationem Majoris, Ballivi, et Juratorum, ubi commoratur, vel eorum alicujus, nisi ipse inde eis dabit notitiam. Sic se adjuvent sancta sanctor', &c.

"Possunt Majores et Jurati, Ballivi et Jurati, et Jurati, in quolibet Portu, &c. recipere et facere liberos tribus modis:

"Uno modo, per Nativitatem infra libertatem suam, si pater suus, tempore nativitatis suæ, fuit liber"——

That, gentlemen, is the point we ground our right upon; the first right. If a person be the eldest son of a freeman, and born within the said town and port, after the admission and swearing of his father into the office of one of the freemen of the said town and port; we say, such eldest son is intituled.

"Alio modo, per Liberum Tenementum perquisit'.

"Tertio, per Emptionem."

So that, gentlemen, by this 34th Article of this Customal you see what the ancient law and usage was; that the eldest son of every freeman, under these circumstances, is intituled to his freedom: and therefore we say, that the plaintiff Henry Moore, as the eldest son of Samuel Moore, has, and he is undoubtedly intituled, under this right, to his freedom.

And, gentlemen, as this Customal mentions three distinct methods of making free, viz. by birth, by a freehold tenement, and by purchase; so it has made a manifest distinction between the freedom acquired by birth, and by either of the other two ways.

For, gentlemen, the fine that is paid by the son of a freeman, upon his being admitted and sworn, is only 6*s*. 8*d*. That is the reasonable fine, that is always paid, when a man is intituled as the plaintiff is: but all other persons, whether they are made free by a freehold or by purchase, they always paid 13*s*. 4*d*. or, however, always more than the person who was admitted as the eldest son of a freeman.

My lord, and gentlemen of the jury, when you have heard this Customal (which we shall lay before you) read, we shall then read to you some hundreds of entries out of the corporation-books; from whence it will appear, that the eldest sons of freemen, under the circumstances of the present case, have been always admitted; and from whence there will result so uniform and clear a testimony in support of the plaintiff's right, that we defy the gentlemen of the other side to produce one entry, in any of the corporation books, to contradict, or at least to impeach, our entries.

Gentlemen, these are old entries, many of them in queen Elizabeth's time; and, therefore, they are not so exact in the stile as modern entries usually are. Sometimes the son is said to be admitted, "Quia pater ejus liber erat, et ipse natus fuit infra libertatem." Sometimes the stile is, "Quia maximus natu filius." And sometimes, "Quia filius liberi hominis."

And, gentlemen, by comparing the times of their fathers' admissions, and the births or baptisms of the persons admitted (which we shall prove to you by authentic copies from the parish register-books in Hastings), it will appear to you to be the most clear and strong case that ever came before a jury.

Gentlemen of the jury, another part of our evidence will arise from living witnesses; very ancient men, who, by their own knowledge and observation for 50 or 60 years together, and by conversing with their ancestors, many of whom lived to be eighty and ninety years old, will prove, that this has always been the custom, that the eldest son of a freeman, born within the liberties, and after his father was made free, has always been intituled to his freedom; till the other day, when the rights of the town were to be played into a narrower compass, and no man was to be intituled to his freedom, but at the will and pleasure of the mayor and jurats. And these witnesses, gentlemen, are not only ancient men, but persons free and disinterested; not a few men disfranchised to-day, to serve a particular purpose, and be made free again to-morrow: but our witnesses are men of great age and experience, not interested. We doubt not, therefore, gentlemen, when you have heard our evidence, that you will be of opinion, that the plaintiff has an undoubted right, as the eldest son of a freeman, and find the custom for the plaintiff accordingly.

Mr. *Strange*. May it please your lordship, and you gentlemen of the jury; I am also of counsel for the plaintiff: and, my lord, this case has been so fully and clearly opened by the gentlemen who have gone before me, that I shall not take up any of your lordship's time in stating any of the circumstances in the plaintiff's case; and I shall beg leave, gentlemen, only to observe, that the single question now to be tried by you is, whether the custom in the town and port of Hastings be, that every person, being the eldest son of a freeman of the said town and port, and born there, after the admission and swearing of his father, has a right, in respect thereof, and also upon paying a reasonable fine, to be admitted into the office of one of the freemen of the said town and port? For, gentlemen, if this be the custom there, the plaintiff Moore is within every part of this custom.

In this case, gentlemen, three things are to be proved:

First, That the plaintiff be the son of a freeman that was admitted and sworn into the franchise of this town.

Secondly, That he be born within the liberties of the town.

Thirdly, That he be born under this circumstance, after the time of his father's swearing and admission into this freedom.

And we shall apply ourselves to lay before your lordship and the jury such an evidence, as shall fully make out the custom, that the eldest son of a freeman, born within the borough, is, upon paying 6*s*. 8*d*. as a reasonable fine, to be admitted and sworn into the freedom of the town.

My lord, and gentlemen of the jury, the particular evidence we shall lay before you, has been minutely opened to you; and I would beg leave only to observe, that, as I humbly apprehend, the custom now insisted on by the plaintiff is a sort of common right of all the subjects of England, there being no corporation in the kingdom (I might say, upon the face of the earth,) but where the sons of freemen, born after their fathers' freedom, are intituled, according to the several usages of the respective boroughs where they claim their freedom; so I do not know, I own, of one instance, that I ever yet heard of, to the contrary.

But, my lord, as we do not rely on that general custom, but on the particular evidence which has been opened; we shall begin with an old record in 1573, as ancient as the old Customal of the Cinque Ports. We shall then, gentlemen, read to you the entries of persons who have been admitted as sons of freemen, for near 200 years past; and then produce to you several ancient living witnesses, who will speak to the usage and custom, and will prove to you, that it has been so time out of mind: and then, gentlemen, we hope, that upon hearing these records, and the opinion of the old witnesses, you will find a verdict for the plaintiff.

Mr. *Marsh*. My lord, we had a rule for inspecting the corporation-books; therefore they are not in our hands: but we have taken authentic copies of the old customal and entries on stamps, which we are ready to prove. Swear Mr. Cranston.

Att. Gen. (Sir John Willes). My lord, we have the original in our hands; and if we produce the original, they cannot read their copy. But, my lord, we say, with great submission to your lordship, that the original itself is no evidence.

Lord *Hardwicke.* Mr. Attorney, some light should be given what it is, and then I shall be able to judge.

Mr. *Strange.* If your lordship pleases, we may as well prove our copy.

Lord *Hardwicke.* If the original is here, I cannot read the copy.

Mr. *Cranston* sworn.

Mr. *Strange.* Where had you that book?

Cranston. From the town-clerk of Hastings.

Mr. *Marsh.* Where was it kept? Among the corporation-books and records?

Cranston. Yes.

Mr. *Marsh.* Turn to the 34th Article.

Sir *Tho. Abney.* My lord, it is an ancient book, kept among the other records of this corporation; and I never knew a trial of this kind, but the ancient books of the corporation were always read.

Att. Gen. My lord, I humbly submit it to your lordship, that, as they open it, such a book ought not to be read in evidence; besides that there are several other objections to it.

My lord, they open it as the Customal of all the Cinque Ports, but not as the Customal of this borough in particular: and, my lord, this Mandamus takes no notice of any privileges that belong to all the Cinque Ports; and therefore the Customal they ought to produce, should be the Customal of that particular town: but, to shew that this will be evidence, they should make it appear, that there is one concurring custom throughout the whole Cinque Ports.

And, my lord, though there are some general customs which do affect all the Cinque Ports; yet, with great submission to your lordship, I must beg leave to insist, that this particular Customal, in case it could be read, no more affects this corporation, than the customs of a county affect every particular borough or hundred in that county. In order to make this evidence, they should prove one concurring custom throughout all the Cinque Ports.

But, my lord, if that were so, I submit it to your lordship, that this cannot be read as evidence.

The gentlemen of the other side say, that it is an ancient record, because it is without a date; and therefore it is ancient. And this, my lord, would have been proper, if they had had the old, ancient Customal itself to produce. And I submit it to your lordship, that they must either produce that Customal, or shew that it cannot be come at, before this can be read. This is only an entry in the corporation-books, in the year 1573, of an ancient Customal.

This, my lord, is what they would offer to your lordship and the jury, as evidence: it is only a copy; and if it be only a copy, I humbly insist, they ought to produce the original, or shew that they cannot come at it. But I believe they will be at a loss to shew, it was ever entered at all by the corporation's order: for there is an entry just before this, in the year 1578, of a mortgage; there are abundance of scraps put together, which nothing at all can be made of; some in 1609, some in 1592; a hundred things got together, and entered at different times, by nobody knows who. *Non constat*, but this pretended Customal may be sewed into the book; for there is nothing entered in this book, that can be given in evidence. If it was the Corporation-book, there would have been other entries, of the manner of electing freemen, officers of the corporation, and members to serve in parliament, and other corporation-affairs: but, because it is found among the corporation-papers, therefore it is to be given in evidence; though found amongst a medley of a hundred sorts of trifling things, in no wise relating to the corporation, and that belong to God knows who. In the book there are copies of mortgages, not one of them from persons who stood indebted to the corporation in one farthing; an account of a rental of a noble lord's estate; the resolution of the judges upon the statute relating to the poor; a hundred miscellaneous things got together, nobody knows how, or why: my lord, I say, when it appears in this light before your lordship, I submit, that as it does not at all appear what this medley of a hundred things are, because it is found amongst some papers in the custody of the town-clerk, and there is one thing which relates to the custom of all the Cinque Ports, and a hundred other things not relating either to them or to this borough, whether it be any evidence at all. I submit it therefore to your lordship, in the first place, that as, upon the face of it, it appears to be only a copy of a thing; and as it appears that thing does not relate to this borough in particular; and as it does not appear what book this is, nor how it came amongst the books of the corporation; and as it is only a collection of useless miscellaneous papers; I think it ought not to be read.

Lord *Hardwicke.* If I could get off from reading this book lawfully, yet from the nature of this cause, I must look upon the book. In cases of this nature, I think it, *prima facie*, proper to be read in evidence. There may be objections to the reading it of different kinds; some, from the nature of the custody in which it has been kept; some intrinsical, from the book itself. Those from the nature of the custody, when, where, and how long it has been kept, are proper against reading it at all: but, when they arise from the book itself, it is impossible to say it should not be read; because the Court cannot judge whether it be proper or no, till they have heard it. I think, therefore, it must be read. If, upon reading, there appear to be any material objections to the book, I will hint them to the jury, when I come to sum up.

Att. Gen. My lord, we submit it to your lordship, that it is torn and defaced, and in many places not legible.

Mr. *Strange.* Why did not you keep it better? This book has not been in our custody. If you do not take proper care of your corporation-books, are we to be prejudiced by your neglect?

Mr. *Marsh.* Mr. Salkeld, please to read the title: If they have put Chevy-Chase in it, what is that to our Customal?

Associate reads:

"The Customal of the town of Hastings, translated out of Latin into English—"

Att. Gen. Don't impose upon the Court, by reading a translation of an old, miscellaneous, useless paper, without any date.

Sir *T. Abney.* We shall read what part we think fit.

Lord *Hardwicke.* What is the title of that part you are now going to read—the Latin title?

Sir *T. Abney.* Read the Latin title.

Associate reads:

"Hic sequuntur Consuetudines Quinque Portuum, et eorum Membrorum, à tempore quo non extat memor' hom' usitat' et approbat'."

Lord *Hardwicke.* Mr. Attorney, it is suggested in the Mandamus, that Hastings is one of the Five Ports.

Att. Gen. But, my lord, this is not the Customal of Hastings: here is page 1, in the middle of the book.

Associate reads:

"Hic sequuntur Consuetudines," &c.

Mr. *Strange.* Turn to Article 34.

Sir *T. Abney.* Begin at "Possunt Majores et Ballivi."

Associate reads:

"Possunt Majores et Jurati, Ballivi et Jurati, et Jurati, in quolibet Portu et Membro ubi Major et Ballivus de communi electione non fuerit, in præsentia Communitatis, recipere et facere liberos tribus modis: Uno modo, per Nativitatem infra libertatem suam, si pater suus, tempore nativitatis suæ, fuit liber: alio modo, per Liberum Tenementum perquisit': tertio, per Emptionem. Et notand', quod nullus gaudebit libertatem alicujus Portus sive Membri, quousque sacramentum suum præstitit, quod esse debet, à die illo, usque ad finem vitæ suæ, bonus et fidelis Domino nostro Regi Angliæ, et hæredibus suis; statutaque et libertates Quinque Portuum, et specialiter illius Portus sive Membri ubi commoratur, pro posse suo maintenebit; obediensque Majori et Juratis, Ballivo et Juratis, vel Juratis, semper erit; semper paratus tam ad scottand' et lottand', si quæ taxat' pro communi utilitate fuerint, quam in armis pro defensione inimicorum Domini Regis, cum per Gubernatores ipsius Portus sive Membri habuerit in mandatis; et quod non audiat aliquod ad deteriorationem libertat' prædict', sive ad reprobationem Majoris, Ballivi, et Juratorum, ubi commoratur, vel eorum alicujus, nisi ipse inde eis dabit notitiam. Sic se adjuvent sancta sanctor'," &c.

Mr. *Strange.* Read on the 35th, 36th, 37th, 38th and 39th articles.

Associate reads:

Art. 35. "Et quilibet gaudere intendens libertatem Quinque Portuum per Emptionem, inveniet quatuor manucaptores resident' de omnibus et singulis præmiss' perimplend'."

36. "Et si fuerit extraneus, in partibus transmarinis oriundus, et in aliquo Portu sive Membro bonæ famæ et conditionis permansit, et postmodum in eodem Portu sive Membro maritat' fuerit, ac libertatem gaudere desideras, fiat ipse liber per emptionem, ut prædict' est, per totam libertatem Quinque Portuum; salvo, quod non ad electionem Majoris, Ballivi, Jurat', sive alior' officiar', nec de consilio sive negotiis Communitatis fiend', quousque habuerit literas Domini Regis, pro indigenat' cognosci potest."

37. "Et potest Dominus Custos Quinque Portuum, sive ejus Locum-tenens, semel dum in officio fuerit, mandare et facere unum extraneum, ultra mare natum, liberum in quolibet Portu et Membro, in forma liberis per Emptionem, absque aliquo fine communitati ubi ipse extraneus commoratur pro eodem persolvend', except' officiar' feod' ad hoc usque consuet'."

38. "Et ipsi, qui sunt in omnibus et singulis formis prædictis facti liberi in aliquo Portu sive Membro, habeant libertatem consuet' in omnibus aliis Portubus."

Sir *T. Abney.* Now read the next, "Nullus fiat liber per Emptionem."

Associate reads:

39. "Et nullus fiat liber per Emptionem, quousque in Portu vel Membro ubi libertatem desiderat, per unum annum et unam diem permansit, et si bene et honeste habuerit," &c.

Mr. *Strange.* My lord, we shall read no more.

Lord *Hardwicke.* Are there any other parts, Mr. Attorney, you would have read?

Att. Gen. Let me see the book. (Turns it over.) My lord, here is an entry in 1606, before the entry of 1573. Here are counter-parts of leases. We must, I believe, trouble your lordship with reading one of them. Read that lease.

Associate reads:

"This indenture made the 10th day of August, in the 15th year of the reign of our sovereign lady Elizabeth, &c. between Theophilus Johnson, of Lamberhurst, in the county of Kent, gent. of the one part, and James Woodgate, yeoman, of the other part———"

Att. Gen. Read the judges' opinion about the statute of queen Elizabeth.

Mr. *Strange.* They would insinuate, that because a few miscellaneous papers are bound up with our Customal, therefore it is not authentic.

Lord *Hardwicke.* There is no weight in that at all: the town clerk may bind up what he pleases with the corporation books. The question is, whether the general declarations of the Cinque Ports are binding in the particular ports, or no?

Att. Gen. My lord, I submit it to your lordship, that the things bound up with it, appearing to be miscellaneous, useless papers, take off from the authority of it.

Lord *Hardwicke.* There are copies of leases bound up with it, Mr. Attorney: will that take off from its authority?

Att. Gen. If you will admit what I state, we will read it.

Mr. *Strange.* You may state what you will, and read what you will out of it; it is your own book.

Att. Gen. Then here is the rental of a certain noble lord's estate.

Mr. *Strange.* That looks as if the corporation were in hopes he would leave it them.

Mr. *Marsh.* Not at that time of day. There are some addresses, that may be a proof of their loyalty.

Lord *Hardwicke.* Let me see the book. (Which was delivered.) There is an entry of some leases, with the rental of an estate.

Att. Gen. Let me see the book.

Sir *T. Abney.* My lord, we beg leave first to read the entries of eldest sons, born within the libertues, after their fathers were admitted, and that were admitted on paying their fines of 6*s.* 8*d.* Read Jeremiah Bryham. He was admitted into the freedom the 27th of April, 12 James 1, anno 1614, and paid his fine of 6*s.* 8*d.* He was baptized, my lord, the 9th of November, 1587, and admitted as the eldest son of James Bryham, jurat. (Produce the copy on stamps.)

Lord *Hardwicke.* What is that? Where had you it from? Is it a true copy?

Cranston. My lord, it is a true copy. I had it from the corporation books; I examined it with the entry in the book.

Associate reads:

"Memorandum. 27 Aprilis, 12 Jacobi 1, anno 1614. Hastings, *ss.* At the court of our sovereign lord the king, came Jeremiah Bryham, and prayed to be admitted to the freedom and liberty of this town; and by Mr. Mayor and his brethren was admitted and sworn, and kissed the right cheek of Mr. Mayor, 'more 'solito, pro fine 6*s.* 8*d.* duntaxat, quia filius 'sen'est liberi hominis et Jurat' hujus villæ, &c. 'viz. filius Jacobi Bryham, Jurat' defunct',' " &c.

Mr. *Strange.* That, my lord, is the custom: he kissed the mayor's cheek, "more solito, pro fine 6*s.* 8*d.* duntaxat, quia filius sen' est liberi hominis et Jurat' hujus villæ, &c. viz. filius Jacobi Bryham, Jurat' defunct'," &c.

Sir *T. Abney.* My lord, we beg leave now to shew when he was born, and when his father was admitted. He was born or baptized the 9th of November, 1587. Read the certificate. Did you compare it with the parish register-book of Hastings? Is it a true copy?

Cranston. Yes, it is a true copy; I examined it with the register.

Associate reads:

"1587, November 9th———

Sir *T. Abney.* This is the birth or baptism of this Jeremiah Bryham.

"Christened, Jeremiah, the son of James Bryham."

Sir *T. Abney.* My lord, to shew that his father was a freeman, we shall read to your lordship and the jury an entry, whereby it will appear, that his father acted as a freeman, Jan. 4, 18 Eliz. 1576.

Lord *Hardwicke.* He is mentioned to be a jurat in this entry; therefore that is needless.

Mr. *Strange.* My lord, the next entry is the 20th of December, 1620, James, the son of James Lasher. Where is that? Did you examine that with the entry in the corporation book? Is it a true copy?

Cranston. Yes, I examined it; it is a true copy.

Associate reads:

"Hastings, *ss.* Assembly holden the 20th December, ann. regni Regis Jac. 18°, 1620, secundum consuetudinem, &c. At which court appeared Richard Waller, mayor; James Lasher, Martin Life, Wm. Byshop, Richard Withers, Jeremiah Bryham, Richard Boys, John Brett, Nathaniel Lasher, Thomas Bryan, John Barley, William Barker, jurats; Robert Mills———

Mr. *Strange.* Pass over the names.

"At this assembly, Samuel Moore and ——————— are elected barons of this town:———

Sir *T. Abney.* My lord, this Samuel Moore was the plaintiff's grandfather.

"And at this court it is decreed, that James Lasher instantly requiring the same, was admitted to the liberty and freedom of this town, by consent of all; 'et fecit sacramentum, et 'osculatus est malam dextram Majoris, more 'solito, et solvit pro fine 6*s.* 8*d.* quia primoge-'nitus filius Jacobi Lasher, Jurat'.' "

Sir *T. Abney.* Because he was the eldest son of his father. Now, my lord, we shall shew he was born within the borough, and after the time of his father's being admitted a freeman. Look out the certificate of James Lasher's baptism, the 27th April, 1579. Is that a true copy, Sir? Did you examine it with the register?

Cranston. It is; I examined it.

Associate reads:

"April 27, 1579. Christened James, the son of James Lasher, jurat."

Mr. *Strange.* The father is said to be a jurat at the time of registering the son's baptism.

Mr. *Marsh.* My lord, the next instance we go upon is Thomas Lovell, (look out that) the eldest son of William Lovell. The father was admitted the 6th of September, 1636. Thomas the son was born the 10th of February, 1640; he was admitted a freeman on the 20th of April, 1667.—Read the son's admission. Did you examine it?

Lord *Hardwicke.* Is that a true copy?
Cranston. It is, my lord; I examined it.

Associate reads:
"Hastings, *ss.* 20 April, 1667. In public court came Thomas Lovell, jun. eldest son of William Lovell, late jurat, deceased, and prayed the franchise of this town; to which, for his fine of 6*s.* 8*d.* he is admitted, took his oath, and kissed the mayor's right cheek, *more solito.*"

Mr. *Marsh.* To prove that his father was a freeman, shew the entry of the 6th of September, 1636. Is it examined?
Cranston. Yes.

Associate reads:
"Hastings, *ss.* Memorand', quod 6th September, 1636, came William Lovell, and prayed to be admitted into the freedoms of this town and port, and took the oaths, *more solito,* and was admitted accordingly."

Mr. *Strange.* My lord, his father had been four years a jurat, when the son was baptized.—Read the certificate of the 10th of February, 1640. Is it a true copy? Did you examine it?—*Cranston.* I did.

Associate reads:
"1640, February 10th. Baptized Thomas, the son of William Lovell, jurat."

Mr. *Filmer.* My lord, the next instance is William Batchelor, eldest son of James Batchelor. He was admitted the 2d of May, 1669.—Read that. Is it a true copy? Did you examine it?—*Cranston.* It is; I examined it.

Associate reads:
"Hastings, *ss.* 2 Maii, 22 Car. 2di, 1669. At this election and assembly, William Batchelor, eldest son of James Batchelor eldest, freeman above-named, at his humble request, is also made a freeman, and admitted into the franchise of this township, for his fine of a demi-mark, and thereunto sworn, and kissed the mayor's cheek, *more solito,*" &c.

Mr. *Filmer.* My lord, he was baptized the 17th of July, 1636.—Read that certificate. Did you examine it? Is it a true copy?
Cranston. It is.

Associate reads.
"July 17, 1636. Baptized, William, the son of James Batchelor."

Mr. *Filmer.* My lord, his father was admitted nineteen years before, 17th September, 15 Jac. 1, 1617.—Read his admission. Is it a true copy? Did you examine it?
Cranston. I did; it is a true copy.

Associate reads:
"15° Regis Jacobi 1mi Jacobus Batchelor admissus est ad libertatem hujus villæ et osculavit malam dextram Majoris, more solito, pro fine suo 13*s.* 4*d.*"

This James was the father, and he paid a fine of 13*s.* 4*d.* because he was not admitted as the son of a freeman. He was admitted by a freehold, or by purchase.

Mr. *Clarke.* My lord, the next instance we shall trouble your lordship with, is William Parker, jun. He was admitted the 9th of May, 1670, for a fine of 6*s.* 8*d.*—Read his admission. Is that a true copy? Did you examine it?
Cranston. Yes; I examined it.

"Hastings, *ss.* 9° die Maii, 22 Car. 2, 1670. Assemblat' tent' ibidem coram Majore ville et portus Hastings prædict'.
"William Parker, jun. eldest son of William Parker, jurat, came here in court, praying his freedom, &c. which is granted him for a demi-mark; took his oath, and kissed the mayor's cheek, *more solito,*" &c.

Mr. *Clarke.* My lord, we have a certificate of the son's baptism, the 14th of August, 1644.—Is it a true copy?—*Cranston.* It is.

Associate reads:
"14 August, 1644. Baptized, William, the son of William Parker."

Mr. *Clarke.* We shall now shew your lordship, that his father acted as a freeman six years before the birth of the son, and as a jurat two years after.—Is that a true copy? Did you examine it?—*Cranston.* It is.

Associate reads:
"Hastings, *ss.* Elect' Majoris villæ et portus de Hastings prædict', tent' ibidem 15° die Aprilis, anno regni Regis nostri Car' Angl', &c. 14°, 1638. Ad hanc diem Johannes Barley electus est in offic' Majoris hujus villæ pro hoc anno sequent'——"

Lord *Hardwicke.* Who was present?

"—— per voces horum liberorum hominum villæ prædict', videlicet, Nic. Staplus, Ric. Staplus, Wil. Goldham, Wil. Chapman, Johannis Sargent, sen. Wil. Turpine, Ric. Wheeler, Johannis Harys, Wil. Dighton, Tho. Raineldes, Sam. Gawen, Geo. Fletcher, Ric. Wynter, Hen. Lasher, Humf. Blinkerne, Jo. Hithe, Mich. Lasher, Phil. Girdler, Wil. Lunsford, Geo. Easton, Ric. Sargent, Sack. Franke, Jo. Sargent, jun. W. Parker, Jo. Wynter, Ro. Marshall, Tho. Stevenson, jun. Jo. Hollybone, Ro. Phillip, Dr. Ellis, Marci Pontes, Wil. Lovell, jun. et Jac. Batchelor: Qui quidem Major sic elect' sacramentum suum præstitit corporale ad offic' illud exercend' prout decet, more solito," &c.

Sir *T. Abney.* The next person we shall trouble your lordship with, is ——
Serj. *Egre.* Was any body else admitted at that time?
Sir *T. Abney.* There were nine made free. My lord, the next is John Fantley. He was admitted the 5th of December, 1674.—Is it a true copy? Did you examine it?
Cranston. I examined it; it is a true copy.

Associate reads:
"Hastings, *ss.* 5 Decembris, 1674, 26 Car. 2di, Assemblat' tent' ibidem coram Majore &c. villæ et portus Hastings prædict', in plena curia venit Johannes Salmon, et petit libertatem

hujus villæ; Johannes Fantley, jun. et Willielmus Genner, jun. et admittuntur, scilicet, prædict' Salmon pro 13s. 4d. et prædict' Fantley 6s. 8d. et prædict' Genner 6s. 8d. quia filii sen' patr' eor' liber'; qui omnes fecerunt inde sacramentum, et malam dextram Majoris esculaverunt, more solito," &c.

Sir *T. Abney.* My lord, the father of Fantley was admitted a freeman the 8th of July, 1626. Fantley the son was baptized the 13th of December, 1640; just thirty-four years before he was admitted a freeman, which was the 5th of December, 1674.—Read the certificate of his baptism. Is it a true copy?

Cranston. It is.

Associate reads:

"Hastings, ss. 13 December, 1640. Baptized, John Fantley, the son of John and Margaret Fantley."

Sir *T. Abney.* We shall now shew your lordship, that his father was admitted to his freedom the 8th of July, 1626, thirteen years before the birth of his son.—Read the father's admission. Is it a true copy? Did you examine it?

Cranston. I did.

Associate reads:

"Hastings, ss. Julii 8, 1626. Johannes Fantley admissus est ad libertatem hujus villæ, pro fine 13s. 4d."

Serj. *Eyre.* There the fine is 13s. 4d.

Sir *T. Abney.* This is the father.

Serj. *Eyre.* That is a very material difference. The son's fine is 6s. 8d. but every body that is admitted by any other right, pays for his fine 13s. 4d.

Mr. *Strange.* The fine of 6s. 8d. is a particular indulgence to the sons of freemen, and all others paid 13s. 4d. or more.—My lord, the next instance is Philip Bayley, the eldest son of John Bayley. He was admitted the 10th of April, 1691; he was born the 14th of May, 1669.—Read his admission. Did you examine it? Is it a true copy?—*Cranston.* It is.

Associate reads:

"April 10, 1691, 3 W. and Mar. Hastings, ss. This day, being Good Friday, Philip Bayley, eldest son of John Bayley, deceased, formerly mayor of Hastings, for his fine of 6s. 8d. was admitted to the freedom of this town and port, by Thomas Lovell, mayor, Edward Milward, Richard Watts, and John Medhurst, jurats; who took his oath, and kissed the mayor's right cheek, *more solito*, and also took the oaths of allegiance and supremacy."

Mr. *Strange.* We shall now produce the copy of the registry of his baptism, which was the 14th of May, 1669.

Cranston. It was the 19th of May, 1667.

Mr. *Strange.* Read the certificate of the 19th of May, 1667, of Philip Bayley's baptism. Did you examine it? Is it a true copy?

Cranston. It is.

Associate reads:

"May 19, 1667. Baptized, Philip, the son of John Bayley and Anne his wife."

Mr. *Strange.* My lord, we shall now read the copy of the entry of the 28th of April, 1656; whereby it will appear, John Bayley his father was then a freeman.—Is it a true copy? Did you examine it?

Cranston. I examined it; it is a true copy.

Associate reads:

"Hastings, ss. The election of the mayor of the town and port of Hastings, the 28th day of April, 1656, in the court-hall of the same town, according to the use and custom thereof, time out of mind used, &c.

"At this day was chosen Thomas Delves into the office of mayoralty of the same town, for the year ensuing, by the voices of these freemen of the said town following:—

Mr. *Strange.* Who was present?

"—— That is to say, of Richard Wheeler, William Dighton, Richard Sargent, sen. Philip Girdler, John Lasher, William Barker, Mark Pontes, James Batchelor, Daniel Downe, James Lasher, gent. Drew Richardson, Thomas Jarret, John Spey, Samuel Smersball, John Fyssenden, Richard Stevenson, James Redames, William Geerey, Robert Bursey, Thomas Hyder, Daniel Stevens, John Brunnel, John Bayley, jun. Thomas Penbuckle, Edward Hildring, Simon Waters, James Chowe, Ralph Barnicle, John Shoesmith, John Fantley, Peter Stanbynooth."

Mr. *Marsh.* My lord, the next instance is Jeremiah Redames. He was admitted the 11th of January, 1691.—Look out that. Did you examine it? Is it a true copy?

Cranston. It is.

Associate reads:

"Hastings, ss. Memorandum. The 11th day of January, 1691, before Mr. Mayor, assisted by Philip Lovell, John Stevens, and Dr. Peter Fiat, jurats, came Jeremiah Redames and Philip Girdler, and craved to be admitted into the freedom of this town and port; and they were accordingly admitted into the freedom, and took the oath of a freeman, and also the other oaths, and kissed the mayor's right cheek, *more solito*; and for a fine paid, viz. Philip Girdler, a mark; and Jeremiah Redames, being the eldest son of a freeman, half a mark; which was *extr'* to the chamberlain."

Mr. *Marsh.* My lord, the time of his baptism was the 2d of January, 1655.—Read that certificate. Have you examined it? Is it a true copy?—*Cranston.* It is.

Associate reads:

"Hastings, ss. January 2, 1655, Jeremiah, the son of James Redames, was baptized."

Mr. *Marsh.* My lord, James Redames was a freeman in April 1649.

Mr. *Clarke.* My lord, the next instance is Thomas Boyce. He was admitted as an eldest son.

Lord *Hardwicke.* You must shew Jeremiah Redames was born after the father's admission, if you would apply this instance.

Mr. *Clarke.* My lord, we will shew that James Redames, the father, acted as a freeman the 28th of April, 1649, six years before the son was born.—Look out that entry. Is it a true copy?—*Cranston.* It is.

Associate reads:

"Hastings, *ss.* The election of the mayor of the town and port of Hastings, the 28th day of April, 1656, in the court-hall of the same town, according to the use and custom there time out of mind used.

"This day was chosen Thomas Delves into the office of mayoralty of the same town, for the year ensuing, by the voices of these freemen of the said town; that is to say, of Richard Wheeler, &c. James Redames, &c." *ut supra.*

Serj. *Eyre.* Read it again.

Lord *Hardwicke.* It is only mentioned as a fact.

Mr. *Clarke.* My lord, the next instance is Thomas Boyce, admitted as an eldest son the 26th of December, 1691. He was baptized the 3d of August, 1671.—Read his admission. Is it a true copy?—*Cranston.* It is.

Associate reads:

"Hastings, *ss.* Memorandum, That the 26th day of December, 1691, before Mr. Mayor, assisted by Thomas Lovell, Philip Lovell, John Stevens, and Dr. Peter Fiat, jurats, came Thomas Boyce, jun. Richard Broadbridge, Benjamin Meadow, and Thomas Wheeler, and craved to be admitted into the freedom of this town and port; and they were accordingly admitted into the freedom, and took the oaths of freemen, and also the oaths of allegiance to their majesties king William and queen Mary, and kissed the mayor's right cheek, *more solito;* and for a fine paid, viz. Thomas Boyce, jun. and Richard Broadbridge, being freemen's eldest sons, paid each 6*s.* 8*d.* and Benjamin Meadow and Thomas Wheeler, 13*s.* 4*d.* each; which was *extract'* to the chamberlain. And forasmuch as the said Thomas Boyce, jun. Richard Broadbridge, and Benjamin Meadow, are not yet house-keepers, their friends have undertaken and promised for them, that they shall pay what scot and lot shall be assessed upon them, also watch, ward, and search, and do all duties incumbent upon freemen, viz. Thomas Boyce, for his son Thomas Boyce, jun. and John Stevens, son of Henry, for Richard Broadbridge and Benjamin Meadow."

Mr. *Clarke.* My lord, he was baptized the 3d of August, 1671. Read the certificate of his baptism. Is it examined?

Cranston. Yes.

Associate reads:

"Hastings, *ss.* 1671, August 3d, baptized, Thomas, the son of Thomas Boyce."

Mr. *Strange.* Now read the admission of Thomas Boyce the father. Did you examine it? Is it a true copy?—Mr. *Cranston.* It is.

"Hastings, *ss.* 'Assemblat' tent' ibidem 20° die Novembris, anno regni regis nostri Caroli secundi, Angliæ, &c. 15° 1663.

"Hastings, *ss.* Memorand', quod 5° die Decembris, hoc anno prædict', venerunt Thomas Boyce et Willielmus Genner coram majore et Juratis in plena curia, et pet' seipsos ad libertatem hujus villæ admitti; et admittuntur, et osculati sunt malam dextram Majoris, et sacramentum suum tunc ibidem præstiterunt, more solito, pro fine utriusque eorum 13*s.* 4*d.*"

Mr. *Clarke.* My lord, the next instance is Stephen Peregoe. He was admitted the 11th of August, 1716; baptized the 29th of January, 1690; and his father was admitted the 12th of May, 1683. Read the son's admission. Is it a true copy? Have you examined it?

Cranston. Yes.

Associate reads:

"Hastings, *ss.* Cur' tent' ibidem undecimo die Augusti, anno regni Regis nostri Georgii 1mi Magnæ Britanniæ, &c. tertio, anno 1716.

"Memorandum. The 11th of August, Stephen Peregoe, jun. was sworn a freeman of this town, *more solito, &c.* at the Bell inn in Hastings before the mayor and jurats, and paid 6*s.* 8*d.* fine, as being the eldest son of a freeman; and the reason of his being now sworn out of court was, because it had been before unanimously agreed to, in full and open court, by the mayor and jurats."

Serj. *Eyre,* Who is that?

Sir *T. Abney.* Stephen Peregoe.

Lord *Hardwicke.* What, is the fine 6*s.* 8*d.*?

Mr. *Clarke.* Yes, my lord; he paid 6*s.* 8*d.* as being the eldest son of a freeman.—Now read the certificate of his baptism. Is that a true copy? Did you examine it?

Cranston. I did.

Associate reads:

"January 29, 1690. Baptized, Stephen, the son of Stephen and Margaret Peregoe."

Mr. *Clarke.* The time of his father's admission was the 12th of May, 1683.—Read that. Did you examine it? Is it a true copy?

Cranston. It is.

Associate reads:

"Hastings, *ss.* 12 May, 1683. Before the mayor and jurats, came Stephen Peregoe, and prayed to be admitted into the freedom of this town and port; whereupon he is admitted for his fine."

Mr. *Filmer.* My lord, Benjamin Meadow, admitted the 6th of May, 1721, is the next. Read his admission. Did you examine that? Is it a true copy?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* At the court of record held the 6th of May, 1721, Benjamin Meadow, jun. was, with the unanimous consent and approbation of the mayor and jurats, made a freeman

of this town and port, for his fine of 6s. 8d. as the eldest son of a freeman."

Serj. *Eyre.* By the unanimous consent of the mayor and jurats, he was made free.

Mr. *Filmer.* My lord, he was baptized the 25th of August, 1697. Read the certificate. Did you examine it? Is it a true copy?

Cranston. It is.

Associate reads:

"Hastings, ss. 25 August, 1697. Baptized, Benjamin, son of Benjamin and Meadow."

Mr. *Filmer.* My lord, his father's admission was the 26th of December, 1691, six years before the birth of the son. Read that. Did you examine it? Is it a true copy?

Cranston. I did.

Associate reads:

"Hastings, ss. Memorandum, 26 December, 1691, before Mr. Mayor, assisted by Thomas Lovell, Philip Lovell, John Stephens, and Dr. Peter Fiat, came Thomas Boyce, jun. Richard Broadbridge, Benjamin Meadow, and Thomas Wheeler, and craved to be admitted into the freedoms of this town and port; and took the oaths, and were admitted accordingly," *prout supra.*

Lord *Hardwicke.* What do you read that for?

Mr. *Strange.* My lord, to shew that Benjamin Meadow was a freeman so many years before the birth of Benjamin Meadow, the eldest son: He came, and prayed to be admitted, and took the oaths. My lord, our next instance is John Barley. He is not mentioned in the entry as the eldest son, but as the son of such a man, who was free; and from thence we infer, that the man had no other sons.

Lord *Hardwicke.* Who is that?

Mr. *Strange.* John Barley, my lord. He was admitted in May, 1608. We chuse to put them together, though we are now gone a hundred years back. Read his admission. Did you examine it? Is it a true copy?

Cranston. Yes.

Associate reads:

"Hastings, ss. 6mi Jacobi 1° 1608. Memorandum, That on the 7th of May, *hoc anno*, John Barley and Richard Kempsall were admitted to the freedom and liberty of this town, and were sworn, and kissed Mr. Mayor's right cheek, *more solito;* whose fines appear upon their heads."

Mr. *Strange.* See the fine of 6s. 8d. paid by Barley.

Associate reads:

"John Barley, Hastings, quia pater suus liber homo, ideo, secundum consuetudinem, finis ejus est 6s. 8d.

"Kempsall, 13s. 4d."

Mr. *Strange.* "Quia pater suus liber homo, ideo, secundum consuetudinem, finis ejus est 6s. 8d."

Lord *Hardwicke.* What was Kempsall's fine?

Mr. *Strange.* 13s. 4d. my lord. Now read his certificate. Have you examined it? Is it a true copy?—*Cranston.* It is.

Associate reads:

"Hastings, ss. 19 May, 1588. Baptized, John, the son of John Barley."

Serj. *Eyre.* Mr. Cranston, you say you have examined the register; Did not you find an elder brother of this John Barley?

Cranston. No.

Mr. *Strange.* My lord, we shall now shew, that his father acted as a freeman anno 1561. Read the entry. Is it a true copy?

Cranston. It is.

Associate reads:

"Hastings. Election' Ballivi tent' ibidem die Aprilis, viz. die Dominica prox' post Hock-day, anno tertio Elizæ, nunc Reginæ Angl' A. D. 1561. Ad quem diem electus est ad officium Ballivi villæ præd' pro hoc anno Tho. Wyks, per voces et nominationem Edw. Aywood, shipwright, Hen. Taught, Wil. James, Johannis Hemlyng, Ed. Smyth, Hen. Smyth, Johannis Barley, Tho. Lake, Johannis Hollands, Wil. Cresey, Rob. Payne, Ric. White, cooper, Johannis Stanbynooth, Tho. Palmer, Steph. Dallery, Hen. Bossam, Johannis Smyth, Tho. Lasher, Ric. Down, Al. Bocher, Johannis Austen, Tho. Matchyn, Johannis Horsey, Wil. Stevens, Johannis Jeffery, Rob. Taught, Wil. Churche, Johannis Bossam, sen. Johannis Stryde, Alani Morris, Tho. Chatfield, Alani Partridge, Rob. Grave, Tho. Harrison, Will. Lockett, Thomæ Mott, Johannis Sargent, et Johannis Derle."

Mr. *Marsh.* My lord, the next instance is William Goldham. He was admitted the 7th of May, 1609.

Sir *T. Abney.* His great grandson is just by.

Mr. *Marsh.* Read the entry. Is it examined?—*Cranston.* Yes.

Associate reads:

"7 Maii. 7° Jac. 1mi, 1609. Hastings, ss. Septimo die Maii, hoc anno septimo Jacobi Regis, Willielmus Goldham admissus est ad libertatem hujus villæ, et sacramentum præstitit corporale, et osculatus est malam dextram Majoris, more solito; et finis ejus pro admissione sua assessatur ad 6s. 8d. quia filius liberi hominis, &c."

Mr. *Marsh.* Now look out the certificate of his baptism. Have you examined it? Is it a true copy?—*Cranston.* It is.

Associate reads:

"29 November, 1584. Baptized, William, the son of John Goldham."

Mr. *Marsh.* My lord, he was admitted a freeman the 15th of April, 1575, nine years before the birth of his son.—Read the father's admission. Is it examined?—*Cranston.* Yes.

Associate reads:

"Hastings, ss. Memorandum, quod 15° Aprilis, 1575, Richardus Frenche, Willielmus

Coombes, Richardus Edborough, Johannes Goldham, et Wil. Mychell, jun. admissi sunt ad libertatem villæ prædict', et facti sunt liberi homines secundum usum et consuetudinem villæ prædict', et feod', et sol' dscul' Ball', &c."

Serj. *Eyre.* Does it appear what the fine was?

Mr. *Filmer.* No.—My lord, the next instance is John Sargent. He was admitted the 14th of July, 1610.—Read the entry of his admission. Is it a true copy?—*Cranston.* Yes.

Associate reads:

"1610, Hastings, *ss.* 14 die Julii, hoc anno octavo regni Regis Jacobi, Johannes Sargent admissus est ad libertatem hujus villæ, et sacramentum præstitit corporale, et osculatus est malam dextram Majoris, more solito; et finis ejus pro admissione sua est 6*s.* 8*d.* quia pater ejus liber erat."

Mr. *Filmer.* My lord, he was baptized the 21st of November, 1568. Read the certificate. Is it a true copy?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* 21 November, 1568. Baptized, John, the son of John Sargent."

Mr. *Filmer.* My lord, April 3d, 1561, his father acted as a freeman; that was seven years before.—Read the entry. Is it examined?

Cranston. Yes.

Associate reads:

"Hastings. Elect' Ballivi tent' ibidem die Aprilis, viz. die Dominica prox' post Hockday, anno tertio Dominæ Elizæ, nunc Reginæ Angliæ, &c. A. D. 1561. Ad quem diem electus est ad officium Ballivi villæ prædict' pro hoc anno Tho. Wyks, per voces et nominationem Edw. Aywood, shipwright, et (inter alios) Johannis Sargent," *ut supra.*

Mr. *Clarke.* My lord, the next instance is Thomas Rainolds. He was admitted the 27th May, 1622.—Read his admission. Have you examined it? Is it a true copy?

Cranston. It is.

Associate reads:

"Hastings, *ss.* Cur' tent' die 27 Maii, 1622, coram Roberto Lloyd, secundum consuetud'. Memorandum, quod ad hanc cur' Thomas Rainolds, filius Melchioris Rainolds, liberi hominis hujus villæ, venit et petit se ad libertatem hujus villæ admitti; et admittitur, et sacramentum suum more solito præstitit, et malam dextram Majoris secundum usum osculatus est, pro fine suo inde, &c."

Serj. *Eyre.* Is there any thing mentioned what the fine was?—Mr. *Clarke.* No.

Lord *Hardwicke.* It is *pro fine suo.*

Mr. *Clarke.* My lord, he was baptised the 15th of December, 1601.—Read the certificate. Is it examined?—*Cranston.* Yes.

Associate reads:

"Hastings *ss.* 1601, December 15th. Baptized, Thomas, the son of Melchior Rainolds."

Mr. *Clarke.* We shall now shew, that his father acted as a freeman the 17th of April, 1597.—Read that entry. Did you examine it? Is it a true copy?—*Cranston.* It is.

Associate reads:

"Hastings, *ss.* Elect' Majoris villæ prædict' tent' ibidem die Dominica prox' post Hockday, viz. 17° die Aprilis, anno regni nostræ Dominæ Elizæ, Dei gratia Angliæ, Franciæ, et Hiberniæ Reginæ, fidei Defensor', &c. tricesimo nono, 1597. Ad hanc electionem Ric. Lyfe, Major; Tho. Lake, Ric. Calverley, Rog. Ferrys, Ric. Frank, Ric. Frenche, Martinus Lyfe, Jurat'; liberi homines, Johannes Cooney, Marcus Sargent, Tho. Stephenson, Willielmus Byshop, Willielmus Coombes, Ric. Hackwood, Johannes Durant, Johannes Horsey, Tho. Young, Rob. Jenkin, Ric. Field, Tho. Colgat, Tho. Mannington, Rob. Mills, Johannes Brett, Ric. Porter, Johannes Knight, Steph. Porter, Ric. Burckam, Johannes Fissenden, Martinus Harrison, Melchior Rainolds, Michael Stunt, Nic. Staplus, Bernardus Borne, Petrus Hurry, Johannes Bailey, Rob. Parkes."

"N. B. At this day Richard Lyfe was chosen mayor, and Melchior Rainolds townclerk."

Sir *T. Abney.* My lord, we shall next lay before your lordship and the jury other instances of persons admitted as eldest sons of freemen, and born within the borough. The first of them was admitted in 1610.

Lord *Hardwicke.* That comes under the first head.

Sir *T. Abney.* My lord, we shall shew that they were the eldest sons of freemen. We begin with Thomas Streat.

Mr. *Strange.* And born within the borough.

Sir *T. Abney.* Thomas Streat, my lord, was admitted the 29th of April, 1610. He was born within the borough the 31st of March, 1580. So that he was thirty years of age, when he was admitted.—Read the entry of his admission. Did you examine it? Is it a true copy?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* 29 Aprilis, 1610, 8 Jac. 1.

"Quinto die Maii, hoc anno 8° Jacobi Regis, venit Thomas Streat, maximus natu filius Thomæ Streat defunct', nuper unius liberorum hominum hujus villæ, et petit se admitti ad libertatem hujus villæ; et per Major' et Jurat' antedictos admissus est, et sacramentum præstitit corporale, et osculatus est malam dextram Majoris, more solito; et finis ejus pro admissione sua est 6*s.* 8*d.* quia pater suus liber erat, secundum consuetudinem," &c.

Sir *T. Abney.* Now read the certificate of his baptism, the 31st of March, 1580, to shew that he was born within the borough. Is it a true copy?—*Cranston.* It is.

Associate reads:

"Hastings, *ss.* 31 March, 1580. The same day baptized, Thomas, the son of Thomas Streat."

Lord *Hardwicke*. What register is that a copy of; now it comes to be more necessary to ask?

Cranston. My lord, it is a true copy of the parish-register of Hastings.

Mr. *Strange*. My lord, the next is William Lovell. His father was not only a freeman, but a jurat. He was admitted the 6th of September, 1636.

Att. Gen. You go backwards and forwards in a very irregular manner.

Mr. *Strange*. We'll go regularly on; you will not be able to follow us.—Read the entry of the 6th of September, 1636, of the admission of William Lovell, jun.

Att. Gen. You must prove William Lovell the father was a freeman; you read him before as father.

Lord *Hardwicke*. What is the time of William Lovell's admission?

Mr. *Strange*. My lord, the 6th of September, 1636.

Sir *T. Abney*. My lord, we read it before, to shew that he was born before Thomas Lovell. He is the third instance we spoke to under the first head.

Lord *Hardwicke*. The 20th of April, 1667, Thomas the son of William Lovell, was admitted.

Sir *T. Abney*. And now, my lord, we read his father's admittance, the 6th of September 1636.

Lord *Hardwicke*. You did not read it before?

Sir *T. Abney*. My lord, we read him before, as a jurat.

Mr. *Strange*. My lord, it has been read, to shew that the father was a freeman at the time of the son's birth.—Read it again. Did you examine it? Is it a true copy?

Cranston. Yes.

Associate reads:

"Hastings, ss. 6. September, 1636, William Lovell, jun. eldest son of his father, jurat, who is now made free of this corporation for 6*s*. 8*d*. fine, took his oath, and kissed the mayor's right cheek, *more solito*," &c.

Mr. *Strange*. Now produce the register of the 31st December, 1639. Is it a true copy?

Cranston. Yes.

Associate reads:

"Hastings, ss. 31 December 1639. Baptized, William, son of William Lovell."

Mr. *Marsh*. My lord, the next instance, under this head, is Thomas Frank. He was admitted the 26th February, 1662.—Read his admission. Did you examine it? Is it a true copy?—*Cranston*. Yes.

Associate reads:

"Hastings, ss. Assemblat' in Aula Curiali', 26 Februarii, 15 Car. 2, 1662. At this assembly also, Thomas Gawen and Thomas Frank, upon their prayer in that behalf, are admitted to the several freedoms of this town and port, for their several fines, viz. Thomas Gawen 13*s*. 4*d*. and Thomas Frank 6*s*. 8*d*. he being the eldest son of a freeman here; who also took their several oaths, and kissed the mayor's right cheek, *more solito*," &c.

Mr. *Marsh*. The 6th of May, 1639, he was baptized, my lord.—Read the certificate. Did you examine it? Is it a true copy?

Cranston. It is.

Associate reads:

"Hastings, ss. 6 May, 1639. Baptized, Thomas, the son of Frank."

Mr. *Clarke*. My lord, the next instance is Robert Sargent. He was admitted the 19th of May, 1663.—Read the admission. Is it a true copy?—*Cranston*. Yes.

Associate reads:

"May 12, 1663. 16 Car. 2. By Mr. Mayor and his Brethren, in full court, Robert Sargent, of this town, seaman, upon his humble suit, is made free of the franchisement of this town, and took his oath, and kissed the mayor's right cheek, *more solito*, &c. His fine paid is 6*s*. 8*d*. He was eldest son of John Sargent, his father, late freeman of this town, deceased, &c."

Mr. *Filmer*. My lord, he was baptized the 3d of November, 1604.—Read the certificate of his baptism. Is that a true copy? Did you examine it?—*Cranston*. It is.

Associate reads:

"Hastings, ss. 3 November, 1604. Baptized, Robert Sargent, son of John Sargent."

Serj. *Eyre*. He was fifty years old, and upwards, when he was admitted. If he had a right as an eldest son, how came he not to claim it before?

Mr, *Strange*. The entry tells you he was a seaman; till he left the sea, it was not worth his while to take up his freedom.

Mr. *Clarke*. My lord, the next instance is Thomas Stevenson. He was admitted the 25th April, 1667.—Read his admission. Did you examine it?—*Cranston*. Yes.

Associate reads:

"Hastings, ss. 25 April, 1667. Before Wm. Parker, esq. mayor; Philip Girdler, Samuel Smershall, Wm. Lansford, and John Hyde, jurats; came James Shingleton and Thomas Stevenson, and prayed to be admitted to the liberty and franchises of this town; and by the said mayor and jurats then present are thereunto admitted; who thereupon took the oath accustomed, kissed the mayor's right cheek, *more solito*; and either of them are to pay, viz. the said James a mark, and the said Thomas half a mark, he being the eldest son of his father Richard Stevenson, a late freeman of this town, deceased, to the present chamberlain of this town, for such their admittance."

Mr. *Clarke*. Now look out the certificate of his baptism. Read that. Did you examine it? Is it a true copy?—*Cranston*. Yes.

Associate reads:

"Hastings, ss. 1642. November 6. Baptized, Thomas, son of Richard Stevenson."

Sir *T. Abney.* My lord, the next is Richard Walter. He was admitted the 8th of January, 1669. Read his admission. Is it examined?

Cranston. Yes.

Associate reads:

"Hastings, *ss.* 8 January, 1669. In full court then also holden before Mr. Mayor and his brethren, came Richard Walter, and prayed the enfranchisement of this town; who being the eldest son of his father Simon Walter, a freeman, is thereunto admitted, for his fine of a demi-mark; and in like manner Robert Boykett and Robert Philip, for their several fines of a mark a-piece; who all took the oath accustomed, and kissed the mayor's cheek, *more solito.*"

Sir *T. Abney.* My lord, he was baptized the 5th of December, 1641. Is that examined?

Cranston. Yes.

Associate reads:

"Hastings, *ss.* 5 December, 1641. Baptized, Richard Walter, son of Simon Walter."

Lord *Hardwicke.* Let me see it; it is Walthers. Who do you call next, Mr. Strange?

Mr. *Strange.* My lord, William Genner. In 1674, he was admitted. He was born the 6th of June, 1647.

Att. Gen. Why do not you keep your own order? We never know where we are. You read that before.

Mr. *Strange.* He is in the same paper with John Fantley, who was read before. Read the admission again, the 5th of December, 1674.

Associate reads:

"Hastings, *ss.* 5 Decembris, 1674, 26 Car. 2di, coram Major' et Jurat' in plena curia venit Johannes Salmon, et petit libertatem hujus villæ; Johannes Fantley, jun. et Willielmus Genner, jun. et admittuntur, scilicet, prædict' Salmon pro 13*s.* 4*d.* et prædict' Fantley 6*s.* 8*d.* et prædict' Genner 6*s.* 8*d.* quia filii sen' patr' eor' liber'; qui' omnes fecerunt inde sacramentum, et malam dextram Majoris osculaverunt, more solito," &c.

Mr. *Strange.* My lord, he was baptized the 6th of June, 1647. Read the Hastings register; there are two parishes. Is it examined?

Cranston. Yes.

Associate reads:

"6 June, 1647. Hastings, *ss.* Baptized, William, the son of William Genner, a jurat."

Mr. *Strange.* This falls within the first head.

Mr. *Marsh.* My lord, the next instance is Richard Sargent. He was admitted the 12th of March, 1676. Is that examined?

Cranston. Yes.

Associate reads:

"Hastings, *ss.* 12 March, 1676, 29 Car. 2. Before Mr. Mayor, Mr. Hyde, and Mr. Tho. Lovell, jurats, in the court-hall, came Richard Sargent, eldest son of Richard, and prayed his freedom; which was granted him by the said mayor and jurats, for his fine of 6*s.* 8*d.* and then and there took his oath, and kissed the mayor's cheek, *more solito.*"

Mr. *Marsh.* My lord, he was born the 26th of Dec. 1624.

Lord *Hardwicke.* His father is not said there to be a freeman.

Mr. *Strange.* My lord, it is only said, "Richard Sargent, eldest son of Richard."

Mr. *Marsh.* My lord, he was born the 26th of Dec. 1624.

Lord *Hardwicke.* Can you shew his father to be a freeman?

Mr. *Marsh.* It is only, "eldest son of Richard;" if he be a stranger, they mention the father to be so; and the fine is 6*s.* 8*d.*

Lord *Hardwicke.* If the father be a freeman, you should shew it.

Mr. *Strange.* Now and then a town clerk stitches a few things together——

Mr. *Filmer.* My lord, the next instance is Thomas Gawen, admitted the 21st of Dec. 1677. Read it. Is it examined?

Cranston. Yes.

Associate reads:

"Hastings, *ss.* 21 Dec. 1677. By and before Thomas Carlton, mayor; Thomas Lovell, and Thomas Dyne, jurats, in the court-hall, being present at the seat; James Batchelor, jun. Thomas Gawen, eldest son of Thomas a freeman, Mark Philips and James Moore, upon their instant suits, are admitted to the freedom of this town and port, for their several fines, as upon their heads appeared; who thereupon took the oath, and kissed the mayor's right cheek, *more solito.* Gawen 6*s.* 8*d.* Batchelor and Philips 13*s.* 4*d.* each."

Mr. *Filmer.* My lord, he was born in Hastings, the 27th of August, 1653. Read the certificate. Is it examined?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* August 27, 1653. Baptized, Thomas, the son of Thomas Gawen."

Mr. *Clarke.* My lord, the next is Thomas Bayliffe, admitted the 21st of Nov. 1678. Read his admission. Did you examine it?

Cranston. Yes.

Associate reads:

"Hastings, *ss.* At a court held the 21st of Nov. 1678, 30 Car. 2, appeared Thomas Bayliffe, seaman, eldest son of Thomas a freeman, for his fine of 6*s.* 8*d.* and Andrew Skeeth seaman, for his fine of 13*s.* 4*d.* upon their earnest prayer and request, are admitted, at this assembly, to the freedom and franchise of this town; who both took the oath accustomed, and kissed the mayor's right cheek, *more solito,*" &c.

Mr. *Clarke.* My lord, he was born in Hastings, Jan. 14, 1637. Read the certificate. Is it a true copy?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* Jan. 14, 1637. Baptized, Thomas, the son of Thomas Bayliffe."

Sir *T. Abney.* My lord, the next instance is Henry Coombes. He was admitted the 17th of Dec. 1679. Read his admission. Did you examine it?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* 13 Dec. 1679, 30 Car. 2. In open court then and there holden, Henry Coombes is made free and sworn, being eldest son to his father, a freeman, deceased, for 6*s.* 8*d. more solito.*"

Sir *T. Abney.* The certificate of his birth or baptism is the 18th Sept. 1642. Is that examined?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* 18th Sept. 1642. Baptized, Henry, the son of George Coombes."

Mr. *Strange.* My lord, the next is Mark Bailey, admitted the 28th of November, 1691. Read his admission. Did you examine it?

Cranston. Yes.

Associate reads.

"Memorandum, That the 28th day of Nov. 1691, before Robert Phipps, mayor; Thomas Lovell, Philip Lovell, John Stevens, Dr. Peter Fiat, and John Medhurst, jurats; came Richard Adams, Nicholas Danyel, Mark Bayley, and Richard Hart, all inhabitants of this town, and separately craved to be admitted to the franchise of this town and port; and they were accordingly admitted into the freedom, and took the oaths of freemen, and at the same time took the oaths of fidelity to their majesties king William and queen Mary, and kissed the mayor's right cheek, *more solito;* and for a fine paid, viz. Richard Adams, Nicholas Danyel, and Richard Hart, each 13*s.* 4*d.* and Mark Bayley, being the eldest son of a freeman, 6*s.* 8*d. extr'* to the chamberlains."

Mr. *Strange.* Now read the certificate of his baptism. Is it examined?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* 22 May, 1664. Baptized, Mark Bayley, the son of Mark."

Mr. *Marsh.* My lord, the next instance is Richard Broadbridge. His name has been mentioned before; but your lordship, I believe, has not taken him as an eldest son. He was admitted the 26th of December, 1691.

Lord *Hardwicke.* I have it; he was admitted for 6*s.* 8*d.*

Mr. *Filmer.* My lord, the next is Robert Bartholomew. He was admitted the 26th of Nov. 1692. Read the entry. Did you examine it?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* memorandum, That the 26th day of Nov. 1692, before Peter Fiat, esq. mayor; Thomas Lovell, John Stevens, Edward Milward, and John Medhurst, jurats; came Robert Bartholomew, and craved to be admitted into the freedom of this town and port; and he was accordingly admitted into the freedom, and took the oath of a freeman, and also the other oaths, and kissed the mayor's right cheek, *more solito;* and for his fine paid 6*s.* 8*d.* being the eldest son of a freeman, *extr' camerar'.*"

Mr. *Filmer.* He was baptized the 10th of January, 1654. Read the certificate of his baptism. Is it examined?—*Cranston.* It is.

Associate reads:

"Hastings, *ss.* 10 January, 1654. This day baptized, Robert, son of ——— Bartholomew."

Mr. *Clarke.* My lord, the next is Thomas Hide, admitted the 11th of March, 1692. Read that. Did you examine it?—*Cranston.* Yes.

Associate reads:

"Memorandum, The 11th of March, 1692-3, before Peter Fiat, esq. mayor; John Hide, Thomas Lovell, and Philip Lovell, John Stevens, Edward Milward, Robert Phipps, and John Medhurst, jurats; came Thomas Hide, of this town, eldest son of a freeman, and craved to be admitted into the freedom of the said town; and he was accordingly admitted into the freedom of the same town; and took the oath of a freeman, and also the other oaths, and kissed the mayor's cheek, *more solito,* and for his fine paid 6*s.* 8*d. extr' camerar'.*"

Mr. *Clarke.* He was born the 10th of March, 1667. Read the certificate of his baptism. Did you examine it?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* 10 March, 1667. This day Thomas Hide, son of Thomas Hide, was baptized."

Sir *T. Abney.* My lord, the next is John Sparrow. He was admitted the 3d of February, 1693. He was born the 5th of April, 1668.—Read his admission. Is it a true copy?

Cranston. Yes.

Associate reads:

"Memorandum, That the 3d of February, A. D. 1693-4, before John Medhurst, esq. mayor; Thomas Lovell, Robert Phipps, and Dr. Peter Fiat, jurats; came John Sparrow, jun. and John Fellows, jun. and craved to be admitted into the freedom of this town and port; which was accordingly granted to them, and they took the oaths thereby required, and kissed the mayor's cheek, *more solito,* and for their fines paid as follows; the said John Sparrow, being the eldest son of a freeman, the sum of 6*s.* 8*d.* and the said John Fellows, 13*s.* 4*d. extr' camerar' more solito.*"

Sir *T. Abney.* He was baptized the 5th of April, 1668. Read the certificate. Is it examined?—*Cranston.* Yes.

Associate reads:

"Hastings. *ss.* 5 April, 1668. Baptized, John, the son of ——— Sparrow."

Mr. *Strange.* My lord, the next instance is Michael Penbuckle. He was admitted the 8th of February, 1693. Read that admission. Is it a true copy? *Cranston.* Yes.

Associate reads:

"8 February, 1693-4. At this court came Michael Penbuckle, and craved to be admitted into the franchise of this town and port; which was granted him, and he accordingly took the oaths thereby required, and kissed the mayor's cheek, *more solito;* and for his fine, being the eldest son of a freeman, paid 6*s.* 8*d. extr' camerar'.*"

Mr. *Strange.* My lord, he was born the 21st of September, 1668, and was twenty-five years old when he was made free. Read the certificate of his baptism. Is it examined?

Cranston. Yes.

Associate reads:

"Hastings, *ss.* 21 September, 1668. Baptized, Michael, the son of ——— Penbuckle."

Mr. *Marsh.* My lord, the next instance we speak to (and we shall read but seven more) is Robert Fellows, admitted the 17th of February, 1693. Read his admission. Did you examine it?

Cranston. Yes.

Associate reads:

"Memorandum, That the 17th February, 1693-4, before John Medhurst, esq. mayor; John Hide, Thomas Lovell, Philip Lovell, John Stevens, Edward Milward, and Dr. Peter Fiat, jurats; in open court, came Robert Fellows, sen. Mark Meadow, and Austin Lacket, and craved to be admitted into the franchise of this town and port; which was granted them, and they accordingly took the oaths thereby required, and kissed the mayor's cheek, *more solito;* and for their fines did severally pay as followeth; the said Robert Fellows, being the eldest son of a freeman, paid 6*s.* 8*d.* and the said Mark Meadow and Austin Lacket paid 13*s.* 4*d.* each, *extr' camerar'.*"

Mr. *Marsh.* He was baptized the 1st of July, 1656. Read the copy of the register. Is it a true copy?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* July 1656. First day of this month Robert Fellows was baptized, the son of George."

Mr. *Filmer.* My lord, the next is John Hussey. Read his admission. Is it examined?

Cranston. Yes.

Associate reads:

"Memorandum, The 5th day of January, 1694, before Mr. Mayor, and three jurats, there came Jeffery Glyde, John Hussey, jun. and Henry Barry, and craved to be admitted into the freedom of this town and port of Hastings; and they were accordingly admitted into the freedom, and took the oaths of freemen, and also the other oaths, and kissed the mayor's right cheek, *more solito,* and for their fines paid severally as follows, viz. the said Jeffery Glyde 13*s.* 4*d.* the said John Hussey, being the eldest son of a freeman, 6*s.* 8*d.* and the said Henry Barry 13*s.* 4*d. extr' camerar'.*"

Mr. *Filmer.* My lord, he was baptized in April 1680. Read the register. Is it examined?

Cranston. It is.

Associate reads:

"Hastings, *ss.* April, 1680. Baptized, John, the son of Matthew Hussey, and ——— his wife."

Mr. *Clarke.* The next, my lord, is John Geery. He was admitted the 25th of October, 1707. Read his admission. Is it examined?

Cranston. Yes.

Associate reads:

"Hastings, *ss.* 25 October, 1707. At the same court Richard Hudson, John Geery fil' Johannis, et Thomas Gyles, were sworn freemen of this town and port, for their several fines following, viz. Richard Hudson, 13*s.* 4*d.* John Geery, as eldest son of a freeman, 6*s.* 8*d.* and Thomas Giles 13*s.* 4*d. more solito.*"

Mr. *Clarke.* He was baptized the 9th of April, 1682. Read the certificate. Is it examined?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* April 9, 1682. John, the son of John Geery, and Elizabeth his wife, was baptized."

Sir *T. Abney.* My lord, the next instance is William Shorter and Jacob Fantley, admitted the 11th of August, 1722. Read the admission. Is it a true copy?—*Cranston.* Yes.

Associate reads:

"Hastings, *ss.* 11 August, 1722. Mr. John Mead, William Shorter, John Harman and Jacob Fantley, were admitted and sworn freemen and combarons, by the mayor and several of the jurats, according to the ancient custom and use, for their several fines following; William Shorter, as eldest son of a freeman 6*s.* 8*d.* John Mead 13*s.* 4*d.* John Harman 6*s.* 8*d.* and Jacob Fantley, as eldest son of a freeman, 6*s.* 8*d.*"

Sir *T. Abney.* My lord, William Shorter was baptized the 29th of June, 1689. Read his certificate. Is it examined?

Cranston. Yes.

Associate reads:

"Hastings, *ss.* June 29, 1689. Baptized, William, son of William Shorter."

Sir *T. Abney.* My lord, we have many more entries, not distinguishing between sons and eldest sons: but we shall not trouble your lordship with them, but go to our living witnesses.—Call Robert Evernden.

Robert Evernden sworn.

Sir *T. Abney.* How old are you?

Evernden. Sixty-five years old.

Mr. *Lucy.* Was your father a freeman of Hastings?—*Evernden.* No.

Sir *T. Abney.* Where were you born?

Evernden. At Robertsbridge, 15 miles from Hastings; but I have lived fifty years in Hastings.

Sir *T. Abney.* What do you know of the custom in Hastings, as to what right the eldest sons of freemen have to their freedome?

Evernden. I have heard gentlemen say—I know no otherwise—

Sir *T. Abney.* Who have you heard say?

Evernden. I have heard Mr. Thomas Moore and John Moore, who were both justices of peace, and jurats.

Serj. *Eyre.* My lord, here is a man prompts this witness.

Lord *Hardwicke.* Let him go on the other side.

Att. Gen. My lord, I apprehend this is not evidence.

Mr. *Strange.* You say, you lived fifty years in Hastings, and knew Thomas Moore and John Moore, justices of the peace, and jurats; give my lord and the jury an account, what you have heard them say in relation to the right of eldest sons of freemen to be free.

Evernden. I heard them say, that the eldest son of a freeman had a right.

Mr. *Strange.* Where must they be born?

Evernden. Born in town, to be sure.

Mr. *Strange.* Whether must they be born before their fathers were made free, or after?

Evernden. They must be born in their fathers freedom.

Mr. *Strange.* What fine do they usually pay?—*Evernden.* Six and eight pence.

Mr. *Strange.* Did you ever know an eldest son of a freeman, during the 50 years you have lived in Hastings, refused?

Evernden. Some did not require it.

Mr. *Strange.* Was any body denied, that ever demanded it?

Lord *Hardwicke.* He only tells you what he heard the Moores say.——You say, you had this conversation with John Moore, and he was a justice; what did he tell you?

Evernden. He told me, that the eldest son of a freeman had a right.

Lord *Hardwicke.* Was John Moore a jurat?

Evernden. Yes, my lord.

Lord *Hardwicke.* And these two men told you this?—*Evernden.* Yes, my lord.

Mr. *Strange.* How long ago is it that they told you this?—*Evernden.* I cannot tell.

Mr. *Strange.* But, according to your memory, how long do you think it may be?

Evernden. It was, I believe, in the last king's reign, or queen Anne's, that they spoke it; I cannot tell to a year.

Mr. *Strange.* Have you seen them lately?

Evernden. No.

Mr. *Strange.* Within 20 or 30 years?

Evernden. Yes.

Mr. *Strange.* Did both, or one of them, mention this? And how long is it since, according to the best of your remembrance?

Evernden. About ten or a dozen years ago.

Mr. *Strange.* Had you any conversation with any other freeman about this right?

Evernden. Yes, with Robert Bartholomew.

Mr. *Strange.* Was he a freeman?

Evernden. Yes; he had been mayor.

Mr. *Strange.* What have you heard him say about this right?

Evernden. I have heard him say, the eldest son of a freeman had a right.

Mr. *Marsh.* Do you know Dr. Fiat? During so many years as you lived in Hastings, do you remember him to say any thing about the right of eldest sons?

Evernden. He has been dead some time.

Mr. *Marsh.* What was he?

Evernden. He was a doctor, and mayor of the town.

Mr. *Marsh.* Did he ever say any thing to you about this right?

Evernden. No, not that I remember.

Mr. *Strange.* During the 50 years you lived in Hastings, what was the general report there concerning the right of eldest sons, that what they informed you about it was true?

Evernden. I never heard any body say but that they had such a right.

Mr. *Clarke.* How old were Robert Bartholomew and the two Moores when you heard them say this?

Evernden. They were very ancient men.

Att. Gen. You know nothing of your own knowledge; it is only by hear-say?

Evernden. No.

Att. Gen. What did you hear them say; it was only in general?

Evernden. That the eldest son of a freeman had a right.

Att. Gen. Was it to the eldest son of a freeman generally, without confining it to being born within the borough, or to any particular case?

Evernden. They said, that the eldest son of a freeman had a right.

Att. Gen. Are you sure they confined it to the eldest son of a freeman? Did they say nothing, that all the sons had a right?

Mr. *Strange.* If all the sons have a right, then an eldest son has.

Lord *Hardwicke.* Mr. Evernden, you said, they must be born in the town during the fathers freedom; did Thomas Moore or John Moore say whether they must be born in Hastings, or after their fathers freedom?

Evernden. No, my lord.

Lord *Hardwicke.* Then why did you say that?

Evernden. They said, that the eldest son of a freeman had a right, if any body had.

Several Counsel. Ay, if any body had!

Lord *Hardwicke.* What is the right of freedom?

Evernden. None at all, but by the election of the mayor and jurats.

Sir *T. Abney.* They are glorious fellows!

Mr. *Lacy.* Did Moore say any thing of residence?—*Evernden.* No.

John Cousens sworn.

Mr. *Strange.* How old are you, Mr. Cousens?—*Cousens.* About sixty.

Mr. *Strange.* Where were you born?

Couzens. In Hastings, and have lived all my time there.

Att. Gen. Was your father a freeman?

Couzens. No.

Mr. *Strange.* During all that time you have lived in Hastings, what have you heard any ancient people say concerning the right of eldest sons to be free?

Couzens. I have heard several ancient people say, the eldest son of a freeman had a right by his father's charter.

Sir *T. Abney.* Did you hear them say any thing, where he was to be born?

Couzens. I cannot tell; but they said he had a right by his father's charter.

Sir *T. Abney.* What is a charter?

Couzens. I take it, his father was to be free first.

Sir *T. Abney.* Can you recollect the names of any ancient inhabitants you have heard say this?

Couzens. Yes; I lived with Dr. Fiat when he was mayor, and was to and fro with him; and I heard him say, the eldest son of a freeman had a right by his father's charter.

Sir *T. Abney.* Did you hear any others say so?

Couzens. Yes; several others, both Thomas and John Moore, jurats.

Sir *T. Abney.* Have you heard any others say so?

Couzens. I have heard it from several others; but I cannot recollect their names.

Sir *T. Abney.* Did you ever know the eldest son of a freeman refused?

Couzens. No, not till I heard of the plaintiff Moore's being refused.

Sir *T. Abney.* Not till you heard of the plaintiff Moore! They are an ancient family in Hastings, I think?—*Couzens.* Yes.

Mr. *Marsh.* My lord, this Dr. Fiat was mayor; he was town-clerk and doctor, and had the records of the town in his custody when mayor, and must know the custom. He was a jurat in 1691.

Serj. *Eyre.* Mr. Evernden, suppose a freeman has several sons, are all these sons entitled as well as the eldest?

Evernden. I cannot say.

Serj. *Eyre.* Did you ever know a younger son refused?

Drew Shengleton sworn.

Lord *Hardwicke.* How old are you, Mr. Shengleton?

Shengleton. Sixty-nine years of age.

Mr. *Strange.* How long have you lived in Hastings?

Shengleton. I have lived sixty years in Hastings, in the town.

Mr. *Strange.* What is the usage and right there of freemen's eldest sons?

Shengleton. I was not born there, though I was a child when I went to live at Hastings.

Mr. *Strange.* Do not you know what the custom and usage is there?

Shengleton. I have heard say, the eldest sons had a right.

Mr. *Strange.* Who has told you?

Shengleton. I cannot nominate them, they were so many; but I can tell it is a discourse among a great many people.

Mr. *Strange.* Was it the common report, when you went to live in Hastings, and since, that the eldest sons of freemen had a right?

Shengleton. So far as I have heard, it was.

Mr. *Strange.* Did you ever know an eldest son refused?

Shengleton. I know nothing about it.

Mr, *Strange.* Have you heard any ancient people, that are dead, talk about it?

Shengleton. I cannot remember.

Mr. *Strange.* Have not you heard them say, that the eldest son of a freeman had a right? Have not you heard your mother say so?

Shengleton. She told me my father was a freeman.

Mr. *Strange.* When was that?

Shengleton. When I was a child.

Mr. *Strange.* What did she tell you else?

Shengleton. I have heard my mother say, that the eldest son of a freeman was to be free, and that my elder brother had a right.

Mr. *Strange.* Was your elder brother a freeman?—*Shengleton.* No.

Mr. *Strange.* Why had he it not?

Shengleton. My mother said, she had lost my father's franchie or charter, and that was the reason; and she said, her son should go into the hall, and demand it.

Mr. *Strange.* How came she to say so?

Lord *Hardwicke.* How long is it since you heard this discourse, that freemen's eldest sons had a right?

Shengleton. It is many years; I cannot tell exactly how many.

Lord *Hardwicke.* How many do you think? Is it ten, or twelve, or twenty years back?

Shengleton. Yes, it is full 30 years back.

Mr. *Clarke.* Did you never hear the report, when you were a young man, that the eldest sons of freemen had a right?

Shengleton. Yes; but I cannot nominate them.

Mr. *Clarke.* You cannot name one person that ever said so?—*Shengleton.* No.

John Boykett sworn.

Mr. *Marsh.* Mr. Boykett, how old are you?

Boykett. Turned of sixty.

Mr. *Marsh.* How long have you known Hastings?

Boykett. I was born there, and have lived almost all my time in Hastings.

Mr. *Marsh.* I would ask you, within your time, what have you known to be the custom with regard to the admitting of freemen? Whether an eldest son is intitled?

Boykett. I have heard it among the freemen.

Lord *Hardwicke.* Who have you heard say so, do you remember?

Boykett. My lord, I cannot speak positively to particular persons.

Mr. *Marsh.* Did you know Dr. Fiat, the two Mr. Moores, and Mr. Bartholomew?

Boykett. Yes.

Mr. *Marsh.* Did you ever speak with them about it?

Boykett. I asked to be made free myself, in court.

Mr. *Marsh.* How came you to ask it?

Boykett. I asked it as a favour, but it was not granted.

Mr. *Marsh.* When was it, and who did you ask it of?

Boykett. I asked it of Thomas Lovell, about forty years ago: He was a freeman and mayor.

Mr. *Marsh.* Did you go into the court-hall to ask it?

Boykett. Yes.

Mr. *Marsh.* Was any thing said to you in relation to your being admitted? How long ago was it?—*Boykett.* Forty years.

Mr. *Marsh.* What did they say to you, upon your asking to be admitted?

Boykett. I asked to be admitted to the freedom, as a favour; and that they would be so good as to admit me. Some were for my being made free, particularly Mr. Clifts, a justice.

Mr. *Marsh.* Was your father a freeman?

Boykett. No. But the mayor said, I should not be admitted, because I was a dissenter: And then Waller, the town-clerk, asked the mayor, whether I was the son of a freeman? and the mayor answered, I was not: And then Waller said to the mayor, then do as you please; and the mayor said, he would not admit a dissenter for 40*l.*

Lord *Hardwicke.* What did Waller say upon that?

Boykett. My lord, the mayor said, they would not make a dissenter free for 40*l.* And then the town-clerk asked the mayor, whether he was the son of a freeman? To which the mayor said, He was not. And then Waller, the town-clerk, said, then, Mr. Mayor, you may do as you please.

Lord *Hardwicke.* What did you understand by those words?

Boykett. I understood by them words, that if my father had been free, I should have had a freedom.

Att. Gen. How many children had your father?—*Boykett.* Several.

Att. Gen. Were you the eldest?

Boykett. Yes, and served my time in Hastings.

Att. Gen. Did you know John Medhurst, any thing of his having a son?

Boykett. Yes, he had a son born in his mayoralty.

Att. Gen. Was it his first son?

Boykett. Yes.

Att Gen. Did he desire to be made free?

Boykett. Yes; he asked for his freedom in court, when I was present.

Att. Gen. Was he made free?

Boykett. Not at that time; I heard them disputing about it.

Lord *Hardwicke.* How long ago was that?

Boykett. I cannot tell, my lord.

Lord *Hardwicke.* Was it ten years ago.

Boykett. I cannot say certainly; but I believe thereabouts.

Mr. *Strange.* You have set up this exclusion for ten years; Was it twenty years ago, that his father was made free?

Boykett. I cannot say.

Mr. *Strange.* How long has he been dead?

Boykett. About eight years.

Mr. *Strange.* How many years before he was dead was it, that the son asked to be made free? Was it seven or eight years?

Boykett. I cannot say.

Mr. *Strange.* Is the son a freeman now?

Boykett. He has not his freedom.

Serj. *Eyre.* How long was it before Medhurst's death, according to your best recollection, that he applied to have his freedom? Was it four or five years?

Boykett. Medhurst the father died about eight years ago; I cannot say how long since the son demanded his freedom.

Lord *Hardwicke.* Can you recollect about what time, according to the best of your remembrance?

Boykett. Not a great while, my lord, before the father's death.

Lord *Hardwicke.* Was it two, or three, or five years?

Boykett. Not five years, my lord.

Mr. *Clarke.* You say, Mr. Boykett, Medhurst was refused his freedom; What was the reason? Was he born within the liberties, and after his father was made free?

Boykett. Yes, during the time he was mayor.

Mr. *Clarke.* Was he his eldest son?

Boykett. He was his only son.

Mr. *Clarke.* Who was mayor when he was refused?—*Boykett.* I cannot say.

Lord *Hardwicke.* He does not remember.

Joan White sworn.

Mr. *Clarke.* Do you know Hastings?

Mrs. *White.* Yes.

Mr. *Clarke.* How long have you known it?

Mrs. *White.* All my years.

Mr. *Clarke.* What age are you?

Mrs. *White.* I am sixty-two years old.

Mr. *Clarke.* Do you know what is the custom of making free in Hastings, whether the eldest son has a right?

Mrs. *White.* I heard my father say, that the eldest son had a right.

Mr. *Clarke.* Was he a freeman?

Mrs. *White.* Yes.

Lord *Hardwicke.* Speak out; speak to that gentleman.

Mr. *Clarke.* Is your father living, or dead?

Mrs. *White.* Dead.

Mr. *Clarke.* Tell the Court what you have heard him say about the right of freemen's eldest sons.

Mrs. *White.* I heard him say, they had a right.

Sir *T. Abney.* What, that freemen's eldest sons had a right?—Mrs. *White.* Yes.

Sir *T. Abney.* Have you ever heard any body else say any thing about it?—Mrs. *White.* No.

Sir *T. Abney.* Did you never hear your mother say any thing about it?

Mrs. *White.* No.

Anne Sargent sworn.

Mr. *Clarke.* Do you know the town of Hastings?—Mrs. *Sargent.* Yes.

Mr. *Clarke.* How old are you?

Mrs. *Sargent.* I am sixty-three years old.

Mr. *Clarke.* How long have you lived in Hastings?

Mrs. *Sargent.* I have lived there always, and was born there.

Mr. *Clarke.* Have you heard any discourse concerning the right of freedom in that town?

Mrs. *Sargent.* I have heard Mr. John Stevens, who was several times mayor of Hastings, say——

Mr. *Clarke.* Is he living or dead?

Mrs. *Sargent.* He is dead.

Mr. *Clarke.* What did he say concerning the right of freedom?

Mrs. *Sargent.* That it belonged to the eldest sons to be freemen.

Mr. *Clarke.* Have you heard any body else say so?—Mrs. *Sargent.* No.

Mr. *Clarke.* Have not you been married?

Mrs. *Sargent.* Yes.

Mr. *Clarke.* Have not you heard your husband say, that it belonged to the eldest sons to be made free?

Mrs. *Sargent.* Yes, he has said the same.

Mr. *Clarke.* Was the common repute during your time, that the eldest sons had a right?

Mrs. *Sargent.* Yes.

Mr. *Clarke.* Was it ever disputed, that they had that right?—Mrs. *Sargent.* No.

Mr. *Clarke.* And you heard Stevens the mayor say, that the eldest sons had a right, several times?—Mrs. *Sargent.* Yes.

Susannah Medhurst sworn.

Mr. *Filmer.* How old are you, Mrs. Medhurst?

Mrs. *Medhurst.* I am 56 years of age.

Mr. *Filmer.* Have not you been Mrs. mayoress?—Mrs. *Medhurst.* Yes.

Sir *T. Abney.* Who have the right in Hastings to be freemen?

Mrs. *Medhurst.* All the sons of freemen.

Sir *T. Abney.* Has not the eldest son a right?

Mrs. *Medhurst.* Yes; I have heard my husband say, they could not deny him.

Sir *T. Abney.* Have you heard him say so more than once?

Mrs. *Medhurst.* Yes; I have heard him say so often.

Sir *T. Abney.* Pray, Mrs. Medhurst, during your time, was it the common reputation, that the eldest son of a freeman had a right?

Mrs. *Medhurst.* Yes.

Sir *T. Abney.* Where were they to be born?

Mrs. *Medhurst.* In the town; it was not so much denied then; if it was required, they would do it.

Sir *T. Abney.* Have you ever known an eldest son denied?—Mrs. *Medhurst.* Yes.

Sir *T. Abney.* When? Was it within twenty years?

Mrs. *Medhurst.* I cannot say when.

Att. Gen. How many years is it since the first eldest son was denied, that you know of? Was it twenty years ago?

Mrs. *Medhurst.* I do not know.

Att. Gen. Mention the name of an eldest son that you know has been denied?

Mrs. *Medhurst.* The eldest son of Mr. Medhurst.

Att. Gen. How long ago is that?

Mrs. *Medhurst.* I cannot tell.

Lord *Hardwicke.* Is your husband living, Mrs. Medhurst?

Mrs. *Medhurst.* No, my lord; my husband has been dead a great many years.

Lord *Hardwicke.* Did you ever know any body denied before? Was it in your husband's mayoralty that this person was denied?

Mrs. *Medhurst.* No.

Lord *Hardwicke.* Was it before or after your husband's death, that Mr. Medhurst was denied?

Mrs. *Medhurst.* It was since my husband's death, my lord.

Serj. *Skinner.* You have a husband now, have you not?

Mrs. *Medhurst.* I hope so, and a good one too.

Serj. *Skinner.* You will be lady mayoress again then.

Serj. *Eyre.* Mrs. Medhurst, I would ask you, whether, when you first knew Hastings, they did not admit every body on payment of a fine of 6*s.* 8*d.*?

Mrs. *Medhurst.* I do not know.

Mr. *Strange.* My lord, we shall trouble your lordship with but one witness more. Call Thomas Colebrand.

Thomas Colebrand sworn.

Mr. *Strange.* You are not a freeman of Hastings, are you?—*Colebrand.* No.

Mr. *Strange.* Have not you been apprentice there? How old are you?

Colebrand. I am about 80 years old, and was apprentice there about 60 years ago.

Mr. *Strange.* Have you been acquainted there ever since?

Colebrand. Yes; I live about sixteen miles from Hastings, and go to and fro frequently there.

Mr. *Strange.* Do you know what is the usage or custom, as to the admitting of freemen?

Colebrand. Yes; that freemen's eldest sons were intituled to freedoms.

Mr. *Strange.* Were they to be born within the town?

Colebrand. I never knew nor heard, that being born within the town, or at a distance, made any difference.

Mr. *Strange.* Had you any discourse with any ancient people about this matter?

Colebrand. Yes.

Mr. *Strange.* What account did you receive from them?

Colebrand. That the eldest sons of freemen, only, had a right to freedoms.

Lord *Hardwicke.* Who have you heard say so?

Colebrand. Old Waller, the town-clerk.

Lord *Hardwicke.* Who have you heard say so besides?

Colebrand. One Thomas Lovell, and Thomas Rainolds; he was a mayor; and I have heard the mayor and jurats say so several times.—I am not able to stand.

Mr. *Strange.* My lord will give you the liberty to repose yourself upon that stool.

Colebrand. I remember one Medhurst demanded his freedom.

Lord *Hardwicke.* How long ago was that?

Colebrand. About 60 years.

Lord *Hardwicke.* What passed upon that?

Mr. *Strange.* Was he the son of a freeman?

Colebrand. Yes. I cannot recollect what the dispute was; but they put him by at first.

Mr. *Strange.* What was the reason given?

Colebrand. I do not know; I was not in court.

Mr. *Clarke.* You say, he demanded his freedom; Do you know upon what right he demanded it?

Lord *Hardwicke.* How came you to know that Medhurst demanded his freedom?

Colebrand. My uncle Lovell was then mayor, and he told me so.

Att. Gen. My lord, the witness speaks to a particular custom only; I submit it to your lordship, whether this evidence of a particular fact—

Lord *Hardwicke.* I think it is evidence to a general right, and not to any particular custom.—What did your uncle Lovell say?

Colebrand. That it was an ancient right, that freemen's eldest sons should be made free.

Lord *Hardwicke.* How came there to be a dispute about this matter? Did your uncle Lovell tell you any thing about it?

Colebrand. He said, that Medhurst came and demanded his freedom.

Lord *Hardwicke.* How did you know afterwards that Medhurst was made free?

Colebrand. Because I afterwards saw him among the freemen, at the election of one Munts to be a member of parliament. He voted in the election.

Mr. *Strange.* This Rainolds was old Rainolds the town-clerk, who was admitted the 27th of May, 1662. He is the 15th man we spoke to.

Sir *T. Abney.* My lord, the 18th of March, 1674, this John Medhurst was admitted.—Read the entry of his admission. Is it a true copy?—*Cranston.* Yes.

Associate reads:

"Hastings, ss. March 18, 32 Car. 2, 1674. In full court then and there holden, before the said mayor and jurats, came John Medhurst, eldest son of Nicholas Medhurst, late a freeman of Hastings aforesaid, and prayed to be made free of the liberties of this town; whereunto he is admitted, took his oath, and kissed the mayor's cheek, *more solito*, and paid 6*s.* 8*d.* to the chamberlain for his fine."

Sir *T. Abney.* My lord, we shall not trouble your lordship to give any further evidence.

Att. Gen. May it please your lordship and you gentlemen of the jury; I am counsel in this case with the defendants: and, notwithstanding the long evidence you have heard, we doubt not but the defendants will make it appear, to your entire satisfaction, that they have no other view in defending this suit, but as by their oaths they are obliged to support the ancient rights of the corporation, and prevent innovations there; of which this pretended right of the plaintiff will appear to be one. And, gentlemen, the single question you are now to try is, Whether there be such a right in the town and port of Hastings, as the plaintiff has set forth in the Mandamus, as the foundation of his claim to be free of this town and port, which he insists belongs to him? And, gentlemen, as the whole depends upon this, Whether he has proved the right in the manner he has laid it in the Mandamus; it will be proper to state the custom to you, and then to observe, how far the evidence that has been given by the plaintiff has supported his right, as it is laid in the Mandamus?

And, gentlemen, as the plaintiff has laid it, four things are necessary to give a man a right to a freedom in Hastings:

1st, He must be an eldest son. It is, 'every person, being the eldest son of a freeman—'

2dly, He must be born in the town. 'And born within the said town and port.'

3dly, It must be after the admission and swearing of his father. For it is said in the Mandamus that the plaintiff has a right in respect thereof; and also,

4thly, Upon paying a reasonable fine, to be admitted and sworn into the place and office of one of the freemen of the said town and port.

So that, gentlemen, these four things are set forth in the Mandamus, and, as they allege, must concur, and are necessary to give a man a right to a freedom in Hastings: for it is, in respect thereof, and also upon paying a reasonable fine, that he is to be admitted and sworn into the place and office of one of the freemen of the said town and port.

If therefore, gentlemen, any of these four things, which they have laid as necessary, or if one of these things laid as necessary, they have failed in the proof of; for the right they lay is in respect thereof; my lord, I say, if every one of these things are necessary—They are,

1st, That he be the eldest son of a freeman.

2ndly, That he be born after his father's freedom.

3dly, That he be born within this town.

And the next qualification is, upon paying a reasonable fine.

These, gentlemen, are the four things they have thought proper to lay as necessary, in order to be admitted a freeman of this town and port

And, my lord, I humbly apprehend, they have given no proof at all of three of them; of one of them they have given but a very slight proof; and of one of the facts every evidence they have produced has given a direct proof to the contrary.

And, my lord, there is one thing more, which is absolutely necessary in order to be free of this borough, that they have not taken in at all; and that is, that he must be resident within this town; and as they have not made that part of their custom, they must undoubtedly fail. I said before, that they had not made residence a part of their custom; and we shall fully prove residence and inhabiting within the town to be absolutely necessary, and shew that they have laid a foundation, by their own evidence, that this is necessary.

My lord, I would beg leave now to consider their evidence which has been brought to support this right of the plaintiff.

And the first thing they have offered to your lordship and the jury, is a writing, which they are pleased to call the Customal; of which I admit it may be a copy, as they have set it out. And, my lord, your lordship hinted, that books of this nature should be read in evidence, because the Court could not see whether it was proper to be read or no, till they had heard it; which supposes (as I humbly apprehend) that we are at liberty to object to it.

And, my lord, I would submit it to your lordship, that, considering how it comes before the Court, and the part they rely on; what bad company it keeps, and what it is said to be, only an entry of a Customal; that it is no evidence at all, or, if it be any, not of the thing they bring it to prove. They open it as only an entry of some old Customal; and the ancienter it is, the better, provided it had been the old Customal; but this is not the thing itself, but only an entry in the books they produce; and it is very improper to have a Customal of the Cinque Ports entered amongst other things. It would have had great weight and honour, had it been kept in some proper place. It does not appear, but this may have been sewed in, by the fraud of an officer of the corporation. It is not the ancient instrument, but only a copy; and it does not appear how it might come there. I would therefore submit it to your lordship, whether, without they give an account that they have made search for the original, this is any evidence at all of what they bring it to prove?

But, gentlemen, if it be evidence at all, I submit it to your consideration, that as it is but an entry, and considering what company it is found in, that it can have no weight. If it had been found in an ancient corporation-book, amongst old entries and authentic records of the corporation, it would have come before the Court and you with some authority. But, as it is found amongst a hundred miscellaneous things no way relating to the corporation, copies of leases, the resolution of the judges upon the statute of queen Elizabeth relating to the poor, amongst many miscellaneous things; and very probably this might be sewed in the middle of the book, for it begins in the 200th page; I say, considering the company it keeps, and the trifling things it is found amongst, it can have no weight; I submit, it is a book that can have no authority at all.

But, gentlemen, if it be any evidence at all; I submit it to you, that it can be no evidence of the matters in dispute. It is not said to be the Customal of Hastings: that, gentlemen, we shall read to you: and though there may be some concurring customs which relate to all the Cinque Ports in general; yet, unless they can shew the same custom to be in all the ports, a custom that relates to the right of all can have no weight in this particular borough. To have made this evidence, they should have proved by ancient charters and records, that there is a concurring right in all the Cinque Ports to the election of freemen.

But, gentlemen, we shall lay evidence before you quite to the contrary. We shall shew you a custom relating to eldest sons in other ports, quite different from this; whereby it will appear, there are distinct rights in all the ports, and that it was never pretended there was one uniform right amongst them; though if this Customal be evidence, there must be a general right of all the Cinque Ports. But, gentlemen, taking it as evidence of the matters in dispute, even then it is far from proving most of the things they have laid, and but a very slight proof of what they rely on.

First, Here is a negative implied: "Possunt Majores et Ballivi, &c." After having set forth the particular persons having a right, it goes on and says, the eldest son of a freeman may be admitted, and that there are three ways of admitting him:

"Possunt Majores et Jurati, Ballivi et Jurati, &c. recipere et facere liberos tribus modis:

"Uno modo, per Nativitatem."

They are qualifications rather than rights: Possunt, &c. They may admit, and there is no distinction made between the eldest son and the other sons.

"Alio modo, per Libèrum Tenementum perquisit':

"Tertio, per Emptionem."

Such a man has no right; and yet the same words are used to those who come in by a freehold, or by purchase, as to those who are to be made free as eldest sons; and therefore it is no evidence of the right of an eldest son. Does it say, the eldest sons of freemen, born after their father's freedom, or within this liberty, that they shall be free?——

Lord *Hardwicke.* "Uno modo, per Nativitatem infra libertatem suam, si pater suus, tempore nativitatis suæ, fuit liber."

Att. Gen. My lord, I ask pardon; it turns

the other way; but I submit that it is no evidence of the eldest son. It does not say, "per Nativitatem" of the eldest son; if he had any son born after his being admitted into the freedom, he had a like right with the eldest son.

Lord *Hardwicke.* "Per Nativitatem infra libertatem suam."

Mr. *Strange.* Within his franchise.

Lord *Hardwicke.* I was thinking, whether it related to the freedom of the father.

Att. Gen. My lord, it is the "Libertatem" of the five towns, and not of this particular town. Talking of the general privileges of the Cinque Ports is an uncertain evidence of what they contend for. My lord, it goes on, and, so far as it is an authority established in all the ports, it says, He is to take an oath to maintain the liberties of the five ports, and especially of that port "ubi commoratur." It lays down, as the foundation of being free, that residence is absolutely necessary: he cannot be admitted, unless he be commorant. This, my lord, is the foundation we go upon, and I humbly apprehend we shall establish it by a very strong evidence.

My lord, I reckon that the 35th Article they have read entirely destroys the credit of this book. The words are, "Et quilibet gaudere intendens libertatem Quinque Portuum per Emptionem, inveniet quatuor manucaptores resident' de omnibus et singulis præmiss' perimplend'." They have not shewn that this Article has ever been complied with: they have never produced a time that such "Manucaptores" have been given, or that they were ever required of any person: and therefore it appears, that this pretended Customal has been always considered as a ballad, as I would consider it; for they would have observed it, if it had been the ancient law: and as they begin with this point, I submit it to your lordship, that it should not be left out of the case; besides, it is necessary that they be resident within the borough.

My lord, and gentlemen of the jury, as to the evidence that has been given from the entries read; in considering this corporation, one general observation may be made, that they are a very weak argument, if any, of what they are brought to prove.

My lord, the Mandamus admits a prescription; and in making out a custom in the case of a borough, they should give in evidence more ancient entries than any of these that have been read. They have gone no further back than 1608, although in the books there are much older entries. It may be said by the gentlemen of the other side, that going back a hundred years is a great way back; and if there are no entries before, it is sufficient: but it happens unfortunately for them, that in this corporation there are regular entries, from the year 1389, down to this time where they have thought proper to begin; and there is no instance or footstep of one claiming, or any entry taking notice of the right of an eldest son; and we shall read entries back for 200 years before they begin; which, I humbly apprehend, will be a strong objection to every entry they have read. A proof from 1608 is but a slight evidence of an ancient custom: and as they have proved another different custom, and there has been an intermission for so many years, this application of the plaintiff's can proceed from nothing else but the same litigious spirit that now prevails in the corporation. From 1691 to 1716, they have produced no footsteps of this right, for 25 years together. Can it be believed there was any right, when for 25 years no eldest son ever claimed a right; I say, when it appears nobody ever claimed it during that time, or, if they did, that they were refused? And, my lord, if they were refused, it is a stronger evidence.

Mr. *Strange.* You are mistaken, Mr. Attorney; there was John Geery admitted the 25th of October, 1707, and John Hussey the 5th of January, 1694; and we have several others.

Att. Gen. My lord, they have divided their evidence into three parts. In the first clause they have given no evidence——

Lord *Hardwicke.* That this, time out of mind, has been the custom.

Att. Gen. My lord, I would consider, how far their evidence supports the right the plaintiff has laid in the Mandamus, and what they have proved.

And, with great submission to your lordship, I must insist, that they have proved no more, than that eldest sons of freemen have been admitted for a fine of 6*s.* 8*d.* for the entries all are, on their praying to be admitted. And, my lord, it is no wonder; for we shall shew your lordship several hundred instances of persons who were admitted during the time these freemen were admitted, who were younger sons, for their fines of 6*s.* 8*d.* and they have produced but 14 instances of eldest sons; they have shewn they were admitted, and proved the fine paid by them to be 6*s.* 8*d.* We have other instances of sons who paid 13*s.* 4*d.* And therefore they might as well say, since there is proof, that every body paying 13*s.* 4*d.* has as good a right to be admitted as the eldest son of a freeman; for it is upon paying 13*s.* 4*d.* and the eldest son's admission is upon paying 6*s.* 8*d.* and if it be an argument of a right, it is a right by paying 6*s.* 8*d.* and every body, from their own account of the matter, has the same right for 13*s.* 4*d.*

My lord, in any of the entries, there is no distinction made in the admission between the sons and others; they all come and pray to be admitted; sometimes it is upon making it their humble request, sometimes upon their earnestly beseeching, that they are to be made free. They all ask in the same manner, whether they are sons or no, and are made free; and therefore, on their own entries, it appears to be a favour granted to eldest sons as well as others, upon their asking that they might have it; and therefore they are indulged with a lesser fine. They rely much on the fine of 6*s.* 8*d.*

but, if it proves any thing, it is (as I humbly apprehend) an argument against them.

My lord, in the next place, they have laid the custom to be, That this eldest son be born within the town, after the admission and swearing of his father; then it is that the son is to be admitted. But I do not remember that any one of their witnesses has confined it to this (I ask pardon if I have forgot); but they said, some of them expressly, that the being born after the father's admission, or within the town of Hastings, or out, made no difference. But they have endeavoured to supply this from their entries, by saying, that they are mentioned in the entries as eldest sons, and therefore they were admitted for 6*s*. 8*d*.: But this infers nothing.

Gentlemen, we shall shew you, both by entries and living witnesses, that there has been no distinction made between the eldest sons and other sons. It was no indulgence therefore to them; but the same to the other sons of freemen as well as the eldest.

And, my lord, we have many entries in the books, where only the sons of freemen are mentioned, without taking any notice of the eldest; which fully proves, that, if the point rested upon their being eldest sons, and born within the borough, after the admission and swearing of the fathers, they would have been particularly entered so in the books, and is a strong presumptive evidence against this pretended right of the plaintiff.

My lord, we have some instances where they are called the youngest sons, and were admitted for their fines of 6*s*. 8*d*. upon their coming and humbly praying that they might be admitted into the franchise of this town. That therefore being added, strongly shews, that they had no regard at all to what the gentlemen of the other side principally contend for, the right of eldest sons.

Besides this, gentlemen, we shall produce to you many living witnesses, very old ones, who will prove to you, that the mayor and jurats (the charter being silent in this matter) have time out of mind admitted persons at their pleasure, and this has been the ancient custom.

And, gentlemen, as their entries go no further back than 1608, so their living witnesses do not make it a jot the better. They do not say there is a right in this borough, in one instance, of their own knowledge; they do not say a word of any distinction, whether they are born after the admission and swearing of the father, or within the borough; and one of them expressly contradicts it. The evidence they have given is nothing but a tittle-tattle discourse of what they have heard, that the eldest sons of freemen had a right.

Therefore, gentlemen, as to the point in question, as they have entirely failed in their entries, and as the living witnesses they have brought to support it say little or nothing to the purpose,—one of them says, when he desired his freedom himself, the town clerk answered the mayor, Sir, you may do as you please. He did not ask him, whether he was born within the town, or after his father became free, and mentions a fact strong to the contrary. And, as some of their evidence comes down so low as 1722, one of them tells you, that when one was made a justice of peace, the eldest son of a freeman came to the court, and demanded his freedom, and was absolutely refused; and that he did it nine years ago, some of them say about twelve. So that, gentlemen, their living witnesses give but a slight evidence of one part of their custom; and as to the other part they have given no evidence at all. But we have many old witnesses, who will give your lordship and the jury no wrong views of the manner of admitting freemen.

My lord, we shall begin with the Customal, which is said in the title to be the Customal of this town; where the fullest directions are given as to the manner of electing freemen, and yet there is not a word said of the right of the eldest son.

We shall then, by reading many entries out of the corporation-books, shew, that no notice at all has been taken of eldest sons, in distinction to other sons; but that they have all been admitted promiscuously.

And then I shall trouble your lordship to say no more; but call our living witnesses, who will fully prove to your lordship and the jury, that the mayor and jurats have, time out of mind, admitted freemen at their pleasure; and that, besides being the eldest son of a freeman, and born within the town after the admission and swearing of the father, he has a right in respect thereof, but it must be on another condition, as necessary as any of the former, upon paying a certain fine. The Mandamus goes on and says, And also upon paying a reasonable fine; and the writ commands the mayor and jurats to admit him upon paying a reasonable fine. So that, my lord, I take it, by the writ, that fine is to be as necessary in order to the person's being admitted, as any of the other qualifications mentioned in the Mandamus: And, my lord, I humbly apprehend, they have proved it a certain fine, instead of a reasonable fine.

My lord, a copyholder lays a custom, to be admitted to copyhold lands upon paying a reasonable fine: If, upon the proof, it comes out to be a certain fine, he must undoubtedly fail; for in copyholds there is a known distinction between a reasonable fine and a fine certain.

And, my lord, I humbly apprehend, that, in point of law, cases of copyholders are parallel with the present.

There is as much a distinction between a fine certain and a reasonable fine in the present case, as in the case of a copyhold.

My lord, they have fully proved 6*s*. 8*d*. to be constantly paid, which is a certain fine, upon every admission of an eldest son. The mayor cannot contend; if they offer that fine, they have a right to be admitted. They therefore have failed in this point; it is not a reasonable, but a certain fine.

My lord, in the next place, we shall call evidence to prove, that, without residence within the borough, no one can ever be admitted a freeman of this town and port: and I take this, my lord, to be a general rule in most corporations; it being unreasonable that any man, who does not reside in the borough of which he is free, should have a share in conducting the affairs of that borough. And although the charter is silent in this affair, yet, my lord, besides the general reason of the thing, we shall shew your lordship and the jury a by-law made above two hundred years ago, by which it is declared, that if any one who was a freeman removed out of the borough, and should dwell out of the town, such freeman lost all his right. And we shall prove by several ancient living witnesses, that residence within the borough was always necessary, and that this has been the constant usage.

My lord, upon the whole circumstances of this case, we beg leave to insist, that they have not proved three parts of the custom, as they have laid it in the Mandamus; and that, as to the fourth part, they have proved directly the contrary: and therefore, gentlemen, we hope you will find a verdict for the defendants.

Serj. *Skinner*. May it please your lordship, and you gentlemen of the jury: I am also of counsel with the defendants: and Mr. Attorney General has been so very particular in answering the evidence, which has been offered to you by the gentlemen of the other side, as well as in stating the evidence we are to lay before you, that I need say little.—

Lord *Hardwicke*. You are not going to stay, Mr. Strange, I hope: we are now coming to a material part.

Serj. *Skinner*. My lord, the right the plaintiff has laid in the Mandamus is, that every person, being the eldest son of a freeman, born within the town, after the admission and swearing of his father into the office of freeman, has a right, in respect thereof, and also upon paying a reasonable fine, to be made free: and they have endeavoured to prove this right, first, by producing an old book, called the Customal, as an evidence of this right: but it is a suspicious authority; it has no date; and that, they say, is an evidence of its antiquity, but without any foundation from the book: there are several entries entered prior to it; it is not paged regularly; it is in the middle of the book, and yet it is marked fol. 1. And if we look into the thing itself, it tells us there are three ways of making free, viz. by birth, if born within the town, and after the swearing and admission of the father; by the purchase of a freehold; and by redemption.

My lord, they have shewn some instances of the first; but as to the second, they have shewn no purchaser of a freehold that ever was made free; and we shall prove many persons living in the town that have freeholds, that never were made free.

The next evidence they have given is from the entries of sons, who have been made free as sons of freemen; and this they would have us take as a proof of the custom, of a right in the eldest son, born after the freedom of the father, to be made free: for they say, it is in respect thereof; that he must be the son of a freeman, and born after his father was made free. And all the instances they have produced of this amount to no more, than that such a one was admitted, being the eldest son of a freeman, not because he was an eldest son, and born after his father was made free.

My lord, they have produced copies taken out of the register-books in Hastings, by which it appears, when these sons were baptized: but it is not given as a reason in any of these entries, that he was admitted into the freedom, because he was born there; though, in fact, it might be so, and that is the right they contend for.

My lord, I submit it to your lordship, that, as to the fine, nothing conclusive can be drawn from thence, that there is any right in the eldest son of a freeman. The fine paid by him is 6*s*. 8*d*. 'quia pater suus liber est;' that is the reason. No; he is not admitted into the freedom because his father was a freeman; but he is admitted for 6*s*. 8*d*. not because his father was a freeman. This therefore does not shew that he had a better right than any body else: and none but the second instance they read, James Lasher, among all the entries, was admitted upon any other terms than his humble petition and prayer to be made free. He, indeed, instantly required the freedom, and by the consent of all he was admitted. In all the other instances it is said, at his humble request and desire he is admitted: nobody insisted on, or demanded this right.

My lord, as they have laid the right, there is a further qualification necessary, viz. on payment of a reasonable fine: and I submit it to your lordship, that they have proved it a fine certain; and that therefore nothing is left to the mayor and jurats in this affair, but to admit the person upon paying 6*s*. 8*d*. and claiming his freedom.

But, my lord, we say, a further qualification is absolutely necessary, and that is residence: and this appears from an entry in this very Customal they have produced. And, my lord, nobody is ever admitted, but on taking an oath to observe the statutes, orders, and by-laws of the borough *ubi commoratur*; and therefore the person admitted into the freedom must be commorant in the place of which he is free. And, my lord, by a by-law of the 12th of April, the 15th of queen Elizabeth, they were not only to be commorant, but to continue to live there; and if any one admitted went and lived out of the town a year and a day, he was to be excluded from any privilege or freedom within that borough: and this by-law has been constantly observed; and yet, my lord, the plaintiff Moore, they do not so much as pretend that he is resident within this borough. We contend not, whether the sons of freemen are intituled to freedoms; but we say, that freemen's sons and foreigners are in the same

right; they pray alike, if it seems fit, and so pleases the mayor and jurats: and the mayor and jurats have rejected the sons of freemen: and it is only a compliment to the sons of freemen to pay 6*s.* 8*d.* and 13*s.* 4*d.* is paid if a foreigner is admitted.

Gentlemen of the jury, we shall lay our evidence before you; and then we doubt not but you will be convinced, that the right is the same to a foreigner as to the son of a freeman, and therefore that you will find for the defendants.

Lord *Hardwicke.* I own there are difficulties upon the point of a reasonable fine, and that of commorancy. I have taken residence in all the ports to be essential.

Sir *T. Abney.* My lord, we apprehend 6*s.* 8*d.* to be a reasonable fine, from the reasonableness of the sum.

Lord *Hardwicke.* The notion of law is, sir Thomas Abney, that there is an essential difference between a fine certain and a reasonable fine.

Sir *T. Abney.* My lord, we can prove that different sums have been paid upon the admission of sons.

Mr. *Strange.* We have one instance of a son who paid 20*s.* for a fine.

Lord *Hardwicke.* Then as to the point of commorancy.

Mr. *Marsh.* My lord, the ports in general preclude no member for non-residence. I have known them vote for mayor, that have not been resiant.

Lord *Hardwicke.* In some of the ports a distinction is made between voting for mayor and members of parliament.

Serj. *Eyre.* My lord, they cannot shew, within ten years, an instance of one son's paying more than 6*s.* 8*d.*

Lord *Hardwicke.* Go first to that point of the fine.

Att. Gen. We shall begin with our by-law, where the words *ubi commoratur* are.

Lord *Hardwicke.* One by-law has been mentioned, that a freeman of one of the ports shall have a right to be admitted in another; that is never used.

Henry Carlton sworn.

Sir *T. Abney.* Were not you a freeman? Are you not disfranchised?—*Carlton.* Yes.

Sir *T. Abney.* Are you not promised to be restored?

Att. Gen. What book is that?

Carlton. One of the corporation books of Hastings.

Att. Gen. Where had you it?

Carlton. It came from the town-clerk's office.

Att. Gen. Read the by-law of the 15th of queen Elizabeth.

Associate reads:

"Hastings, *ss.* Electio Ballivi tent' die Dominica prox' post, &c. 12 die mensis Aprilis, anno regni Reginæ Elizæ 15, Elect' Major' pro hoc anno.

"It is decreed, That if any freeman, now or at any time hereafter an inhabitant of this town, shall depart or dwell out of the town, by one year and one day, he or they, so dwelling out of the town, shall lose his or their freedom."

Att. Gen. How old are you, Mr. Carlton?

Carlton. I am 80 years old.

Att. Gen. Where have you lived? Where was you born?

Carlton. I was born within a mile of Hastings. My father came to live at Hastings when I was about fifteen years old; and since I have lived greatest part of my time at Hastings.

Att. Gen. Do you know what the custom is in Hastings, as to the admission of freemen?

Carlton. Yes; I was a freeman myself, and have been at several meetings of the mayor and jurats.

Att. Gen. Pray now, during your whole time, did you ever know any one made free that was not resident?

Carlton. No, never, except honorary freemen.

Att. Gen. Have they any right to vote in your borough at elections?—*Carlton.* No.

Att. Gen. But as to those that are really free, did you ever know any, that were not inhabitants, vote at elections?—*Carlton.* No.

Att. Gen. Did you ever know any, that were not inhabitants, demand it?

Carlton. No, nor I never knew it demanded.

Att. Gen. Is it not necessary, in order to be free, that they should inhabit within the town?

Carlton. I always thought so.

Att. Gen. Did you ever hear any thing to the contrary?—*Carlton.* No.

Serj. *Skinner.* You know no instance, in your time, of any persons made free, who were not resident?

Carlton. No, none but honorary freemen, such as members of parliament and captains of ships.

Att. Gen. Did they own that the eldest sons had a right?

Lord *Hardwicke.* Whether they had a right to demand a freedom, although they were not resident?

Att. Gen. Have they a right to demand it?

Carlton. No, nobody that don't live there.

Mr. *Lacy.* Is there not a roll of the freemen, by which they call over their names upon elections?—*Carlton.* Yes.

Mr. *Lacy.* Are the honorary freemen called over with the others upon such occasions?

Carlton. No.

Mr. *Lacy.* Does not a freeman by non-residence lose his freedom?—*Carlton.* Yes.

Mr. *Lacy.* Do you know any instance?

Carlton. Yes, Jonathan Stevens.

Mr. *Lacy.* Was he a freeman?

Carlton. Yes.

Mr. *Lacy.* Was he out of the freedom a year and a day?

Carlton. Yes, and lost his freedom.

Mr. *Lacy*. Did you know one Milward?

Carlton. Yes, he was a jurat.

Sir *T. Abney*. I would ask you, Sir, as to the eldest son of a freeman; has not he a right?

Carlton. No, no right, without the favour of the mayor and jurats.

Lord *Hardwicke*. Examine him to the point we are upon.

Att. Gen. Can the mayor and jurats elect an eldest son, if he is not resident?

Carlton. No.

Lord *Hardwicke*. You said, Mr. Carlton, you had known persons not resident admitted?

Carlton. Yes, my lord, honorary freemen.

Lord *Hardwicke*. Could not they as well admit the son of a freeman not resident?

Carlton. No, I never knew it in my life.

Att. Gen. Could not a son of a freeman be made free, though not resident, as well as another?

Lord *Hardwicke*. Mr. Attorney, to support the qualification of residence, some right must be set up.

Att. Gen. Honorary freemen have no right in point of law. The universities give degrees to persons who are not members; it is a compliment, and they do not vote.

Mr. *Strange*. It is not worth their while to come down to vote.

Lord *Hardwicke*. Honorary freemen vote at elections.

Serj. *Eyre*. I submit it to your lordship, that we are upon the right, and therefore ought to examine to that.—I would ask you, Mr. Carlton, has any body non-resident a right to be elected a freeman?

Carlton. Nobody has any right.

Mr. *Strange*. Did you ever know the eldest son of a freeman refused, because he was not resident?—*Carlton*. I never knew it asked.

Serj. *Eyre*. A man who is free forfeits his freedom by being out of the borough; and yet you would have it that persons non-resident have a right.

Mr. *Strange*. That, Mr. Serjeant, is by your by-law, not by a custom.

Mr. *Clarke*. Do you know no person, though non-resident, that voted?—*Carlton*. No.

Mr. *Clarke*. Do you know one Thomas Hatcher? Do not you remember his coming to vote, though he lived out of the corporation?

Carlton. No.

Lord *Hardwicke*. That by-law, will it take away a right?

Serj. *Eyre*. We do not rely upon that, my lord.

Robert Bartholomew sworn.

Serj. *Skinner*. How old are you, Mr. Bartholomew?

Bartholomew. I am eighty-two years old.

Serj. *Skinner*. Where have you lived?

Bartholomew. In Hastings, almost all my time.

Serj. *Skinner*. Have you been there at their meetings?—*Bartholomew*. Yes.

Serj. *Skinner*. Did you ever know one admitted, not living in the borough?

Bartholomew. No.

Serj. *Skinner*. Has any person a right to be admitted a freeman, that does not live there?

Bartholomew. He that lives there, to be sure, has a right.

Lord *Hardwicke*. Examine him to the fact, what he has known.

Serj. *Skinner*. What right has any body to be made free?

Bartholomew. They are made free by the mayor and jurats.

Serj. *Skinner*. Did they live in the town when they were made free?

Bartholomew. I never knew any body made free, that lived out of the town, in my life, except honorary freemen, and them we used to call Ablocates.

Serj. *Skinner*. Have you known no persons non-resident, made free, to vote, or do a corporate act?—*Bartholomew*. No, none.

Sir *T. Abney*. Who has a right to be made free of your town?

Bartholomew. Any body the mayor and jurats please.

Mr. *Strange*. Have not you sometimes taken it into your head to fancy the eldest son of a freeman has a right?

Bartholomew. No, I never had such thoughts.

Mr. *Strange*. Did not you say so?

Bartholomew. No.

Mr. *Strange*. Have not you said so to Robert Evernden?—*Bartholomew*. No.

Mr. *Strange*. Nor to Mr. Broadway?

Bartholomew. No.

Mr. *Strange*. Did you never say so in their hearing?—*Bartholomew*. No.

Mr. *Strange*. Nor to Mr. Dodson?

Bartholomew. No.

Mr. *Strange*. They are in town.

Bartholomew. I know they are; I see them.

Mr. *Strange*. Have not you declared to them, that the eldest son of a freeman has a right?

Bartholomew. Never since I was born.—I have heard my father say, a man could not be made free, that would not swear himself worth 100*l*.

Mr. *Strange*. Why do you take more money of other people than of freemen's sons?

Lord *Hardwicke*. It is inconsistent to say there is no such thing as a right, and yet commorancy is necessary, and honorary freemen are admitted, though no person of right can demand his freedom: But to say they are all at the pleasure of the mayor and jurats, and yet residence is necessary, is a contradiction.

Att. Gen. My lord, they cannot be admitted if they have a right, if they have not that of residence.

Lord *Hardwicke*. If you put it in that way, you must go into the custom. Go on your own way.

Serj. *Eyre*. The gentlemen of the other side, my lord, are not able to shew a freeman's eldest son admitted for any other fine than 6*s*. 8*d*.

Sir *T. Abney*. Yes, we can produce the book; it will shew its antiquity; it is scarce able to

be read.—Read the entry of John Hall, admitted for a fine of 20*s*.

Lord *Hardwicke*. Don't go into the reply, before they are gone through the defence.

Att. Gen. What book is that?

Cranston. One of the corporation-books.

Att. Gen. You had it from the town-clerk, from among the records of the town?

Cranston. Yes.

Mr. *Marsh*. What book is that, Mr. Attorney?

Att. Gen. It is the Customal of Hastings; that is a translation.

Mr. *Marsh*. What language is it in?

Att. Gen. It is in old French.

Mr. *Strange*. That bound up with ours is a translation, and that you say is the original.

Att. Gen. I believe so.

Mr. *Strange*. (Looks upon it.) This Customal is false.

Att. Gen. It is a translation, and may be wrong translated.

Mr. *Strange*. We'll see that.

Att. Gen. Read it.

Mr. *Holmes* reads—(The copy in old French.)

"The usage of Hastings time out of mind—

"Die Maii, anno 30 Elizæ—.

Att. Gen. Read that relating to the making of a freeman.

Mr. *Holmes* reads:

"If a foreigner resides in Hastings for a year and a day, he may come before the bailiff and jurats, and be admitted to the freedom upon taking an oath."

Att. Gen. In order to be admitted a freeman, he is to stay a year and a day.

Serj. *Eyre*. Have you looked over that book, Mr. Holmes?—Mr. *Holmes*. Yes.

Serj. *Eyre*. In order to be a freeman, he is to come and reside a year and day; and if he be of a good conversation, then he is to be admitted.

Serj. *Eyre*. Is there any other custom in that book relating to making of freemen?

Holmes. No.

Serj. *Eyre*. Read the entry of the 36th Edward 3.

Associate reads:

"Memorandum, quod in pleno hundredo tent' apud Hastings, viz. die Dominica prox' ante festum Annunt' beatæ Mariæ, anno regni Regis Edwardi 3tii à Conq' 36to, coram Ball' et tot' Communitat', Willielmus de Bourn, et Johannes fil' ejus, recep' sunt ad libertat' de Hastings, et dederunt communitat' unam pipam vini, de quo satisfec'."

Lord *Hardwicke*. That is the admission of particular persons. Is there any fine in that admission?

Serj *Eyre*. A pipe of wine, my lord.

Att. Gen. We shall shew, my lord, a concurrent proof of 6*s*. 8*d*. paid as a fine certain.

Lord *Hardwicke*. Can you shew any admissions of persons who were eldest sons, without paying any fine at all?

Att. Gen. My lord, it is improper to call such an one an eldest son, if the father had no other son.

Lord *Hardwicke*. There two persons were admitted: but in that entry neither is mentioned to be the son of a freeman.

Att. Gen. It is for a pipe of wine; that, my lord, is one of the rights they admit upon.—Read the admission of William Cobden, fol. 147. He was admitted the 7th of May, the 7th of James the 1st.

Associate reads:

"Hastings, *ss*. Ad assemblat' tent' ibidem 7° die Maii, 7° Jacobi Regis primi, Gulielmus Cobden admissus est ad libertatem hujus villæ, et sacramentum suum more solito præstitit, et osculatus est malam dextram Majoris secundum usum, pro fine suo; quia filius liberi hominis."

Lord *Hardwicke*. The Customal of the five ports does not fix what the fine shall be.

Mr. *Strange*. My lord, proving that all the sons are admitted, is proving that the eldest son is admitted.

Lord *Hardwicke*. You have laid it 'in respect thereof,' which you need not have done. I cannot imagine why it was laid so, 'in respect thereof.'

Serj. *Eyre*. Turn to fol. 147. Read the admission of John Sand, the 14th of July, the 8th of James the 1st.

Associate reads:

"Hastings, *ss*. 14 Julii, 8 Jac. 1, in plena Curia venit Johannes Sand, et petit libertatem hujus villæ, et admissus est ad libertatem, quia pater suus liber erat, et sol' 6*s*. 8*d*. et fecit inde sacramentum, et osculavit malam dextram Majoris more solito."

Mr. *Strange*. We may admit many of these entries, Mr. Attorney, if you will tell us for what purpose you read your entries over again.

Att. Gen. These were admitted as sons of freemen. We read them, to shew a different custom from what you have laid.—Read Nathaniel Lasher the son. He was admitted, 'quia filius liberi hominis.' Turn to fol. 175.

Associate reads:

"Hastings, *ss*. 1613, 11 Jac. 1, 26 Martii, *hoc anno*, came Nathaniel Lasher, son of James Lasher, jurat, before Mr. Mayor and his brethren, and prayed to be admitted to the liberty and freedom of this town; and was admitted, sworn, kissed the right cheek of Mr. Mayor, 'more solito, pro fine 6*s*. 8*d*. quia filius liberi 'hominis,'" &c.

Att. Gen. Turn to fol. 179. Read John Isted.

Associate reads:

"Hastings, *ss*. 1614. 'Decimo quarto die 'hoc anno,' came John Isted, and craved to be admitted to the liberty and freedom of this town; and by Mr. Mayor and his brethren was admitted, and sworn, and kissed the right

cheek of Mr. Mayor, 'more solito, pro fine 6s. 8d. duntaxat, quia filius est liberi hominis hu-jus villæ.'"

Lord *Hardwicke*. What men do you admit there?

Att. Gen. My lord, we admit men as the sons of freemen, and that pay 6s. 8d.—Now read the entry of the 31st of March, 1638, of the admission of James Batcher, jun.

Serj. *Eyre*. James Batcher, jun. son of his father.

Mr. *Strange*. That is just the same as you read before.

Serj. *Skinner*. Read William Lovell.

Sir *T. Abney*. We read that.

Associate reads:

"Hastings, ss. March 31, 1638, 14 Car. 1. At this court, James Batcher, jun. son of his father, a freeman, is now made also free, for his fine of 6s. 8d. took his oath, and kissed the mayor's right cheek, *more solito*," &c.

Serj. *Skinner*. I believe we must trouble the doctor once more.

Att. Gen. Mr. Carlton, you told me you had lived all your time in Hastings, except about fourteen years; you say you have been at their elections; pray, who has the right to be elected a freeman of this borough during your time?

Carlton. Those whom the mayor and jurats please.

Att. Gen. Has not the eldest son of a freeman a right to be admitted?

Carlton. No; if there had been such a custom, it would never have been denied.

Att. Gen. Did you ever know any body, that was an eldest son, insist on this right?

Carlton. Yes; one Evernden insisted on it, and was refused.

Att. Gen. How long is that ago?

Carlton. It was before I was a freeman, about 35 years ago.

Att. Gen. So you say Evernden demanded his freedom, and was denied; Do you know this of your own knowledge?

Carlton. I have heard it, but do not know it.

Att. Gen. Who have you heard it spoke by? Are the persons dead or living?

Carlton. I have heard it by some persons living.

Att. Gen. Was it the general reputation in the town, that this Evernden had no right?

Carlton. Yes; he was looked on as an impudent fellow, for coming and demanding it.

Att. Gen. Did you ever know any body admitted upon this right?—*Carlton*. No.

Att. Gen. How long have you been a jurat?

Carlton. Ever since the year 1701.

Att. Gen. That is 35 years ago. Did ever any body before this Evernden come and demand to be admitted as an eldest son?

Carlton. I do not know any one.

Serj. *Parker*. Suppose the eldest son of a freeman apply to the mayor and jurats to be admitted, and they think fit to admit him; how do the corporation proceed on that occasion?

Carlton. They apply to the mayor and jurats separately at their houses, and ask that favour of them; and if they consent, then they come to the court-hall, and ask it of them again.

Serj. *Parker*. What follows upon that?

Carlton. Then the mayor asks the gentlemen, if they consent, and are satisfied, and whether they are willing the person should be made free; and then they put it to the vote.

Serj. *Parker*. Do they make any distinction between the eldest and youngest sons?

Carlton. No; the majority determines whether the man shall be made free or no.

Serj. *Eyre*. If any other person applies to be made free who is not a son, what steps do they take then?—*Carlton*. Just the same.

Serj. *Eyre*. You are the eldest son of a freeman, are you?

Carlton. Yes; but not born within the town.

Sir *T. Abney*. Mr. Carlton, did you know John Geery?—*Carlton*. Yes.

Sir *T. Abney*. Was not he admitted to the freedom in your time?—*Carlton*. Yes.

Sir *T. Abney*. Was not he the eldest son of a freeman?—*Carlton*. Yes.

Sir *T. Abney*. Did you know John Oliver, John Chambers, Benjamin Stevens, Philip Stevenson, William Shorter, and Jacob Fantley?—*Carlton*. Yes.

Sir *T. Abney*. Have not all these persons been admitted in your time, as eldest sons?

Carlton. Not because they were eldest sons, but because the mayor and jurats thought fit to admit them.

Sir *T. Abney*. You said you did not know, but you believed Evernden was refused; pray, do you believe or fancy any other person, who was an eldest son, was ever refused?

Mr. *Strange*. Do you remember Boykett the dissenter, that applied to be admitted to his freedom?—*Carlton*. No.

Mr. *Strange*. Do you know no enquiry made by the town clerk, whether he was the son of a freeman, or not?—*Carlton*. No.

Mr. *Strange*. And upon admitting freemen, you say, that is the only question put by the mayor, Gentlemen, are you satisfied? and if any objects, he puts it to the vote?

Carlton. Yes.

Mr. *Marsh*. Do you remember Tho. Lovell?

Carlton. Yes; he was mayor several times.

Mr. *Marsh*. Do you remember Mr. Waller, the town clerk?—*Carlton*. Yes.

Mr. *Marsh*. How long is it since he was town clerk?

Carlton. Since I was upon the bench.

Mr. *Clarke*. Do you remember nothing of Boykett?—*Carlton*. No.

Mr. *Clarke*. Nothing of his being refused?

Carlton. No.

Mr. *Clarke*. Call Robert Bartho'omew again. (He not appearing.)

Mark Bayley sworn.

Mr. *Marsh*. Are you a freeman?

Bayley. I was one, and am disfranchised.

Serj. *Skinner.* How long have you known Hastings?—*Bayley.* Ever since I was born.

Serj. *Parker.* How old are you?

Bayley. I am 76 years old.

Att. Gen. How long have you lived there?

Bayley. I have lived there all my time.

Serj. *Skinner.* You have been a jurat there, have not you?

Bayley. Yes, six or seven years.

Att. Gen. How do you make freemen?

Bayley. You must apply to the mayor and jurats, and desire that they would please to let you be made free.

Serj. *Skinner.* Suppose I was the eldest son of a freeman, might I come and demand to be free?

Bayley. No; there is no such thing as demanding it without the consent of the mayor and jurats.

Serj. *Parker.* When you come before the mayor and jurats, does the mayor put the question, whether the person shall be admitted, or no?

Bayley. He says, that such a man desires to be made free, if you think fit of it.

Serj. *Parker.* The eldest son can demand it, if he thinks fit, cannot he?

Bayley. No, no; we have nothing at all of an eldest son.

Sir *T. Abney.* Are not you the eldest son of a freeman?—*Bayley.* No.

Sir *T. Abney.* How long have you been a jurat?—*Bayley.* Six or seven years.

Sir *T. Abney.* How long have you been a freeman?—*Bayley.* 48 years clear.

Sir *T. Abney.* What profession are you of?

Bayley. I am a seaman.

Sir *T. Abney.* Pray, Mr. Bayley, were you always resident in the borough? Did you live there all your life?—*Bayley.* Yes.

Sir *T. Abney.* What, when you were at sea?

Bayley. No, but at all times when I was not at sea.

Thomas Caswell sworn.

Serj. *Eyre.* How long have you known Hastings?

Caswell. I was born there, and have lived there almost all my time.

Serj. *Eyre.* Have not you been a freeman and a jurat?—*Caswell.* Yes.

Serj. *Eyre.* Are not you disfranchised?

Caswell. Yes, I am now disfranchised.

Serj. *Eyre.* When were you made a freeman?

Caswell. In 1717.

Serj. *Eyre.* When a jurat?

Caswell. In 1726.

Serj. *Eyre.* Pray, Mr. Caswell, how do they make free?

Caswell. When I was made free, I asked the mayor and jurats, although I was the eldest son of a freeman.

Serj. *Eyre.* Acquaint my lord and the jury, what happened on your applying to be made free.

Caswell. I applied in 1717 to the mayor and jurats for their good will to make me free.

Serj. *Eyre.* Is there any difference between an eldest son and another in making free?

Caswell. No difference at all, but that one pays half the fine, and the other the whole; but the consent of the mayor and jurats is the same.

Serj. *Eyre.* As to non-residence, do they ever make any persons free, who are not resident within the borough?

Caswell. They never make any free, but such as are resident.

Serj. *Eyre.* Has any person a right to be made free, or is it in the pleasure of the corporation?

Caswell. It is entirely in the pleasure of the mayor and jurats.

Serj. *Eyre.* A man by purchasing a freehold, has he any right?—*Caswell.* No.

Att. Gen. Is he free of the other four Cinque Ports?—*Caswell.* No.

Mr. *Strange.* Where were you born?

Caswell. At Hastings. My father was a freeman when I was born, and many years before. That is my father's copy. (Producing it.)

Mr. *Strange.* Did you take up your freedom by that copy?

Caswell. I wish I could; I should have had it sooner.

Mr. *Strange.* How old were you when you were made free?

Caswell. I was twenty-six years old.

Mr. *Strange.* Did you ever know an eldest son of a freeman denied?

Caswell. No; but it is in the breasts of the mayor and jurats, whether he shall be free or no.

Mr. *Strange.* Was your father the son of a freeman?—*Caswell.* I cannot tell.

Mr. *Strange.* How comes it upon your father's admission to be marked the day he was born?—*Caswell.* It is the time I was born.

Mr. *Strange.* How came it there?

Caswell. I wrote it from a Bible where my father had entered it.

Mr. *Strange.* For what purpose?

Caswell. I wrote it down now, upon this summons, to shew how old I was.

Mr. *Clarke.* What is the difference between the fine paid by freemen's sons, when you were admitted, and now?

Caswell. When I was admitted it was 6*s.* 8*d.* and now it is 20*s.*

Mr. *Clarke.* How long has it been 20*s.*?

Caswell. Twelve or fourteen years.

Mr. *Strange.* If the mayor insists upon 10*l.* you pay it?—*Caswell.* The usage is 6*s.* 8*d.*

Mr. *Strange.* But he might refuse it now?

Caswell. I do not know.

Mr. *Strange.* Suppose he had asked ten guineas?

Caswell. You ask foolish questions.

Mr. *Strange.* It is not your business to tell me so.

Caswell. You do it to aggravate your case.

Mr. *Strange.* I ask you, is it not a custom for the eldest son to be admitted, upon paying

such reasonable fine as the mayor shall think fit?

Caswell. No; all the custom is, that 6s. 8d. is paid by sons, and 13s. 4d. by others; and now the distinction is 20s.

Mr. *Strange.* Do you know any instance of persons admitted for a fine of 20s.?

Caswell. I know but of one instance.

Mr. *Strange.* So you take it, no person has a right to be made free?

Caswell. Not without the consent of the mayor and jurats.

William Bourne sworn.

Serj. *Parker.* Do you know Hastings?

Bourne. Yes.

Serj. *Parker.* How long have you known it?

Bourne. Fifty-eight years.

Serj. *Parker.* What method must a man take to be admitted a freeman of Hastings?

Bourne. The way is to get the good will and liberty of the mayor and jurats.

Serj. *Parker.* Supposing an eldest son applies to be made free, does he apply to the mayor and jurats in the same manner as another?

Bourne. Yes, he must make the same application.

Att. Gen. Has he any right, without the leave of the mayor and jurats?

Bourne. None that I know of.

Att. Gen. Were you the eldest son of a freeman?—*Bourne.* Yes. I was.

Att. Gen. Did you demand it as a right?

Bourne. I demanded it as a favour.

Att. Gen. Had you any right, in case the mayor and jurats had refused you?

Bourne. No.

Serj. *Eyre.* Are the freeholders within the borough made free?—*Bourne.* No.

Lord *Hardwicke.* Suppose a man has an estate, and lives in the town.

Bourne. It is all one, my lord,

Lord *Hardwicke.* Did you ever know one of them admitted?—*Bourne.* No.

Att. Gen. Did they admit you immediately on your application? or was there any dispute, whether you should be admitted or no?

Bourne. Yes; it was two or three court-days before they admitted me; I believe, in all, about six weeks.

Lord *Hardwicke.* When were you admitted?

Bourne. In 1701, my lord.

Serj. *Skinner.* So it was six weeks you was asking this favour?—*Bourne.* Thereabouts.

Serj. *Skinner.* You went to their houses, to ask leave that you might be free?

Bourne. Yes.

Serj. *Skinner.* Is it the custom for any persons that are non-resident to be made free?

Bourne. No.

Serj. *Skinner.* Did you ever know the eldest son of a freeman refused?—*Bourne.* No.

Serj. *Skinner.* Nor any others?

Bourne. Yes, some.

Serj. *Skinner.* Did you ever know any demand it as eldest sons?

Bourne. I cannot say.

Mr. *Strange.* Do not you expect to be made free again?

Att. Gen. He expects to be a freeman before your client.

Lord *Hardwicke.* Were you ever a jurat?

Bourne. No.

Lord *Hardwicke.* Or a common-councilman?—*Bourne.* No.

Att. Gen. My lord, we rest it here.

Sir *T. Abney.* My lord, I beg leave to trouble your lordship with a word by way of reply: and, notwithstanding what has been offered by the gentlemen of the other side, I agree, that, upon the Mandamus, we have laid down four things as necessary qualifications for claiming a freedom in this borough:

1st, That he must be an eldest son.

2dly, That he be born within the borough.

3dly, It must be after the admission and swearing of his father. And,

4thly, It must be upon paying a reasonable fine.

And, my lord, I humbly apprehend, that if they have proved that any other of the sons, or that all the sons, are intituled as well as an eldest son, it will not at all affect our custom: or, if we prove our custom larger than we have laid it, that it will not at all impeach our custom or claim as an eldest son.

My lord, a man lays a custom, that he has a right of common for sheep, and proves the right to be for horses, cows, and sheep too; this shall not impeach his custom.

And therefore, if any evidence has been given to your lordship and the jury, that all the sons of a freeman are intituled to their freedoms, then, my lord, *à fortiori*, the eldest son is intituled.

Lord *Hardwicke.* It is laid 'in respect thereof,' sir Thomas Abney.

Sir *T. Abney.* My lord, I humbly apprehend, those words relate to the act of the father. It is, "every person, being the eldest son of a freeman, and born within the said town and port, after the admission and swearing of his father into the place and office of one of the freemen of the said town and port, has a right, in respect thereof."

My lord, that, in common understanding, cannot be in respect of his being born an eldest son, but in respect of his father's being sworn and admitted a freeman at the time of his birth.

Lord *Hardwicke.* Has a right in respect of his being born after his father's admission and swearing.

Sir *T. Abney.* And, my lord, the Customal, to make out that fact, says, "Uno modo, per Nativitatem infra libertatem suam, si pater suus, tempore nativitatis sum, fuit liber:" If the father was a freeman at the time of the son's birth, then he is to be made free.

My lord, we have supported this custom in the strongest manner, by forty entries, by a great number of living witnesses, and by their own witnesses, Customal, and entries too;

insomuch that one Robert Everuden is the only person they have been able to shew that was ever refused.

My lord, we have gone so far back as the year 1588 with our entries, which, we humbly apprehend, is a very strong proof of an ancient custom; we have brought it down to within 20 years of the present time; and, in all that space, they have not been able to shew one instance of an eldest son that was ever refused; and the entries are equally full, and have shewn in the clearest manner, that the eldest son of a freeman, born within the borough, and after the swearing and admission of his father, was always admitted.

My lord, as to what Mr. Attorney says, that the rules laid down in the Customal as to the making of freemen, that these are qualifications rather than rights, and that we have not stated our custom properly, and are gone on account of the commorancy; my lord, I do admit, that if the witnesses had come up to that point of commorancy, we must have given it up.

But, my lord, I must beg leave to insist, that, although Mr. Attorney has bestowed so much learning and time upon the words "ubi commoratur," to shew that residence arises from the Customal, and from this article, which we have laid down as the foundation of our right; and that the person admitted is to take an oath to be true and faithful to the borough where he dwells; yet, my lord, the words "Possunt Majores et Jurati," &c. not only imply a right, but they bespeak a qualification: and, my lord, we have fully shewn them to be rights that were never contested.

My lord, another objection that has been made by the gentlemen of the other side, is, that, as we have laid it, it is necessary a reasonable fine should be paid upon the admission of every eldest son; and that we have given evidence only of a fine of 6*s.* 8*d.* and that we should have given evidence of different fines paid, in order to take in the custom as we have laid it. But, my lord, I submit it to your lordship and the jury, whether the sum required is unreasonable or no? Is this so? Can it be thought so? If on a special verdict it were to be found, that every man had a right upon paying 6*s.* 8*d.* I humbly apprehend, the quantity of the sum must shew that it is a reasonable fine.

My lord, as to the by-law they have read, that, if any freeman depart out of the town for a year and a day, he loses his freedom; with great submission to your lordship, I apprehend it is not at all applicable to the present case. It does not say one word of what is necessary in order to a man's being elected a freeman. We say, that in order to be admitted a freeman, a man must be an eldest son, born within the borough after his father's freedom: but they do not read one word out of this by-law, that no man shall be elected a freeman, unless he be resident; but it says, that, if any freeman go and dwell out of the town for a year and a day, he shall for ever lose his freedom.

And as to their living witnesses, they, I humbly apprehend, will have little weight with your lordship and the jury. They are not so free as ours; they are men disfranchised to serve a particular purpose. It is true, they are legal witnesses; but it will go to their credit, and the jury will think they are under a bias, and that they are to be made free again, and therefore are prejudiced, and are determined to keep the borough in the same narrow hands they now have it. They have all said, that none but the mayor and jurats can give a right; and that, if I was to be let into the freedom to-morrow, (as Mr. Attorney told you) there is no right but at the will and pleasure of the mayor and jurats only. With respect to one of the jurats, and his own right, Robert Bartholomew, it will have weight with the jury, that he is disfranchised; but much greater, to prove him perjured, which we shall do by three witnesses of undoubted credit, whom we shall call to contradict all this talk that he tells you, that there is no such thing as a right but at the will and pleasure of the mayor and jurats.

Gentlemen, we have no other evidence to tronble you with, but to contradict Bartholomew; and then, gentlemen, we shall leave it upon the strength of the case; and we make no doubt, but you will be of opinion, that the plaintiff has an undoubted right, and therefore will find a verdict for him.

Mr. *Broadway* sworn.

Mr. *Strange*. Pray, Mr. Broadway, do you know Robert Bartholomew?—*Broadway*. Yes.

Mr. *Strange*. Had you any discourse with him about the right of freemen's eldest sons?

Broadway. Yes; I was in company with him about two years ago, at the sign of the Blue Anchor in Hastings; he then told me, that the eldest sons of freemen had a right to be admitted to their freedoms.

Mr. *Strange*. Did he say any thing, that they must come cap-in-hand to the mayor and jurats, and beg the favour that they would please to admit them?

Broadway. No, nothing at all of that.

Mr. *Strange*. Did he say any thing further about the right of eldest sons?

Broadway. He said, he could remember the time particularly well, when they were admitted without any dispute.

Serj. *Parker*. Mr. Bartholomew, is that true? Were you at the Blue Anchor in Hastings with Mr. Broadway?

Bartholomew. No, there is no such sign in Hastings.

Sir *T. Abney*. You must call John Sargent.

Att. Gen. Mr. Broadway says, you told him, that you remembered the time particularly well, when the eldest sons were admitted without any dispute.

Bartholomew. I never told him so.

(Here a person who was upon the pannel whispered to one of the jurymen.)

Serj. *Skinner*. You must not talk to the jury: are you a Hastings man? ——— No.

Juryman. He is upon the pannel.

Serj. *Skinner*. Did he say any thing to you about this cause?—*Juryman*. No.

Att. Gen. Mr. Bartholomew, do you remember that you said so, or no?

Bartholomew. Last summer I was there with Dodson; but I never heard any such thing mentioned.

Mr. *Marsh*. How came you to tell them, they wanted to pry into the corporation-secrets?

Sir *T. Abney*. Did not you tell him you was admitted upon that right?

Bartholomew. No.

Sir *T. Abney*. Who is that person?

Bartholomew. The minister of the parish.

Serj. *Skinner*. So he came to pump you?

Mr. *Marsh*. He knows he told them so.

Henry Dodson sworn.

Mr. *Marsh*. Mr. Dodson, was you at Sargent's with Robert Bartholomew?

Dodson. Yes, about two years since.

Mr. *Marsh*. Was Mr. Broadway, the minister of the parish, there?

Dodson. Yes, he was in company with Bartholomew and me.

Mr. *Marsh*. Pray, what was the conversation in relation to the right of freemen?

Dodson. I met with Mr. Bartholomew and Mr. Broadway at Sargent's. I told him, the reason of our meeting was to enquire of him what was the right of freemen's sons. He said, that the eldest sons of freemen had an undoubted right to claim their freedoms; and he said, that formerly he had been requested to take up his freedom, but that he had refused it, because in war time the freemen were burthened with taxes, watching and working night and day; but that afterwards he had thought proper to accept of it, and was admitted for a bottle of wine. He said, he applied to the mayor and jurats, and was admitted.

Mr. *Marsh*. Did you say any thing more to him?

Dodson. He told me this; but I said nothing to him, but took a memorandum in writing of it.

Mr. *Marsh*. Did he tell you any thing more of the right.

Dodson. He said, he looked upon the sons of freemen to have a right.

Lord *Hardwicke*. Was this at the time Broadway was with you?—*Dodson*. Yes.

Mr. *Marsh*. Was Bartholomew sober?

Dodson. Yes; it was in the morning; he had drank nothing but one glass of wine.

Serj. *Skinner*. Did the parson go with you to find out evidence? You was the attorney; did the parson go as another agent to find out more evidence?

Mark Whales sworn.

Mr. *Strange*. Mr. Whales, do you know that old gentleman?—*Whales*. Yes.

Mr. *Strange*. Have you heard him make any declaration concerning the right of an eldest son to be free?

Whales. About 19 years ago, he said that the sons of freemen had a right.

Mr. *Strange*. Did you never hear him talk about an eldest son?

Whales. I do not remember.

Lord *Hardwicke*. That variance of the fine, I wish you would apply yourself to that point, Mr. Strange. The admission seems to have been upon a certain fine, 6*s*. 8*d*.

Mr. *Strange*. May it please your lordship, and you gentlemen of the jury; you have heard a very long evidence; and as the gentlemen of the other side have been pretty minute in their objections, it will be proper for me as shortly as I can to reply to them.

And, my lord, the chief thing the defendants contend for is, that there is no such thing as a right to a freedom in this borough; and that, though the electing members to represent them in parliament be one of the principal privileges of every freeman, yet that there is no person whatsoever has a right to come and claim 'the 'consuetudo regni;' but the mayor and jurats may at their pleasure chuse members to represent this borough in parliament, and confine the election in their own hands, and may chuse them when, and in what manner, and what persons they please.

But, my lord, to support this right, they should have laid their finger upon something that would have intituled them to this right; and yet they have shewn no circumstance upon the face of the earth that can possibly entitle them to it.

My lord, there is no corporation in England, but where if a man serves an apprenticeship, he has, by that apprenticeship, a right to his freedom, and the sons of freemen have a right to come and demand their freedom. But here, my lord, according to their account of the matter, in no shape or sort you can ever acquire a right: a most extraordinary privilege indeed! and, my lord, I would beg leave to make this observation, that, as they began with attacking what sir Thomas Abney set out with, the ancient Customal; so it appears, they have treated it in a ludicrous manner, and with no regard at all. They tell us it is bound up with a great many miscellaneous papers of no use, and therefore it can have no authority. And, my lord, this observation would have been material, if it had come out of our custody; for then we should have shewn why it kept no better company. But, as it comes out of their own custody, can we oblige them to keep their own book better than they have thought fit to keep it? Besides, my lord, it goes equally to their own book which they have produced; it is made up in the same miscellaneous manner as ours is; and therefore this objection is as

strong against the authority of their book as ours.

But, my lord, I submit it to your lordship, that there is no foundation at all to quarrel upon this account.

Suppose it had been found loose, in no company at all, and without any cover; is it the worse, if it had been loose, for being stitched? It rather argues it to be a book of great authority, and that this was done to preserve it; because, whilst it lay about loose, it was liable to decay; and in order to preserve it, it was thought proper to bind it up.

My lord, they say further, it would have been material, if it had been bound up with ancient charters and records of the corporation: my lord, I looked at it, and saw that the very charters themselves are bound up with it.

My lord, they tell us, this Customal, produced by them, has not at all left it clear, that the eldest sons of freemen have a right; and they say, that whatever our Customal may prove, that our entries, which have been read, are no proof of any right; they pray to be admitted, and therefore they have no right.

But, my lord, I beg leave to observe, that it is not a phrase that runs through all the entries: in some of them, they are admitted upon their instantly requiring it; in others, it is *secundum consuetudinem.*

But, my lord, suppose it was so in all the entries, it is the common form of them, and of the admission of all the copyholders in England.

Lord *Hardwicke.* You need not labour that, Mr. Strange.

Mr. *Strange.* My lord, they say, there is a circumstance of our proof, which we have entirely failed in, and which they would prove for us, or that they shall help it out; and that is, that the party is to be commorant within the borough: and to prove this, they have read a by-law, that says not one word that he is to be commorant; but that, if a man goes out of the town for a year and a day, he shall lose his freedom.

But, my lord, I humbly apprehend, that a new by-law, that appears before your lordship and the jury to have been made but a year and half, and contradicts an old custom, is the strongest evidence in the world, that it was the custom till the by-law was made.

To what purpose else was the by-law made? They had better have rested it upon the general consent, than have introduced a new bye-law, which, upon the face of it, appears to contradict an old custom.

My lord, Mr. Attorney, I think, was pleased to admit, that there must be a Customal; and that, taking this for evidence of the matters in dispute, and so far as it is an authority, it says, that the comers in *per emptionem* must have been commorant within the borough a year and a day; and he says, the reason of this is, that they should have some knowledge of the affairs of the borough before they are made free

But, my lord, this commoranoy is not confined to the comers in *per emptionem.* The words of the 39th Article are, "Et nullus fiat liber per Emptionem, quousque in Portu vel Membro, ubi libertatem desiderat, per unum annum et unam diem permansit, et si bene et honeste habuerit," &c. To what end should it be put, that a man who comes into the freedom *per emptionem* should be resident a year and a day? ——

Lord *Hardwicke.* It infers nothing one way or other.

Mr. *Strange.* But one born out of the town, and bred out of the borough, it is not necessary for him to be resident, if the mayor and jurats please to admit him; and yet every one born in the town, though he be the son of a freeman, must undergo the same experiment by being resident.

My lord, the 34th Article, as to the words *ubi commoratur,* it is only a part of the oath every freeman is to take upon his admission, "That he will be good and faithful to the king of England and his heirs, and that he will observe the statutes of the five ports, and especially of that port where he resides." And it is not to be inferred from thence, that at the time of his admission he must be commorant, but that he will observe the statutes of the borough, and consult the good of it.

My lord, I do not apprehend, that by the 38th Article, a man, by being free of one port, is intituled to his freedom in all the other ports. The words are, "Et ipsi qui sunt in omnibus et singulis formis prædictis facti liberi in aliquo Portu sive Membro, habeant libertatem consuetam in omnibus aliis Portibus:" i. e. As a member of one of the ports, he shall have the general liberty belonging to them, but not that he shall be a member of all the five ports.

My lord, as to the words 'in respect thereof,' they insist, that as we have laid it, they exclude all persons from being intituled to any freedom, but the eldest sons of freemen.

But I submit it to your lordship, that as in the Mandamus other circumstances are afterwards mentioned, that those words 'in respect thereof,' are to be referred to the last antecedent words, to the freeman's being born within the liberty, and after the admission and swearing of his father: and unless something be brought to make it improper to refer it to them, I submit it to your lordship, whether it would in a right have the consequence they contend for.

My lord, the Mandamus says, that the eldest son is intituled; but this is not an exclusion of the other sons: for, if all my sons are intituled to their freedoms, then my eldest son most certainly is.

If it had been a question, whether all the sons of a freeman were intituled? and upon the face of the thing, the man sets out only that he was the eldest son, he would not enlarge the custom; because it would have required more proof: but, if he had been the youngest son, he must have said that all the sons are intituled,

and there must have been an averment, to make it square with our case. They have not read above one entry of the youngest sons of freemen. If we had laid it more confined, we might have failed upon the proof: but as the proof has come out, it would have been enough to have said he was *filius* of a freeman.

My lord, I have but one thing more to trouble your lordship with: the gentlemen of the other side insist, that a previous application to the mayor and jurats is necessary in order to a man's being made free; and they infer from thence, that it is not right, but mere favour in the mayor and jurats. Even where a man has the most indisputable right in the world, by servitude, he must produce and prove his indentures, and his master certifies that he has served an apprenticeship faithfully; yet even in this case, according to them, the mayor says to the jurats, Gentlemen, are you satisfied? and if they are, they admit him.

But, my lord, it does not at all follow, that, because their opinion is to be taken as to the admission, that therefore they have a right to refuse an apprentice, who has by servitude acquired a right to his freedom; but only whether they shall admit him as he states his case.

My lord, having troubled your lordship so long, I will beg leave only to say one word more as to the fine of 6*s*. 8*d*.

They object to us, that we laid it as part of the custom, that the eldest son is to be admitted on paying a reasonable fine, and that it comes out to be a fine certain. But I submit it to your lordship, that 6*s*. 8*d*. is a reasonable fine; the sum is reasonable; and that the constant payment of it upon every admission is an evidence what is a reasonable fine: And I rely on those instances we have read, that that is the reasonable fine; and they are brought only to warrant that there is a reasonable fine to be taken; and that therefore we are not wrong in saying, we have a right upon paying a reasonable fine. If we had laid it to have been upon a fine certain, they would have objected it to us, and they would have shewn, that at one time a pipe of wine was the fine; and at another time 20*s*. was the fine; and therefore it would have been dangerous to have laid 6*s*. 8*d*. to be a certain fine.

Lord *Hardwicke*. You have shewed no evidence, Mr. Strange, that it has ever been varied.

Mr. *Strange*. They have taken 6*s*. 8*d*. always upon the admission of sons.

Lord *Hardwicke*. One of the witnesses says, now the fine as a freeman's son is 20*s*.

Mr. *Strange*. That, my lord, is a reasonable fine, and no certain sum. That in a church-lease was a reasonable fine at one time, which is not so now; and the corporation think that 20*s*. now is not more than 6*s*. 8*d*. was formerly.

My lord, we therefore submit it to your lordship, upon the circumstances of this case, that we have fully proved our issue; especially as they have not shewn who is intituled to a freedom within this borough.

Lord *Hardwicke*. It will be proper to consider, how much of this ought to be left to the jury. Thus much is fact, and that they must enquire of:

First, Whether it appears from the evidence, that there is any custom within the borough, that the eldest son of a freeman, born after the admission and swearing of his father, has a right? I think the words 'in respect thereof' are answered; the confining it 'in respect thereof' must refer to the two qualifications, that of being born within the borough, and after the father's freedom. I think it is no objection, that they have proved the right for all the sons: For, as Sir Thomas Abney insisted, if a man has a right of common, and lays it for sheep, and proves he has a right for sheep, cows, and horses too, he shall prevail; and that I think the same with the present case; for the custom's extending to other persons does not prove this bad, because laid more confined. The jury therefore must determine, whether there be any custom within the borough for an eldest son to be free.

Secondly, Then they must enquire, whether being born within the town, after his father was made free, be necessary qualifications of the custom, or not? For you have laid the right to rise from thence. That was not necessary, but that you have laid it so.

Thirdly, it will be necessary for the jury next to consider, if they believe resiance to be another necessary qualification?

If the jury be of opinion, that either of these two qualifications, of being born within the town, or after the father was made free, are necessary; or that that point commorancy is not necessary; then they must find a verdict for the plaintiff.

But, if they should be of opinion that the two former are not essential qualifications, and the last is necessary; then they must find for the defendants; and in that case that point must be saved.

The point of laying a reasonable fine must be saved, if the jury find a verdict for the plaintiff.

I own, I am not satisfied: What Mr. Attorney General said, that there is great difference between a reasonable fine and a fine certain, has weight in it.

A reasonable fine is such as the law will judge to be so; the general usage of the kingdom is, that it shall not exceed two years and a half's rent. But what a reasonable fine is, and who shall be the judge of it, the law has established no rule: And if so, the question will be, Whether the jury should find that the reasonableness is to be judged of by the proportion of the sum? and that point to be reserved for the determination of the Court, Whether there be a variance from the fine laid in the issue?

If the jury find for the plaintiff, there must be a rule for the Postea to stay; and that point to be saved, for the opinion of the Court.

Mr. *Marsh.* In laying the evidence before the Court, my lord, their own witnesses said, that fourteen years ago there was a fine of 20*s.* paid.

Att. Gen. There is but one instance, and that was in 1730.

Mr. *Strange.* We take it, Mr. Attorney, upon your own witnesses evidence.

Lord *Hardwicke.* He did not say how many instances.

Att. Gen. My lord, he said one instance, and no more.

Lord *Hardwicke.* The books ought to be looked over for this purpose. I apprehend you would have shewn instances where there had been a variance of the fine. Call that witness again: It was Thomas Caswell.—Mr. Caswell, you mentioned the fine now taken to be 20*s.*

Caswell. Yes, my lord.

Lord *Hardwicke.* How many instances do you know of 20*s.* taken for the fine?

Caswell. But one, my lord; it is Mr. Hall.

Mr. *Strange.* Why did you say, that for about fourteen years 20*s.* had been taken?

Caswell I said, for about nine or ten years 20*s.* had been taken; but it was always 6*s.* 8*d.* besides.

Mr. *Strange.* You are disfranchised, are you not?—*Caswell.* Yes.

Mr. *Strange.* Were you not a little while ago?—*Caswell.* Yes.

Lord *Hardwicke.* I will not have another examination of the witnesses.

Mr. *Strange.* My lord, I only asked him what they asked me.

Att. Gen What was that?

Mr. *Strange.* Nothing at all.

Mr. *Marsh.* What do you know of the others who were admitted? What did they pay?

Lord *Hardwicke.* Gentlemen of the jury, This is a writ of Mandamus, brought by the plaintiff Henry Moore to require the defendants, the mayor, jurats and commonalty of the town and port of Hastings, to admit him into the place and office of one of the freemen of that town: And the writ sets forth, that the plaintiff is the eldest son of a freeman, born within the town after the admission and swearing of his father; and has a right, in respect thereof, and also upon paying a reasonable fine, to be admitted a freeman of the town.

And, gentlemen, the matter comes to this issue, whether time out of mind there has been a custom, that every person, being the eldest son of a freeman, born within the town, after the admission and swearing of his father into the place and office of one of the freemen of the said town and port, has a right, in respect thereof, and also upon paying a reasonable fine, to be admitted into the place and office of one of the freemen of the said town and port?

That, gentlemen, is the issue you are to try; and you have, no doubt, observed on what points this question turns.

It appears, that Hastings is one of the Cinque Ports, and it is besides a corporation.

Gentlemen, the point insisted on by the plaintiff's counsel, and the first thing produced to be considered by you, is a book consisting of various parts: one of the parts is a Customal of the town of Hastings, translated out of Latin into English,—in an old hand,—of what authority is not certain.

At last it comes to this, that in the book appears to be an ancient entry of the Customal of the five ports and their members, the time whereof the memory of man is not to the contrary.

From what authority it comes, is not certain; but it is an ancient book of the town, and kept among the records of the corporation; and the entry is in this book. There are several other papers bound up with it; leases, the rental of an estate, a copy of a mortgage, and some other things.

But that does not take off from the credit of it, if it has any credit in itself; for the town-clerk might bind up what he thought fit with it.

Gentlemen, the entry relied on for the plaintiff is this:

'Concerning the making of freemen in the Cinque Ports and their members:'

"The mayor and jurats, the bailiffs and jurats, in every town and port where there is a mayor and a bailiff, may receive and make freemen three ways:

1st, "Per Nativitatem infra libertatem suam, si pater suus, tempore nativitatis sue, fuit liber."

By birth within their liberty, if his father, at the time of his birth, was a freeman.

Another way is by a freehold purchase.

And the third way is by buying a freedom.

And it goes on and says, "And it is to be observed, no man shall enjoy the freedom of any of the ports, unless he take an oath to be good and faithful, to the end of his life, to the king of England and his heirs; and to maintain the liberties of the Cinque Ports, and especially of that port where he is commorant; that he will be obedient to the mayor and jurats; that he will pay scot and lot, &c. that he will not do any thing to the reproach of the mayor, bailiff, and jurats where he is commorant, but give notice to them."

And there were other clauses read; and one of them is, "That they who are made free in this form in one of the ports, shall enjoy the accustomed freedom in all the other ports."

And there is another clause, "That no man to be made free by redemption, shall be admitted into the freedom, till he has dwelt in the borough by the space of one year and a day."

These, gentlemen, are the entries relied on by the plaintiff. After reading these entries, the counsel for the defendants objected, that this was not a particular Customal of Hastings, and therefore not so conclusive. But Hastings in the Mandamus is suggested to be one of the five ports.

Gentlemen, they have given evidence of three different species of persons admitted under this right.

The first is, where persons were admitted as eldest sons of freemen, born within the

borough, and after the swearing and admission of the father.

The next is, where the admission has been of eldest sons, born within the borough; but it does not appear whether before or after the admission of the father. And,

The third species, of persons who were admitted as the sons of freemen in general; but they have not shewn that they were born in the town, or after the father's freedom.

As to the first species of persons, who were admitted as eldest sons of freemen, born within the town, after the admission and swearing of the father; I think they read in number eleven instances: I need not repeat them. The first is Jeremiah Bryham, admitted the 12th of James the 1st, anno 1614; the last was Benjamin Medhurst, the 6th of May, 1721.

The next species is of eldest sons admitted, and mention is made in the entries that they are eldest sons: but it is not clear, whether they were born before or after the father's freedom; but it appears they were born in the town. They are in number fourteen. They begin the 7th of May, 1608; and the last instance of them is the 21st of Nov. 1678.

The third species is of admissions of persons, mentioning them generally as the sons of freemen, without distinguishing between the eldest and other sons; but it does not appear, whether they were born in the town, or after their fathers became free. They are in number twenty. So that the entries they have read are in all forty-five, under the several species I have mentioned to you.

Gentlemen, after reading these entries, to shew that such persons have been admitted, mentioning them as eldest sons, or sons, the fine that has been taken upon their admissions appears to be 6s. 8d. in all they have read; and at the same time other persons were admitted with them, but in the entries notice is not taken of them as sons of freemen; and as to them, the fine is 13s. 4d.

Gentlemen, besides these entries, they have called several living witnesses.

The first is Robert Evernden. He says, he is sixty-six years old, and has lived in Hastings fifty years. He says, he has heard Thomas Moore, an old jurat, say, that the eldest sons of freemen had a right, and that the usual fine paid upon the admission of an eldest son is 6s. 8d. and that he has also heard John Moore, another jurat, say the same thing. He says, they are both dead, and that John has been dead about ten or twelve years. He says nothing about the qualification of residence, or being born in the town after the freedom of the father.

The next witness they call is John Couzens. He says, he is sixty years old, and that he always understood, and has heard several ancient people say, that the eldest son of a freeman had a right by his father's charter; and takes it, that the father must be free before the birth of the son. He says, he heard both Thomas and John Moore say the eldest son had a right, and never heard of an eldest son's being refused till the plaintiff Moore; and says, he heard Dr. Fiat say, the eldest son had a right by his father's charter.

Their next witness is Drew Shengleton. He says, he is sixty-nine years old, has lived fifty years in Hastings, and speaks to the same purpose with the two former witnesses; and says, it has been the discourse twenty years back, that freemen's eldest sons had a right.

John Boykett is the next: and he says, he is above sixty years old; that he was born in Hastings, and has lived almost all his time there; that about forty years ago he went into the court-hall, and asked to be made free as a favour; but the mayor was against it; and then the town-clerk asked, if his father was a freeman; the mayor said, No; and Waller replied, Then you may do as you think fit; to which the mayor answers, I will not give my consent to make a dissenter free for 40l. He says, one Medhurst, the only son of a freeman, demanded his freedom about fifteen years ago, and was refused.

Joan White says, she is 62 years old; has heard her father say, the eldest son of a freeman had a right.

Anne Sargent says, she is 63 years old; that she has heard John Stevens, who was several times mayor of Hastings, say, that it belonged to the eldest sons of freemen to be free.

Susannah Medhurst is the next witness. She says, she is 66 years old; that her former husband was mayor of Hastings, and is dead; and that she has heard him often say, the eldest son had a right, and that they could not deny him; and says, that at that time it was generally granted to eldest sons.

Gentlemen, the last witness for the plaintiff is Thomas Colebrand. He says, he is 80 years old; that when he lived there 60 years ago, it was the usage, that eldest sons of freemen had a right; that old Waller the town-clerk, T. Lovell, and T. Rainolds, told him so; and that he has heard the mayor and jurats say so several times. He says, that about 60 years ago, one Medhurst, who was the eldest son of a freeman, came and demanded his freedom; and Lovell the mayor told him, it was an ancient right, that the eldest son of a freeman should be made free; and that afterwards he saw Medhurst among the freemen at an election, and vote for members of parliament. Gentlemen, it appears upon the admission of this Medhurst, which they have also read to you, that he paid a fine of 6s. 8d. And this, gentlemen, is the whole of the plaintiff's evidence.

For the defendants, the gentlemen of the other side insist, there is no right at all to freedoms in this borough; but that all admissions depend upon the will and pleasure of the mayor and jurats; that they may admit or refuse a stranger or a son, just as they please: and they insist, that, if there be such a right, that it is restrained by these two qualifications, of being born in the town, and after the swearing and admission of the father.

And another qualification insisted on by the defendants is, that he should be resiant within the borough.

Gentlemen, the matter of law which will arise, if you are of opinion that there is such a custom, will be, whether the fine be a reasonable fine, as the plaintiff has laid it, or whether this is a certain fine of 6*s*. 8*d*.

Gentlemen, the first evidence that has been produced for the defendants is an old book, in which there are entries of an old Customal, and a by-law, dated the 12th of April, the 15th of queen Elizabeth; by which it is decreed, "That, if any freeman, now or at any time hereafter an inhabitant of this town, shall depart or dwell out of the town by the space of a year and a day, he or they, so dwelling out of the town, shall lose his or their freedom for ever."

I own, I do not know so extraordinary a custom any where: for a man to have a right to be admitted a freeman, who was not resident; and yet the corporation could disfranchise a man for non-residence.

But this by-law will not be of much weight one way or other. It only shews the act of the corporation to disfranchise any person that goes out of the borough.

They have also produced for the defendants another book, in which, they say, is contained the usage of Hastings time out of mind; and they have read out of it an entry in old French, the purport of which is, "That if a foreigner resides in Hastings for a year and a day, he may come before the bailiff and jurats, and be admitted to the freedom upon taking an oath."

The witness, who read this, swore there was no other evidence in the book relating to the making of freemen.

They read this, to shew that there is no right of freedom at all in this borough, if a stranger, who has lived in the town a year and a day, may come before the bailiff and jurats, and they may admit him upon taking an oath.

Gentlemen, the next evidence the defendants have produced is from entries of the admission of sons of freemen, without mentioning that they were either eldest or younger sons; and the plaintiff admits many of these entries; and they only shew, that the fact is, that other sons, as well as eldest sons, have been admitted for a fineof 6*s*. 8*d*.

The next evidence is from living witnesses: and the first witness they have called is Henry Carlton. He says, he is 80 years of age, was born within a mile of Hastings, and from 15 years old has lived there. He has been at several meetings of the mayor and jurats, and has known several honorary freemen made, (members of parliament, and captains of ships) who did not reside; and yet he says, he never heard of any who do not live there, that had a right to demand their freedoms; and persons who have lived there, and been sons of freemen, have been refused, and has known instances. He says, he never looked upon it that any person had a right, unless according to the pleasure of the mayor and jurats. He says, one Evernden, who was an eldest son, applied to the mayor and jurats to be made free, and was refused; and that this was about 35 years ago. He says, he has been a jurat from 1701; and tells you, that the common way of making free is, for a man, if he be an eldest son, to apply to the mayor and jurats, and ask the favour of them to be made free; and if they consent, he comes to the court, and asks it again; and if any difference arises, they put it to the vote; and this, he says, is the method of proceeding in the case of admitting freemen's eldest sons. He says, he was the eldest son of a freeman, not born in the town; that he was admitted, and paid but 6*s*. 8*d*. Therefore this is not to be applied only to the right of eldest sons born within the borough, he says, that several such have been admitted, but not upon the foot of right.

Their next witness is Robert Bartholomew, aged 82. He says, he was made free by the favour of the mayor and jurats; and that, in his opinion, nobody but those whom the mayor and jurats please have a right. He was asked, whether he did not tell Mr. Broadway and Mr. Dodson, that he remembered the time particularly well, when the eldest sons of freemen were admitted without any dispute? And he says, He never told them so.

Mark Bayley is the next. He is 76 years of age, and has lived all his time in Hastings, and has been a jurat six or seven years. He says, there is no such thing as demanding a freedom by right, and that the eldest son of a freeman has no more right than any body else.

Their next witness is Thomas Caswell. He says, he has been a freeman ever since the year 1716; that he is the eldest son of a freeman, and applied to the mayor and jurats for their good-will to make him free; and knows no difference between the admission of an eldest son and another, but paying half the fine. He says, he never knew any persons made free but who were resident in town, nor upon a freehold; and that it is entirely in the pleasure of the mayor and jurats to make free. He says, when he was admitted, the fine was 6*s*. 8*d*. but since they have taken 20*s*. But being called on to name instances, he says, he knows but of one instance.

William Bourne is the next: and he says, he has been a freeman, but never a jurat; that he has known the town 58 years; and that the way to be admitted is to get the good-will of the mayor and jurats. He says, he is the eldest son of a freeman, but knows of no right, and that he requested it as a favour; and before they admitted him, they considered of it two or three court days: and he says, that no non-resiants can be admitted.

This, gentlemen, is the whole of the defendants' evidences.

By way of reply, the plaintiff has called two witnesses to contradict what Robert Bartholomew has sworn.

Mr. Broadway is the first: and he says, that

he was in company with Bartholomew about two years ago, at the Blue Anchor in Hastings; when he told him, that the eldest sons of freemen had an undoubted right, and that he was admitted upon that right, though he had before declined it, by reason of the taxes.

Mr. Dodson was also present, and he says the same.

Upon this Bartholomew was confronted with Dodson and Broadway: and he said that he was not with them at such a place, and that there is no such sign as the Blue-Anchor at Hastings. He denied he said the eldest son had a right; but owns he said, he thought they came to pry into the secrets of the corporation.

Upon this evidence, gentlemen, it will be proper for you to consider,

First, Whether you believe there is any positive right in this borough for an eldest son to be free? As to the right that has been set up for the defendants, That all is at the will and pleasure of the mayor and jurats, and that there is no right at all to be free; it is such an extraordinary custom as I hardly ever heard of, and know no such instance any where. Some right there must be, although the magistrates may have taken it into their own hands. Therefore the question will be, Whether you believe there is a right in the eldest sons to be free?

Gentlemen, you have heard the ancient Customal read. This, to be sure, is some evidence, but not conclusive; and it is the Customal of the five ports in general, and there are separate customs in each port.

And here is one method laid down of an admission of freemen in right of a purchase, and that, they shew you, has never been complied with.

But they have read many instances of persons who were admitted upon the first right; thirty-five they have read who were admitted as eldest sons, or sons: of the first species, they read eleven in number; and you must take it together with what the living witnesses tell you, who all say, that they have taken the custom to be so, that the eldest son has a right.

What Boykett swore is very material, that, when he applied to be admitted, Waller the town-clerk asked, if his father was a freeman? The mayor said, No; to which Waller replied, Then do what you please.

Gentlemen, for the defendants, the witnesses have sworn, that they know of no right to freedom in this borough, but at the pleasure of the mayor and jurats; and that during their time, and though particular mention is made in the entries that they are sons, in respect of the difference of the fine, and that they are admitted for paying 6*s*. 8*d*. they tell you it is not at all material being the son of a freeman.

Gentlemen, in the next place you will consider, if you believe there is any right for the eldest sons of freemen, then whether it be necessary that he be born in the town, and after his father was made free; because the plaintiff has made it necessary for him to prove that he be born there after the admission of his father, by laying it 'in respect thereof.' And as to that, the ancient Customal says, "Uno modo, per nativitatem infra libertatem suam, si pater suus, tempore nativitatis suæ, fuit liber:" That every body has a right by birth within their liberty, if his father at the time of his birth was a freeman. This the ancient Customal mentions; but this is not conclusive. Therefore, gentlemen, you will consider it with the evidence of the living witnesses, and none of them have made that a necessary qualification. One of them said, that the father must be free before the birth of his son; and another said, it made no difference, whether born before or after: But none of them said positively, that he must be born within the liberty, after the admission and swearing of his father. Therefore you will consider, whether these two qualifications are proved essential to the right to be made free.

In the next place, it will be proper to consider, that the Customal supposes that no man has a right, unless he be resiant; and it tends to enlarge the freedom of the borough, to let in persons not resident: But very little positive evidence has been given of that.

The defendants' witnesses have sworn positively, that the mayor and jurats can admit none but resiants; and yet, that they may admit honorary freemen who are non-resident: Though the ancient Customal has an express clause in it, which supposes, that, in order to be free, a man must be resident. They swear to pay scot and lot, and to maintain the liberties of the five ports, and particularly of the port where they are commorant; which implies, that every freeman should be commorant. And the counsel for the defendants have mentioned, that every freeman is to take an oath to maintain the rights of the five ports, and especially of that port where he is commorant.

You will consider therefore, gentlemen, whether this imports as a necessary qualification, that in order to be free, a man must be resident?

The counsel for the plaintiff did not ask the witnesses as to this point of residence.

The witnesses for the defendants all swore, they took it to be so; but yet that honorary freemen, who were not resident, might be made free.

It will be proper for you therefore, gentlemen, to consider,

First, if you believe, on this evidence, that there is no right in the son of any freeman to demand his freedom of the mayor and jurats, but that all depends on their pleasure:

But, if you believe that there is a right in the son of a freeman, and that the mayor and jurats cannot deny him his freedom: Then

You will consider, whether the two qualifications, of being born in the borough, after the freedom of the father, are necessary, or no?

If you believe they are not necessary; but that whether he be born in or out of the borough, or before or after he was made free, makes no difference; in that case you must find for the defendants.

But if you believe a right in the sons of freemen; and that being born in the borough, and after the father's freedom are essential:

Then you will consider the matter of residance:

And if you believe residance not necessary, then you must find a verdict for the plaintiff.

But, on the other hand, if you believe being born in the borough, and after the father's freedom, are not necessary; or, if necessary, that it is equally necessary that the persons should be resident; then you must find a verdict for the defendants.

Verdict for the Plaintiff.

Foreman. We find, that the eldest son of a freeman, born within the borough, after his father's freedom, has a right.

Lord *Hardwicke.* What do you find as to the commorancy?

Foreman. My lord, we find residence not necessary; and that the eldest son, born within the borough, after his father's freedom, has a right upon paying a customary fine.

Lord *Hardwicke.* What do you find the fine?

Foreman. We find the fine to be *6s. 8d.* and that that is reasonable.

Lord *Hardwicke.* That point of the reasonable fine must be saved for the opinion of the Court; and let the Posten stay.

N. B. The Special Verdict was afterwards solemnly argued, and determined by the Court in favour of the plaintiff Moore.

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498. Proceedings in the Trial of Captain JOHN PORTEOUS, for Murder.* Published by Order of the House of Lords: 10 GEORGE II. A. D. 1736.

CURIA JUSTICIARIÆ S. D. N. Regis, Tenta in Novo Sessionis Domo Burgi de Edinburgo, Quinto Die Mensis Julii, Millessimo septingentesimo trigesimo sexto, per Honorabiles Viros, Andream Fletcher de Milton, Justiciarium Clericum, Dominum Jacobum Makenzie de Roystoun, Magistrum Davidem Erskine de Dun, Dominos Gualterum Pringle de Newall, et Gilbertum Elliot de Minto, Commissionarios Justiciariæ dicti S. D. N. Regis.

Curia legittime affirmata.

Intran'

JOHN PORTEOUS, lately one of the captain lieutenants of the city guard of Edinburgh, present prisoner in the Tolbooth of Edinburgh, pannel. Indicted and accused at the instance of Duncan Forbes, esq. his majesty's Advocat for his highness interest for the crimes of murder and slaughter, and others, as is more fully mentioned in the indictement raised against him thereanent. Setting forth, That where, by the law of God, the common law, the municipal law and practice of this kingdom, and the laws of all other well-governed realms, murder and slaughter, maiming and wounding with mortal weapons, any of the subjects of such realms, and the ordering, commanding, and causing any band, or number of men, armed with firelocks, and other mortal weapons, to fall upon, wound, murder and destroy numbers of his majesty's subjects, innocently and lawfully assembled, by firing sharp shot amongst them, whereby multitudes are, or may be endangered, and many men, women and innocent children are, or may be killed or wounded, with-

* As to the parliamentary proceedings having relation to this Case, see New Parl. Hist. vol. 9, pp. 1281, *et seq.* vol. 10, pp. 187, *et seq.* 347, *et seq.*

Mr. Burnett (Treatise on the Criminal Law of Scotland, chap. 1, p. 71, tit. Homicide by soldiers in discharge of their duty,) after considering several cases of homicide committed by soldiers, in which the soldiers appeared to have acted in self defence, or in defence of goods regularly seized, or in assistance of revenue officers, or being on duty in obedience to orders, cites the following observation of lord Royston, with respect to some of those cases: "This defence," (meaning that the soldiers acted by orders of their officers) "was likewise pleaded for some soldiers, who were tried for shooting two persons of a mob, who attacked those soldiers, but there was no explicit interlocutor on that point; principally, because the Court was not inclined to give too much encouragement to soldiers, even though acting by orders; military execution being an extraordinary remedy, and not to be used but in cases of necessity."

Mr. Burnett then proceeds as follows: "This principle seems to have ruled in the noted Case of Porteous (July, 1736,) which happened a few years thereafter; though, considering the violence of the mob, the actual assault made on the soldiers, and the notoriety of the avowed purpose which brought the greater part of the mob there, this principle ought not to have had effect in such a case, and certainly would not now be followed, were a similar case to occur."

He then abridges the arguments maintained on the part of the prosecutor and on that of the pannel, and then recites the interlocutor of rele-

out any just cause or occasion, and without lawful warrant, more especially when committed in the public streets of a city, by a person lawfully commissioned by the magistrats thereof, to command such band of armed men for the preservation of peace and order, and for the defence of the inhabitants, and others resorting thereto, are crimes of a high nature, and severely punishable: yet true it is, and of verity, that he the said John Porteous had presumed to committ, and was guilty and accessary, or art or part, of all and every, or one or other of the foresaid crimes aggravated as aforesaid: In so far as, upon the 14th day of Aprile last, or one or other of the days of the said month, when the deceast Andrew Wilson, sentenced to be hanged to death by the high Court of Justiciary, was to be executed at the Grassmarket of the city of Edinburgh, he being at that time one of the captain lieutenants of the town guard of the said city, lawfully commissioned by the magistrats and town council thereof; and in the ordinary course of rotation with the other officers of the said guard, being ordered to attend at the said execution to preserve the peace, and support the executioner in the discharge of his duty, having under his command a detachment of about seventy men, he did then attend in the said Grass-market accordingly, and after the said Andrew Wilson had hung upon the gallows, erected for his execution, until he was dead, at least for a considerable time, and so long as there was ground to conclude he was dead, he the said John Porteous, shaking off all fear of God, and respect to his majesty's laws, and conceiving a most wicked and malicious purpose of destroying, wounding and maiming numbers of his majesty's subjects, the inhabitants of the said city of Edinburgh, and others there assembled at the said execution, without any just cause or necessary occasion, ordered the said detachment of the guard under his command to fire upon the people so assembled at the said execution; and the men, at least severals of them having fired, as it seems he apprehended, over the heads of the multitude, so as to avoid doing them harm, he with threats and imprecations, repeated his commands to fire, calling out to them to level their pieces, and be damned, or words to that purpose; and at or about the same time, he levelled the firelock that was in his own hand, taking aim at Charles Husband, servant to Paul Husband, confectioner in the Abbay of Holyrood-house, and most wickedly and murderously fired at him, whereupon he immediately dropped to the ground, having received a wound by a bullet or large drop of lead on the left side of his head, which pierced into his brain, and another large wound likewise by a bullet or large drop of lead on the left side of his neck, and a third wound in his body, and a fourth wound in his left hand, at least a mortal wound, or wounds, whereof he died in some short space thereafter; at least, he did so level his piece, and appeared to take his aim at some one of the innocent multitude who happened to stand directly over against him, and he did fire, and upon his so firing, the said Charles Husband, at least one or other of the persons particularly after-mentioned, or more of them, did immediately drop to the ground, having received a mortal wound or wounds, whereof they soon after died. And by his said example and command, severals of the said guard, to the number of twenty, less or more, did at the same time with him, or soon after him, fire upon the innocent multitude, whereby all, or one or more of the following persons received mortal wounds, whereof they soon after died, viz. Archibald Ballantyne, son to John Ballantyne, younger, dyster in Dalkeith, received several wounds, with bullets or large drops of lead, which pierced into his body, at least a mortal wound or wounds in his head or body, whereof he died a few days thereafter; and John Anderson, son to George Anderson in Craighead, drover, received a wound in the head with a bullet or large drop of lead, at least a mortal wound or wounds in his head or body, so that he died in few hours thereafter; and the following persons were grievously maimed, hurt, and wounded, to the great danger of their lives, viz. Margaret

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vancy; upon which he observes as follows: "Nothing is here said of the conduct of the mob, the true and indeed only ground of justification on the part of Porteous; but his defence is made to rest solely on his behaviour at the time. There was, indeed, both in the information for the prisoner, and in his petition afterwards to queen Caroline, too much said on his supposed conduct at the time (his not firing, or giving orders to fire) and too little on the general argument in justification, arising from the conduct of the mob, and the consequent plea of duty on the part of the soldiers. It is plain from the interlocutor of relevancy, and still more from the sentence following on the verdict, (which last expressly found, that the pannel and his guard were attacked and beat, and several of the soldiers bruised and wounded) that the Court were influenced by the circumstance, of Porteous's conduct at the time betraying symptoms rather of a revengeful and malicious purpose, than shewing that he acted from a sense of duty."

He adds, that "in the Case of Sullivan and Black, two soldiers, tried for murder before lord Auchinleck at Inverary, in Sept. 1763, who had been assisting revenue officers, the interlocutor seemingly narrowed the prisoners' defence, since it finds the murder relevant; but 'allows 'the prisoners to prove that the same was com-'mitted in the just and necessary defence of 'their own lives, and when they were in the 'execution of their duty, and all facts and cir-'cumstances tending to their exculpation,' as if the 'periculum vitæ' was deemed necessary to exculpate in such a case. The jury found not guilty; the fact being, that a rescue was attempted by persons armed; and the soldiers first fired over their heads to intimidate, before they fired ultimately."

Arthur alias Airth, residenter in the Cannongate, near the Water-gate thereof, Jean Peal, servant to James M'Dowal, merchant in Edinburgh, David Wallace, journeyman wright in Edinburgh, James Philip late servant to ——— Lauder, esq. residenter in the Cannon-gate, David Kidd taylor in Edinburgh, Patrick Spalding apprentice to David Mitchel jeweller in Edinburgh, James Lyle, and Alexander Wallace, both servants to James Wright staymaker in Edinburgh, John Miller taylor in Edinburgh, David Ogilvie writer in Edinburgh, and James Nivan late servant to William Sellars writer in Edinburgh, residenter in the Potter-row: at least, the said persons were so killed, wounded and maimed, by the firing in manner, and by the direction, as aforsaid, and by the second firing aftermentioned; for not contented with the barbarities thus committed, after he had with the said company or detachment of the city guard marched towards, or into the place or street called the West-bow, he, without just cause or occasion, again ordered the men under his command, to face about and fire upon the people, and at or about the same time, he fired a musket or firelock that was in his own hand, having either reloaded, or caused to be reloaded his own piece, or taken another out of the hand of one of the guard; and severals of the said guard did, upon that second example and command of his, fire upon the multitude, whereby Alexander M'Neil son to Edward M'Neil indweller in Merton-hall, received a shot in the head with a bullet or lead drop, which pierced into his brain, at least a mortal wound or wounds in his head or body, so that he died thereof in a few days thereafter; and Margaret Gordon servant to William Ogilvie taylor, in Saint Mary Wind in Edinburgh, received a wound in the head above the left eye, with a bullet or large drop of lead, which pierced into her brain, at least a mortal wound or wounds in her head or body, so that she died thereof in a short space thereafter; and Henry Grahame taylor in Cannongate received a wound in the head, with a bullet or large drop of lead, which pierced into his brain, at least a mortal wound or wounds in his head or body, of which he died in a few hours thereafter: at least, by this, and the other firings by him, and by his order and example above-mentioned, all or one or more of the persons particularly above recited, as having been killed, received mortal wounds, of which they soon after died, and all or one or more of the persons above recited, to have been wounded, were grievously maimed, hurt and wounded, to the great danger of their lives: at least, at the time and place aforsaid the said persons above-named and mentioned to have been respectively killed and wounded, were all, or one or more of them, wickedly and maliciously slaughtered, murdered and wounded, by wounds severally given them by mortal weapons: and he was guilty, art and part, of the slaughter, murder and wounding of all, or one or more of them: all which, or any part thereof being found proven by the verdict of an assize, in presence of the lords justice general, justice clerk, and commissioners of justiciary, he ought to be most exemplarly punished with the pains of law, to the terror of others to commit the like in time coming. *Sic Subscribitur,*

CH. ARESKINE, A. D.

Pursuers.—Duncan Forbes, esq. his majesty's advocate; Mr. Charles Erskine, his majesty's solicitor; Mr. Hugh Forbes, his majesty's advocate depute; Mr. Patrick Haldan; Mr. Hugh Murray, Kinnynmont; sir James Elphinstoun.

Prolocutors in Defence.—Mr. James Grahame, jun.; Mr. Henry Home; Mr. Alexander Lockhart; Mr. James Lessley; Mr. James Holburn; advocates.

The libel being openly read, and debate *viva voce*, in presence of the judges, pannel and jury, the lords ordained both parties to give in their informations to the clerk of court, in order to be recorded, and the pursuers to give in theirs against Friday next at six o'clock at night, and the prolocutors for the pannel to give in theirs against Tuesday thereafter, and continued the cause till Friday the 16th instant, and ordered assizers and witnesses then to attend, and the pannel to be carried back to prison.

July 12, 1736.

INFORMATION for his Majesty's Advocate for his Highness's interest,

AGAINST

JOHN PORTEOUS, late Captain Lieutenant of the City Guard of Edinburgh, Pannel.

The pannel is charged by the indictment, with murdering, slaughtering, maiming and wounding, divers of his majesty's subjects, by firing with his own hand, and causing and ordering a band of armed men under his command, to fire upon a multitude of innocent people, assembled to see an execution in the Grassmarket of the city of Edinburgh, without any just cause or provocation, contrary not only to the laws of God and nature, and to the good and laudable laws of this and all other well-governed realms, but also contrary to the express duty of his office, who was one of the commanders of the city guard, intended to preserve the peace of the city, and to protect the inhabitants thereof from all violence; and who was on that occasion entrusted with the command of a large detachment of the said guard to preserve peace and order, to secure the execution of a sentence of the high Court of Justiciary, and to prevent all riots and tumults, whereby the execution of the said sentence might be disappointed, the laws might be violated, and the people assembled might be hurt or destroyed.

The indictment sets forth, particularly, That at the time and place libelled, where a great multitude of innocent persons of all ages, and of different sexes, were lawfully assembled, to see the execution of Andrew Wilson, sentenced

to be hanged by the high Court aforesaid; the pannel having under his command a detachment of seventy armed men of the city guard, and having conceived a most wicked and malicious purpose of destroying, maiming and wounding numbers of his majesty's subjects, the inhabitants of the said city, and others assembled at said execution, without any just cause or necessary occasion, ordered the said detachment under his command to fire upon the people so assembled; that the men under his command, having probably, in his apprehension, fired over the heads of the people, he, with threats and imprecations, repeated his commands to fire, calling out to them to level their pieces, and be damned; that at or about the same time he levelled the firelock that was in his own hand, taking aim at one Charles Husband, and fired at him, whereupon he immediately dropt to the ground, having received wounds, whereof he instantly died; at least, that he levelled his piece, seeming to take aim at some one in the croud, and fired it; and that upon his firing, the said Charles Husband, or one or other of the persons in the indictment mentioned dropt, having received wounds by bullets, of which they instantly died; and that by his commands and example, several of the city guard under his command, fired upon the innocent multitude, whereby the persons particularly mentioned in the indictment, were killed, maimed and wounded.

The indictment further charges, that not contented with this barbarity, the pannel, after he had marched off his detachment towards, or unto the place or street called the West-bow, again ordered the men under his command, to face about and fire upon the people, and at or about the same time, fired a musket or firelock that was in his own hand, having either reloaded, or caused to be re-loaded the piece formerly fired by him, or having taken another out of the hand of one of the guard; and that several of the said guard did, upon that second example and command, fire upon the multitude, whereby the persons described in the indictment, were killed or mortally wounded: and the indictment concludes in common form, that the pannel is guilty, or actor art and part of the crimes aforesaid, or one or other of them.

The charge in this indictment is so heinous, that one should have imagined it would have been decent in the pannel, to have made no objection to the relevancy, and to have founded upon no defence for avoiding the effect of the libel, if true, but to have contented himself with a flat denial thereof, reposing himself upon his innocence, if he is truly not guilty of the facts alleged, without any other desire, but that of having a fair examination of unbiassed witnesses, to be produced by him as well as the prosecutor, in order to discover the real circumstances of the transaction.

But his procurators, it seems, thought it their duty to move every objection against the relevancy of the lybel, and to offer every defence that their invention could suggest from a particular relation of the circumstances of the whole transaction, which they laid before the Court upon the pannel's information, and which they offered to prove to make good their defence.

They informed the Court, therefore, on behalf of the pannel, That the magistrates apprehending, that some violent attempt might be made for rescuing Wilson, the offender sentenced to be hanged, had ordered the pannel to attend the execution, with the greatest part of the city guard, to support and protect the executioner in the discharge of his office, with directions to repel force by force; that to make those directions effectual, powder and ball were by the town-treasurer delivered out of the town's magazine to the city guard, the morning of the execution, with directions to load their pieces: that besides this precaution, the danger of the rescue appeared to the magistrates so great, that they desired of general Moyle, and obtained a detachment of the regular troops, who were posted near to the place of execution, in order to support the city guard if there had been occasion; and whose commanders were told that the lord provost would give them authority to fire, if it should prove necessary; that the pannel with the town guard attended accordingly the execution; that when the offender was hung up on the gibbet, the magistrates retired from the scaffold, and repaired to a house over against it in the Grass-market; that after the offender had been hung up for some time, the multitude became unruly, and began to fling stones of great size, and with great violence, that some of the guard were thereby hurt; one had his shoulder-blade broke, others were bruised, and the timber of the drum was beat to pieces; that the insolence of the mob growing still greater, and they pressing from all sides upon the guard, the pannel, who apprehended they might have intended to carry off the criminal, who by this time was cut down, in order to attempt the recovering him to life, found it necessary for him to keep off the multitude by threats and menaces; that to this end he presented his piece, first to one quarter, and then to another, calling to the people to stand off, and threatening if they did not, he would fire; that nevertheless, he neither fired himself, nor gave any orders to fire, but, on the contrary, when some of the guard, provoked by the hurts they received, had without his orders or authority, presumed to fire, whose example was followed by several others, he did all he could to prevent that mischief, by commanding them to desist, and actually did beat down the muzzle of one of the men's pieces, who was presenting it in order to fire; that finding he could not be obeyed, he endeavoured to march off his men, and prevailed with several of them to follow him some small way up the West-bow, when again some of those men who followed him, provoked by what he did not know, faced about and fired towards the Grass-market; that the first notice he had of this firing was by hearing it,

which made him turn about in order to stop it; that at this last place he neither fired, nor gave orders to fire; that he marched as many of his men as he could gather together back to the city guard room; that there he prevented the men's cleaning their pieces, that the guilty who fired might be distinguished from the innocent who did not fire; that his own piece had not at that time been at all fired; that conscious of his innocence, and that he had on this, as well as on every former occasion, done his duty with patience and temper, he presented himself before the magistrates, whereas nothing was easier for him than to have made his escape, and that in their presence the firelock which he had in his hand was presented, and appeared not to have been at all fired; and that therefore it was impossible the lybel, as lybelled, could be true.

From this, which was said to be the state of the case, the procurators for the pannel contended first, That the lybel was insufficient, as not describing with proper accuracy the particular part of the street where the person supposed to be shot by the pannel stood, and his situation with respect to the pannel at the time, because thereby the pannel was deprived of the opportunity of making his defence, by founding in particularly on circumstances which he might avail himself of, if the position and situation had been distinctly described.

To this it was and is answered, That the lybell is as particular as the law requires, describing the street where the execution was had, which is all that the utmost scrupulosity could expect in such a case. Minute circumstances cannot be known to the prosecutor, or certainly discovered but by proof upon the trial: every circumstance of the pannel's own acting must be known to him; and therefore, if from the position or situation in which he was at the time of the firing, he can show that it was impossible he could have killed the person whom he is charged to have shot, describing and proving those circumstances, he may have advantage from them, but cannot object to the prosecutor, that he did not minutely describe a situation that was not known to him, and which describing, perhaps erroneously, might minister an unjust occasion to a criminal to escape justice: wherefore this objection to the form of the indictment ought to be repelled.

But in the second place, The procurators for the pannel, very unnecessarily, one should think, if he is innocent of firing, or ordering to fire, and in some degree inconsistently with that plea, alleged, that the delivering out powder and ball to the city guard; the ordering so great a detachment to attend; the calling for the regular troops to support the town guard; the intimation to the commander of those troops, that they should have orders to fire, in case of necessity; and the direction to the pannel to support the execution of the sentence against Wilson, and in case of a violent rescue or deforcement, to repel force by force, amounted to a flat order from the magistrates to fire, when it became necessary: and that the violent assault made by the mob, as aforesaid, with stones, which were to be considered as lethal weapons, in order, as the pannel believed, to carry off the offender, in hopes of recovering him to life, made it necessary to repel force by force: wherefore these circumstances to infer the order, and the violent assault of the mob as mentioned, ought to be sustained and admitted to proof, as a total defence against the indictment, at least as circumstances fit to mitigate the punishment, and restrain it from the *pœna ordinaria;* since the pannel being *versans in licito,* and engaged in the discharge of a lawful piece of duty, if any excess was committed by him, it ought not to be attended with capital punishment, but ought to be corrected *extraordinem,* according to the degree of the excess.

To this it was answered, That though it were true, which is not at all upon the part of the prosecutor denied, that the magistrates, upon just apprehensions of disorders, and an attempt for a violent rescue of the criminal, who was sentenced to die, had ordered powder and ball to be distributed to the guard, had increased their numbers, had obtained assistance from the commander of the regular troops, with assurance, that in case of necessity they should be authorised to fire, had directed the pannel at all hazards to support the execution, and prevent a violent rescue, and had even told him, that in case of necessity he was to repel force by force, it will not in the least follow, that those orders could in any degree justify him, except in case of necessity, except there had been an attempt towards a violent rescue, which could not otherwise have been prevented, and except all the proper precautions for dissipating otherwise the mob, and for legitimating the act of firing upon them, had been previously made use of.

For, in the first place, no order from any civil magistrate whatever, can justify a barbarity so horrid, as that which is charged on the pannel. Had the provost, and all the magistrates of Edinburgh been present on the spot, and had they ordered him to fire upon the innocent people, when there was no just cause for so doing, those orders indeed might subject the magistrates, as well to the penal consequences that attend murder, but could not on the least acquit him, who was not at all bound to obey such illegal orders, and who therefore acted at his peril.

In the second place, it is not at all pretended, that the pannel had any orders expressed or implied to fire, except the violence of an attempt to rescue, not otherwise avoidable, made it necessary. Had that been truly the case, firing possibly might have been the pannel's duty, the reading the proclamation undoubtedly would have made it justifiable; and this the magistrates knew, when they ordered ammunition to be distributed, and invited the regular troops to their assistance: but till it became necessary, when there was no hazard of a rescue, before any disorder was sought to be quelled by the

legal precaution of reading the proclamation, which is intended to intimidate rioters, and to separate the innocent from the guilty, by giving due notice to all thoughtless people, who without any malevolence are mixt with the multitude, to separate from the ill meaning, it was the most cruel, as well as unjustifiable act, that has at any time been heard of, to make use of the weapons that were put in the hands of the guard, for the security of the peace and of the people, to destroy so many innocents, who had not in any degree offended.

For, thirdly, though the pannel mentioned the flinging of stones, and the size of some of them, with some hurts received therefrom, yet the libel charges, and he admits that the criminal was cut down before this trifling provocation prevailed with any one to fire: his duty then, so far as concerned the execution of the sentence, was over: he alleges no danger, nor can he in these circumstances, of a rescue, no invasion with fire-arms, or other mortal weapons, fit to deforce or destroy a detachment of 70 disciplined men, with loaded pieces and screwed bayonets: how then can the exigence, or the orders defend him? If his act had been absolutely necessary, some defence might have been founded on that necessity joined with his orders: but when his allegations, though they were true, do not point out the least necessity, and are in reality founded on nothing else than the customary impertinence on such occasions, of flinging dirt and stones at the executioner, though the provocation thereby given might perhaps justify a choleric man, for drubbing any of the actors for their wantonness, yet to be sure, it could not justify the slaughtering of the offender, far less can such impertinence in a few boys, or other idle people, excuse the firing sharp shot upon an innocent multitude, whereby numbers of his majesty's subjects were destroyed: and therefore it seems to be beyond all doubt, the pannel can find no shelter from those orders, or the duty he imagines lay upon him to fire; and must therefore stand or fall, upon his being, or not being guilty of the facts charged upon him.

The procurators for the pannel endeavoured to find an argument for him, in a late resolution of the Court, which suspended a sentence of the court of admiralty, proceeding upon an interloquitor that found it necessary for soldiers, who happened to kill in the execution of their duty, when by order attending custom-house officers, to prove, that the killing was necessary for the defence of their lives, inferring from this resolution, that the Court did not think it necessary for the pannel to prove, that he was in danger of his life: and though all that their observation necessarily implies were granted, they could have no benefit by it, because in this case the pannel neither does, nor can aver, that the firing which he was personally guilty of, and ordered, was necessary for securing the execution of that trust that was committed to him, or for preserving the rights of the crown, or any subject.

Where a man has by law weapons put in his hand, to be employed, not only in defence of his life when attacked, but in support of the execution of the laws, and in defence of the property of the crown, or liberty of any subject, he doubtless may use those weapons, not only when his own life is put so far in danger, that he cannot probably escape without making use of them, but also when there is imminent danger, that he may by violence be disabled to execute his trust, without resorting to the use of those weapons: but when the life of the officer is exposed to no danger, when his duty does not necessarily call upon him for the execution of his trust, or for the preservation of the property of the crown, or the preservation of the property or liberty of the subject, to make use of mortal weapons, which may destroy his majesty's subjects, especially numbers of them, who may be innocent, it is impossible, from the resolution of the Court of Justiciary hinted at, to expect any countenance to, or shelter for the inhumane act.

And upon a principle very near allied to this, the pannel's pretence, that being *versans in licito*, and intrusted with the execution of legal orders, any excess, that for lack of discretion he may have been guilty of, cannot be punished *pœna ordinaria*, ought to be repelled; for it's obvious, the trust reposed in him, and the duty expected from him, was no more than to see the execution perfected, and to resist any violent attempt to rescue, which should disappoint the execution of the law. Now when the sentence of the Court of Justiciary was executed, when the criminal was hanged and cut down, before any person fired, the trust reposed in the pannel, and the duty expected from him ceased; he was no longer an officer employed to that end for which the fire arms were loaded, and his actions came to be estimated of by the same rules, that would have made them lawful or unlawful upon every ordinary occasion, where no particular danger threatned, and where no necessary service was in view.

And therefore, as in such cases, the pannel must be convinced, that nothing short of being constituted in immediate danger of death without firing, could justify him or his guard for making use of loaded fire arms, he must in consequence acknowledge, that in the case in question, no danger of life, which he could not have avoided, having threatened him and his guard, he was absolutely inexcusable for firing, and that therefore his mischievous and temerarious act must be attended with the highest penalty.

An armed man who assaults, and without just cause destroys another man though armed, and in no particular trust or confidence with him, the law considers and denounces as a murderer; but when the captain of a city guard, who has an armed force committed to his care, for the good and safety of the community, thinks fit, upon any slight offence or provocation, to turn those arms, and that force upon a crowd of citizens lawfully as well as inno-

cently assembled, he is, in addition to the slaughter and destruction that ensues, guilty of the most notorious breach of trust, and for an example to others, whom it may be necessary for the good of the community to trust, ought to be punished in the most severe manner. Men so trusted are under double tyes, for besides the general obligations of duty and humanity, a particular confidence is reposed in them, which at the peril of their lives they ought to answer.

The procurators for the pannel complained, That in the indictment he was charged with a wicked and malicious purpose of destroying, wounding, and maiming numbers of his majesty's subjects; and by the pannel's sober and modest deportment on former occasions, and the whole circumstances precedent to the melancholy accident now in question, endeavoured to shew that he had no premeditated malicious design. But this again was to no purpose: the prosecutor never heard, nor, so far as he knows, did ever any man before this time, complain of the wickedness or inhumanity of the pannel, and he has received no information, by which he can be induced to think, that for any considerable time before the fact complained of, the pannel had premeditated the destructive action of which he is accused. But then his procurators very well know, that firing and ordering to fire, imply, and are proof of a wicked and malicious purpose of destroying those that are fired at: 'malitia' and 'propositum præcedunt ictum,' in the construction of reason as well as law, and whoever wilfully murders and destroys his majesty's subjects, must be demeaned as a murderer, if his malicious purpose preceded the drawing of the tricker, or giving the orders, one moment, as much as if it had been preconceived a whole year.

These shews of defence, rather than defences being removed; the next thing that comes to be considered, is the history of the pannel's behaviour, during the melancholy transaction, which his procurators offered to prove, and insisted, would, if proved, be a sufficient defence against the facts charged in the lybel.

But in this the prosecutor can by no means agree, for he takes it to be extremely plain, that every single circumstance alleged by the pannel may be true, and yet it may also be true, that he with his own hand fired, and killed one or more of the innocent people, and that he ordered the men under his command to fire.

It may for example, possibly be true, that he, at some period or another of the action, called out to the multitude to stand off, or that he would fire; that he at some one point or another of time prohibited the men to fire, and struck down the pieces of such as were presenting them; and yet it may also be true, that he at some other point of time gave the precise word of command to fire, and actually fired the piece that was in his hand: before he lost his temper he might have threatened only, before he took the resolution of annoying, as well as after he saw mischief done, he might have endeavoured to prevent a particular act of inhumanity; but his doing so at certain periods, is no conclusive evidence, that at other points of time his conduct might not have been very different.

Were his giving orders, or actual firing dubious, the circumstances mentioned for the pannel might create a strong presumption for him: but if it shall be proved, as it is charged in the lybel, that he actually fired the piece in his hand oftener than once, and gave positive orders to fire; what can it avail him, that, at some other periods of the fray, he behaved himself in a different manner, since both the one allegation and the other may be true?

But the procurators for the pannel insisted, That though the proposition they undertook to prove was in some degree a negative, yet it was so circumstantiated as to be capable of a positive proof; for they said that credible witnesses could be produced, who would inform the Court and jury, that during the whole fray, they kept their eyes upon the pannel, and were attentive to his actions; and that they could take upon them to say, that thorow out the scuffle he did not fire his piece, nor order the guard to fire, but that he threatened to fire, which might by persons at a distance who heard the word fire only pronounced, be mistaken for a command, and that he presented his piece only in a menacing posture, but without firing, which might have misled the spectators into an opinion that he did fire, though he really did not; if any one who was near him happened to discharge his shot about the same time.

This reasoning however is manifestly defective, because the evidence of the witnesses, who shall say, they did not see or hear, bears no proportion in point of weight, to the testimony of those, who shall upon oath positively say, that they did hear or see.

And besides the obvious reason for maintaining this distinction in the common case, there is a particular consideration that supports it, in the case of a fray or tumult, where shots are fired, murder ensues, and there is a general confusion and surprize. No one could possibly be so interested in keeping his eyes upon the pannel, when it could not be forseen there would be occasion to give evidence touching his behaviour, as not to be lyable to be carried off from that object, upon any fresh surprize that happened in the tumult: the firing of a shot, the flinging of a stone, the extraordinary behaviour of any one of the multitude, or of the guard, might imperceptibly have drawn the eyes and attention of any spectator from the pannel, to that new object, and prevented his seeing or hearing what he said or did in the mean time: and therefore no witness, or number of witnesses, who should take upon him or them to say absolutely, that the pannel did not at any period of the fray fire, or order to fire, would at all be credible; at least most certainly they could not be credited against such witnesses as should positively say, that they saw or heard him fire, or order to fire.

If witnesses shall say against the pannel, that they saw him present his piece and fire, and for their *causa scientiæ* shall aver, that they observed fire and smoke issuing out of the muzzle of his piece, and a man drop down dead in the place towards which he pointed it, will that evidence be sufficiently contradicted by persons who may say they observed no such thing, or that others of the guard fired about the same time, and at the same place? It is humbly thought it cannot, because this is setting up a negative evidence only against positive, which neither law or reason permits.

And if credible witnesses shall aver, that the captain distinctly ordered the guard to fire, can it avail him that other witnesses heard him threaten the crowd, that if they did not retire he would fire, without hearing the positive orders for firing given? In a tumult every individual cannot possibly hear every thing that passes; but then it is no evidence that particular words were not uttered in a fray, that some persons present at a fray, did not hear or attend to them.

And the pannel in framing his defence on this article, does not seem to have attended to what is expressly libelled against him, that in great anger he said to the men under his command, upon their firing over the heads of the multitude, 'Level your pieces,' and be damned. Will this circumstance, should it be proven, be at all consistent with that part of the defence, which tends to render the expression fire dubious? If the pannel's passion moved him to utter the expression, level your pieces, and be damned? is it at all doubtful in what sense the word fire was pronounced? These things are, it is thought, too plain to be further insisted on.

The only remaining circumstance, on which the procurators for the pannel seemed to lay stress, was the condition of his firelock, when the action was over, and his voluntary presenting himself before the magistrates, when he could have made his escape; from which they would have inferred, an impossibility that he was guilty of actual firing, his firelock appearing not to have been discharged, and a strong improbability that he was conscious of having given any criminal orders, since without necessity he freely presented himself to justice.

Now as to these matters, it must be observed, first, that the condition in which the pannel's firelock appeared, can yield no evidence for him: A piece that has been fired may be re-loaded, and so cleaned and brushed-up, as to leave no vestige or mark of the former firing; and the piece which the pannel made use of in firing, might have been changed, and another produced to the magistrates in the room thereof.

But 2dly, the indictment no where avers, that the pannel made use of his own piece when he fired. Where he is first charged with firing, no more is said, than that he levelled the firelock that was in his hand, and fired it at Charles Husband. Now the firelock that was in his hand, might have been that belonging to another man, as well as his own: And in the other part of the indictment, where he is charged with firing, it is said that he made use of a musket or firelock that was in his hand, having either re-loaded, or caused to be re-loaded his own piece, or having taken another out of the hand of one of the guard: So that the lybel in every article of it may be true, and proved; and yet it may be also true, that the pannel did not fire his own piece.

And as to the article, that the pannel, conscious of no guilt, appeared voluntary before the magistrates, when he could easily have made his escape: It can possibly infer no presumption for his innocence, if the facts charged in the indictment are made good. Whoever shall be satisfied by the proof, that the pannel acted in manner lybelled, must be convinced that he was governed in his actions by no principle of discretion, and must therefore lay no weight upon an act of his, which can yield no inference unless he is supposed to have been governed by discretion and prudence.

Having thus run over the several circumstances of the pannel's narrative, the prosecutor apprehends, he may safely conclude, that they cannot jointly or separately, be sustained as a defence, against the charge laid in the indictment: Because, though every circumstance alleged were undeniably proved, the unhappy pannel might nevertheless be guilty, and a positive proof of the facts charged must necessarily prevail with every unbiassed jury-man, to join in a verdict against him.

The prosecutor is nevertheless far from wishing, that the unfortunate pannel should be deprived of an opportunity of laying every circumstance that may make for his defence before the jury by proof, though he humbly insists they cannot be sustained as a defence relevant to assolizie from the indictment. It is possible the fact may come out otherwise in the trial, when witnesses are upon oath, than it did when the examination was taken in the precognition; and should the proof of the indictment be in material circumstances defective, the evidence offered for the pannel may have its weight; wherefore, so far as the forms of the Court will allow, the prosecutor makes no opposition to the indulging the pannel to bring what legal evidence he can, for the information of the jury.

It is far from being the interest of the crown, or of the public, that an innocent man should suffer; but it is greatly the interest of both, that a fair and strict inquiry be made, where the guilt lyes, when a massacre so cruel and so dangerous happens, to the end, that if the officer, who has power put in his hand, for the preservation of the peace, and for the protection of the people, should, from any unjust motive whatever, make use of that power in breach of the laws, to the destruction of the people he may be made an example to restrain others in the same circumstances, from the like monstrous and dangerous abuses in time coming

In respect whereof, &c.

Sic Subscribitur, DUN. FORBES.

July 13th, 1736.

INFORMATION for *John Porteous*, late Captain Lieutenant of the City Guard of Edinburgh, against his Majesty's Advocat.

The Pannel stands indicted at the instance of his Majesty's Advocat, for his highness's interest, for the crime of murder, and slaughter, maiming, and wounding; and the facts charged against him, from whence these crimes are pretended to be inferred, are these following; That the pannel being one of the captain lieutenants of the said city guard, was by the magistrates of the city ordered to attend with a detachment of about seventy men of the said guard, at the execution of Andrew Wilson, sentenced to be hanged by the High Court of Justiciary; and that the said Andrew Wilson, having hung upon the gallows, erected for his execution in the street called the Grass-market, until he was dead, at least for a considerable time, and so long, that there was ground to conclude he was dead, he the said pannel, conceiving a wicked and malicious purpose of destroying, wounding, and maiming the persons, inhabitants of the said city, and others assembled at the said execution, did, without any just cause or necessary occasion, order the said detachment under his command to fire upon the people so assembled; and that some of the men having fired, as it would seem the pannel apprehended, over the heads of the multitude, with intention to avoid doing them harm, he the said pannel did with threats repeat his commands to fire, calling out to the men to level their pieces, and be damned, or words to that purpose; and that at the same time he levelled the firelock that was in his own hand, taking aim at one Charles Husband, and having fired the said firelock, the said Charles Husband immediately dropt to the ground; having received a wound or wounds by bullets or large drops of lead, whereof he died in a short space; and that by the pannel his said example and command, severals of the said guards, to the number of about twenty, did at the same time, or soon thereafter, fire upon the innocent multitude, by which fire two other persons were killed, and several others wounded, maimed, or hurt; and that the said pannel having thereafter marched off the said detachment of the guard into that part of the street aforesaid called the West-bow, he did again, without any just cause or occasion, order the men under his command to face about and fire upon the people; and that at this time, the said pannel did fire a musket that was in his own hand, having either reloaded, or caused to be reloaded, his own piece or firelock, or taken another out of the hands of one of the guard; and that severals of the said guards did upon that second example and command of the pannel's, fire upon the multitude, by which fire three other persons were killed; at least that, by the said firings of the pannel, or of the firings of the other men in the said detachment of the guard, proceeding from the pannel's order and example, the several persons mentioned in the indictment to have been killed, maimed, or wounded, were all respectively killed, wounded or maimed: Whereby the pannel is guilty of the killing, wounding, or maiming the said persons; at least is art and part thereof, or accessary thereto; from whence the indictment concludes, that the pannel ought to be punished with the pains of law, *i. e.* capitally.

To this indictment the pannel pleaded not guilty; for that he had at no time, during the execution of Andrew Wilson aforesaid, given any order, or shewed any example to the said detachment of the guard then under, or that ought to have been under his command, to fire upon the multitude so assembled; and that he did at no time fire any piece or firelock himself upon the said croud; that though it might be true, that at, or about the time of the said execution, several persons were killed and wounded by the firings of that detachment of the guard, which indeed ought to have been under the pannel's command, and which he does, with great grief and sorrow, regrete; yet that, as such firing proceeded wholly from the men in the said detachment, without any order or example from the pannel, so he could not be charged therewith, however fatal or tragical the consequences of such firing may have proved.

That though the pannel, as conscious of his own innocence, could safely rest his trial upon the denial of the facts aforsaid, and upon such proof, as he could bring, by the evidence of multitudes of persons of undoubted credite, who happened to be present, close by him, during this unhappy scene, that he was nowayes instrumental in the killing or wounding the said persons, but that, upon the contrary, he did all that was in his power to prevent and restrain the said firing upon the multitude; yet, that he was advised by his counsel, that they could not, during the conducting of his trial, consistent with their duty, suffer him the pannel to omit or abandon any defence that was competent to him in law; and that therefore, as by the law of Scotland, the pleading to an indictment, upon supposed facts, is no legal admission of such facts, the pannel was at liberty to plead any other exception that lay against the form of his indictment, or even to plead, that though such firing had proceeded from his order or example, yet even in that case, such firing, and the consequences wherewith it was attended, was not sufficient to support the charge against the pannel, of the crimes of either murder, slaughter, maiming, or wounding, or to render him obnoxious to the pains libelled.

And in the entry of the debate, the procurators for the pannel ask liberty to offer to the Court, a full recital of the behaviour of the pannel, during the execution of the said Andrew Wilson, and for some short space previous and subsequent thereto; and also, to offer a short relation of what they apprehend

was the cause, that the execution of the said Andrew Wilson was attended with such an unusual confluence of people, and was ordered to be guarded and overseen by such a numerous and unaccustomed armed force.

The said Andrew Wilson, along with one Robertson, and others, had been sentenced to death by your lordships, for robbing one of the collectors of his majesty's revenue of considerable sums of money of the public; and while they lay under their sentence, they were allowed, as usual, to go to the church adjoining to the prison, for the benefite of divine service, under the custody of a small detachment of the city guard; and while the convicts were thus at church, Robertson, one of them, found means to escape from his keepers of the guard, by suddenly jumping over a pew, and getting out at the door of the church; his retreat apparently being favoured by the mob, or lowest sort of the people, he easily made his escape, without having been ever since overtaken.

From this escape of Robertson's, so favoured by the mob, and from strong surmises and suggestions, that, at the execution of Wilson, a rescue was intended by the mob, which indeed there was a reasonable ground to apprehend; because the commons have imbibed a pernicious and absurd conceit, as if the robbing of the public money, was a crime more pardonable, than private robbery: therefore it was, as the pannel apprehends, that the magistrates of the city, from a sense of their duty to prevent the execution of the laws being any further defeated by the rescue of Wilson, took the strongest precautions that the execution of him should be made effectual.

In consequence whereof, as would seem, the provost of the city sent for the pannel, in whom, he must take the liberty to say, confidence was generally put upon those difficult occasions, and told him, that there being great apprehensions of a mob at Andrew Wilson's execution, that therefore there was a necessity to be well prepared to prevent their designs; and for that end, that he would have the whole city guard to attend at the execution, he having given orders to the town treasurer to furnish the men with powder and shot, and such other military ammunition as might be necessary for the use of the men in maintaining the peace of the town, and supporting the execution of the laws. And this conference with the provost happened upon the Monday preceding the execution of Wilson, which followed on the Wednesday thereafter. But it seems the magistrates of the city, not thinking even this precaution sufficient, upon the Tuesday thereafter, the provost sent the pannel with a letter to general Moyle's residing near the city, and chief commander of the forces in Scotland, telling the pannel, that the import of this letter was, desiring from the general an order for a party of the regiment lying in the Cannon-gate to enter the city (a thing very uncommon, except in the case of urgent necessity) in order to over-awe the mob, and thereby maintain the peace during the said execution.

It seems this letter to the general induced him to send a verbal message in return thereto, by a person of known honour and veracity, major Pool, of that regiment now lying in the Cannon-gate, who told the provost, that the general wanted to know of him, what part the king's troops were to act, and what precautions had been taken for preventing any insult or invasion that might be made upon the troops, or what length these troops might go in the case of tumult or disturbance. To which the provost made answer, That there was no reason to apprehend any inconveniency would happen to the king's troops, because he would have them only to parade, for a terror to the mob, in a street called the Lawn-market, removed from the sight of the execution, but at a small distance only, where nevertheless they would be ready at a call in case of necessity; but that he had ordered the whole hand of the city guard to attend at the execution itself, with proper arms and ammunition, namely, slug shot, with orders to repel force by force, and even to discharge their arms among the mob in case of resistance.

On Wednesday the day of the execution, in the forenoon, the pannel attended the provost, and told him, that in obedience to his commands, the men were all ordered to be in readiness, their arms put in order, and loaded; whereof the provost approved, and told the pannel, that he was to be ready betwixt two and three in the afternoon, with his guard, and to draw out until the party of the king's troops from the Cannon-gate past him; and that so soon as the king's troops were drawn up in the Lawn-market, the pannel, with the city guard, should forthwith march to the prison, and conduct the prisoner to the place of execution, without allowing him first to go to the town's council-house, as usual, still with intention, as would seem, to prevent any opportunity of rescue, or disturbance upon that head; and at this time in the forenoon the pannel humbly proposed to the magistrates of the city, that they would send a proclamation through the town, as a caution to such innocent unwary people, as might by curiosity be drawn to the sight of the execution, warning them of their danger, in case any disturbance should happen, or attack be made upon the guard. And accordingly George Lindsey, one of their clerks, made a scroll of the said proclamation to be sent through the town; but for what reason it was not proclaimed, the pannel knows not, and at the same time the pannel remembers some one or other of the common-council of the city proposed in case of disturbance, the reading of the Riot Act, and for that purpose sent for a dozen of copies of the act to a bookseller's shop, in order to distribute them among the proper officers of the law, authorized to read and proclaim such act; but it seems at no time either of those proposals were put in exe-

cution; nor at the time of the said execution, did any officer of the law, authorized to proclaim such act, attend with the pannel.

A short space before the pannel marched with his men from the guard-house, towards the place of execution, he was heard say, that he had no cartrages in his box; on which a corporal told him, that he would get him some; and accordingly the corporal did, in presence of several of the men, open the pannel's cartrage box, wherein it was observed that there were no cartrages, and put three cartrages therein, with one of which the pannel loaded his piece, and immediately marched away with the men.

When the criminal was conducted to the scaffold erected for his execution, the detachment of the city guard were posted on the street, in a circle surrounding the scaffold, in order to keep off the mob; but because of a certain building, called the Corn-market, nigh adjoining to the scaffold, part of the men did also incircle that building. And here it may not be improper for the Court to cast their eye upon a plan of the ground, and the posture of the men, in order to have a clearer view of the descriptions to be hereafter mentioned.

So soon as the criminal was thrown over the ladder, and so left hanging upon the gibbet, the city baillies immediately withdrew nigh to, directly opposite, and in view of the scaffold, but without leaving any order or officer of the law to attend with the pannel: And it had happened, that some short space before the act of execution, while the minister was assisting the criminal by prayer, the pannel had gone up to join, leaving his piece with the serjeant; and so soon as public prayer was ended, or some short time after, and the convict left to his own private devotion, the pannel took back his piece in his hand, and afterwards came off the scaffold, and posted himself at the west end of the detachment of the guard.

So soon as the convict had been hung up as aforesaid, and that the city baillies had withdrawn from the scaffold, the mob became to be troublesome, intending, as would seem, to use this last shift, immediately to cut down the criminal, and endeavour to bring him to life by bleeding; an expedient which, when timeously applied, has on many other occasions been known to be attended with success, and the mob fell a murmuring, that they would have him instantly cut down, and if it were not quickly done, they would do it themselves: And at this time they pressed hard upon the guard, striking at them with sticks, seizing of their fire arms and bayonets, and throwing exceeding big stones at the guard; one whereof cut a drummer to the skull, another broke one of the men's shoulder bones, another wounded one of the men's legs, and several others of the men were wounded, whereby they are yet unable to do duty: The truth of all which can be attested by their common surgeon, who is by the city ordered to attend them upon all exigencies.

This insolence in the mob alarmed the pannel, and still observing it to encrease, he was apprehensive that the mob might obstruct the perfecting of the execution; for no criminal can be cut down from the gibbet, but upon the order of a city baillie, upon a judgment that the criminal has hung up until he is compleatly dead, agreeable to the sentence, which always commands such convict to be hanged until he be dead; therefore it was that the pannel sent a message to the baillies, to know if he should suffer the criminal to be cut down from the gibbet; who brought back an answer, that the convict was to hang there yet for a quarter of an hour.

At this time the mob waxed exceeding bold, became very turbulent, and prest hard upon the guard, and while the pannel was endeavouring to keep off the crowd from pressing among the soldiers, at one end of the scaffold, some of the convict's friends, assisted by the mob, catched an opportunity and cut him down without any order: And though the convict being thus cut down, was in the possession and keeping of the mob, who were endeavouring to recover him to life, by causing the veins of both arms to be opened: Whether it was that they were apprehensive, that the guard would recovar him out of their hands, as having been cut down without order; or that the officers of the law were designed to see his interment, and that he was executed to death; or that the convict's body was intended to be given to be anatomized by the surgeons, as is sometimes practised, where persons of low degree or notorious offenders are sentenced to death; or from whatever motive it proceeded, the mob began to insult and attack the guard: And upon this attack it was that the man aforesaid had his shoulder blade broken; and another so bruised, that he has been never able to do duty since; and the timber of the drum was broke by the force of an exceeding large stone that was thrown, and several others of the men were hurt and wounded.

This violence in the mob so alarmed the pannel, that he made a step or two forwards to the westward of the scaffold, turning about his face towards the west port, from whence the throwing of the stones mostly proceeded; and having put his piece to his shoulder, he levelled it at the mob, and pointing it around to them, threatened with an audible voice, that if they would not be at peace, and leave off throwing stones, and attacking the men, he would fire among them; but immediately recovered his piece without firing it; the threats being only intended to intimidate the mob.

But unfortunately upon this ensued the whole tragical scene; for no sooner had the pannel stept forward, threatening to fire as aforesaid, but one of the men came up from behind him, and running by him upon his right hand, instantly discharged his piece; upon which one of the crowd dropt down, supposed to be Charles Husband, and which Charles Husband will upon proof be found to have been the person

who tumultuously stept in and cut down the criminal.

Immediately upon this first fire, another of the guard came up to the pannel, with his piece presented and cocked, and asked if he should fire; to which the pannel answered with some vehemence, No, by no means, and struck up his piece, bidding him go to his rank, and actually thrust him thereto.

After the example of this first fire, several more of the men were heard to discharge their pieces, but upon what provocation the pannel cannot tell; these shots having been at a considerable distance from the pannel, proceeding, as is supposed, from such of the men as were standing at the south west corner of the Corn-market; whereas, as has been noticed, the pannel was still standing at his former station, to the west of the scaffold and gibbet.

The pannel not knowing the fatal consequences of those shots, but suspecting however that mischief would happen, seeing the men had been so rash as to fire without orders, thought it was the best course he could take, to lead off the men of the guard as soon as he could; and for that end he called aloud to them to follow him, and after having given orders to the serjeants to gather them together (for it was impossible to bring them into ranks by the confusion of the mob) he marched off as many of them as he could find, by the north-side of the scaffold, towards the foot of the West Bow, and towards a parcel of the men, whom one of the serjeants had got together at the foot of the Bow; but as he was going to join that parcel of the men, he heard a piece fired near him, with which he was a good deal surprized, and yet more, when he observed two or three people fall to the ground, and which observation was the first thing that greatly alarmed the pannel, as knowing from thence, that certainly mischief was done: but it is certain that this fatal shot did not proceed from the pannel, but from a certain man in the guard, that can be well proven; who, after having fired this shot, immediately retired amongst the crowd, and then gote himself joined to the party: and surely the magistrates of the city will remember, that when a precognition was taking of the several facts and occurrences upon this tragical day, that a certain person told them, that if they would be pleased to sist the whole band of the guard before them, he would point out the man who made this last fire, but the magistrates overlooked this offer.

As soon as the pannel saw there was no restraining the men from irregularities, he marched off so many of them as he had gote together, without taking time to forme them into any order; giving orders at the same time to the serjeants, to beat and press off the rest with all manner of dispatch. Upon which he observed those that had straggled come off partly from about the scaffold, and partly from east-end of the Corn-market, and fall into the rear; and while the pannel was thus marching up the Bow, upon the front of the foremost part of the men, and had come as far as the turn of the Bow, he heard some dropping shots firing in the rear, and about thirty or forty paces distant from him, which he supposes may have proceeded from those men who were straggling upon the east side of the Corn-mercate, nigh to the head of the Cow-gate, but upon what occasion the pannel knows not; but being alarmed with the shots, he looked back, supposing the men might be attacked by the mob, and observing no marks of any such attack, he thought the most prudent course he could take was forthwith to march off the men.

It falls here to be noticed, that all this firing, from first to last, and whereby so much mischief has been done, lasted not above two or three minutes; and therefore, considering the violence of the mob, and the straggling situation of the men of the guard, and supposing the truth of the above narrative, which will be attested in proper time by the oaths of many gentlemen of undoubted veracity; and who had fair opportunity of observation at the time, it is left with the Court, and to every impartial by-stander, whether the pannel could well have done more for the safety of the burgh; considering that it shall also be proved, that during these few minutes of firing, accompanied with great hurry and confusion, the pannel gave several repeated orders to the men to restrain from firing; but observing those orders prove ineffectual, he endeavoured to sweep them off the field with all manner of precipitation.

The pannel marched on with the men to the guard-house, and as he thinks with coolness and deliberation, passing by the king's troops in the Lawn-market (a thing generally esteemed somewhat inconsistent with guilt, especially such horrible guilt as he is charged with.) Upon his arrival at the guard-house, he drew up his men there, sending a serjeant to the provost for orders, which were brought, that they should wait on their arms till the king's troops past; and some of the men in waiting, offering and attempting to clean their guns, but the pannel discharged it, and would not allow it to be done; mean time a certain person of credit came up to the pannel, and asked if he had fired? To whom he made answer, he had not; but the person not being satisfied with the answer, put his finger into the muzzle of the pannel's piece, and after having rubbed it about, and after having also viewed the lock, said to the pannel, I see you have not fired, and I am glad of it.

The king's troops having passed the guard, the pannel filed off the men into the guard, and ordered the serjeants to keep them close till further orders, and by all means not to suffer them to clean their pieces: and at the same time the pannel delivered his carabine, loaded as aforesaid, at the guard door, to one of the guard, neither entering the guard himself, nor any other house, but went immediately to the provost: thus his own piece was brought back loaded, and apparently without having been

fired, and the other two cartrages which he had gote at the guard were found upon his return in his cartrage box.

When the pannel went up to the provost, some person there present alleged he had seen the pannel fire, which he contradicted, and begged the provost to send for his piece, which he told he had delivered at the guard as aforesaid, and that it would appear from inspecting of her, that she had not been fired: and the piece being accordingly sent for, and brought up to the council chamber, and after being strictly inspected, it was agreed by all present that she had not been fired; and in this condition she still lies loaded, in the custody of the magistrates, along with the cartrage box, containing the two cartrages, as aforesaid.

Though the pannel has a pretty important prize at stake, yet he rests in full security, that he will prove to the conviction of the Court every article above recited, and a good deal more in his behalf to be hereafter mentioned: and if it should here be made matter of wonder, how such different accounts as are given of this matter can consist together, seeing numbers of people are impressed with the guilt of the pannel, and that even good, well-meaning people, who were present upon the spot, persist in affirming that the pannel was guilty, by both firing himself, and giving repeated orders to fire:

The pannel can give no other account of this matter than in this way. A miserable slaughter was, somehow or other, committed within the town. The guilt must be laid to some-body's door; and whether any art might be used to lay the heavy load upon the pannel, in order to draw the attention of the multitude from another point in view, the pannel shall not say; but intreats upon the honourable court, and every candid reader, who may happen to take up this information, to look into the Caledonian Mercuries of the 15th and 19th of April last, papers supposed to be published by authority; where will be found a most charitable account of the matter, touching this misfortunate pannel, who was then lying in close confinement, without any body being allowed access to him; and of consequence, could have no opportunity of vindicating himself, until once the prejudices were deep-rooted and rivetted, so as even to catch the unwary, though well-meaning, part of the people; and these beatiful relations of this transaction, are adorned with some witty sarcasms, very proper to this melancholy occasion, and painted out with ingenious reflections, and quaint rhetorical invectives, very suitable to the authors of these historical relations.

And indeed the authors of these accounts of the matter, whoever they are, have the impudence to affirm, and the wickedness to endeavour to fix it upon the pannel, as an instance of premeditation and felony forethought, that the pannel had ordered the detachment of the guard to load with ball and slug-shot, before they marched from the guard: And this worthy author affirms, that such doing was unprecedented, and such as the pannel would not pretend orders for; notwithstanding that it is now, with his usual candor, admitted by his majesty's advocat in his information against the pannel, and dare not be denied, but that the pannel had orders to see the whole men's pieces loaded with bullet and other shott, and even to fire those pieces amongst the mob in case of exigency.

The prejudices against the pannel being once artfully rooted, it was an easy matter to catch the giddy mob, who are not able to look back and decern the true springs and causes of things: For such is the nature of human passions, that if they are once artfully moved, they will be apt to misguide the understandings, even of persons of observation; and thus the speat having once been created against the pannel, it grew into a torrent, and flew like a train of fire, every one adding fewal to the flame, and sparks originally increase into a mighty combustion: And so, in like manner, things entirely of themselves innocent may be multiplied into horrid cruelties and savage barbarity.

It might also operate to the prejudice of the pannel, that this scene was acted in a very short space, attended with great commotion and confusion. Words and actions might be misconstrued (whereof more particular notice shall be taken hereafter) whereby persons even of judgement might be deceived, and thereby fall into the vulgar notions. And here it cannot be deemed an useless digression in the pannel to give a caution to all gentlemen, who may happen to be called in evidence upon this trial, (for it is feared the mob are not capable of this advice) not to affirm things upon oath, except their observations have been accompanied with all that certainty which those sensations wherewith mankind is endued, can admit of; because any inconsiderate rashness to the prejudice of the life or fame of the pannel, cannot fail, for hereafter, to be attended with very painful stings of remorse.

It was observed for the pannel, as a thing that could not be denied, that upon many former occasions, he had been singled out as the fittest person to maintain the peace of the city, by quelling of mobs and tumults; and that he had never hithertofore, during all the many occasions on which he had been employed, ever discovered any imprudent rashness or cruel temper in the exercise of his command, but had exposed his person to very great danger, rather than involve the city in blood, or proceed to such extremities, as the law even would have entirely justified.

It was also observed in behalf of the pannel, that it was no new thing for the private men in the city guard, who though they are tolerably acquainted with discipline, yet are not subject to the military law, to take upon them to fire upon the multitude, without any order from their commander, whereof the following instances are offered, and which cannot be denied; to witt;

That at the settlement of Mr. Wotherspoon, as a minister in the West Church parish, a party of the city guard under the pannel's command, did, one or more of them, in the rear ranks, within the west-gate of Edinburgh, while the pannel was marching on their front, face about and fire upon the mob, without any order, and by which fire severals were dangerously wounded; and the like happened in a few years ago, after the execution of one Campbel, when a detachment of the city guard were conducting the corps of the person executed, which was delivered over to the surgeons of Edinburgh, by order of the magistrates. And the same thing happened a few years ago at a race at Leith, where the party of the guard was commanded by captain Lind, whereby several persons were wounded. And another instance was given, where the same irregularity happened, within these few moneths, at the execution of Brown the smith, when the detachment of the city guard was commanded by both captains, Lind and Ferguson. And, indeed, innumerable other instances might be given of the rashness of the men in this particular, which it is needless to condescend upon, because they are notourly known in the city.

It may also deserve notice, that the private men of the guard might be prompted to fire without orders, partly from resentment, that Robertson before-mentioned had escaped out of their hands, and partly from being encouraged by the general order they heard was given by the magistrates to fire, in case of resistance: for it is now found, that severals of them were heard to say, before they went out to the execution of Wilson, that now they had gote arms and ammunition put in their hands and therefore would not fail to use them, in case they were attacked, or any resistance made.

These observations it is humbly thought cannot fail to operate in favour of the pannel, in case the proof of the libel shall be attended with any uncertainty or dubiety: and although the pannel is not so weak of judgment, as to imagine that such presumptions can prevail against positive and certain proof; yet he doubts not, that in due time, when the proof is led, such observations must have weight with the candid jury.

One thing more we must observe in general, That as he has been employed for these many years past, as the scourge of the mob, though never once known to proceed to extremities; yet such station of his may be the cause of drawing resentment from the lower sort of the people against him.

The pannel has just reason to ask the forgiveness of the honourable Court for dwelling so long upon generals; but it is hoped, from what is above noticed, and that this is the first occasion he had of vindicating himself from the aspersions and prejudice of his adversaries, he may merit the pardon of the Court.

And now to proceed to the particulars in the indictment: and whereas it sets forth, That the pannel conceiving a most wicked and malicious purpose of destroying, wounding, and maiming numbers of his majesty's subjects, inhabitants of the city of Edinburgh, had acted the several matters and things charged in the indictment: the pannel must observe, that the circumstances of the case naturally exclude any supposition of premeditate malice and resentment in the pannel, because it is impossible to conceive, that the pannel should have retained any malice against a multitude of persons, of whom he neither had, nor can be supposed to have had, any acquaintance: and though it was admitted, that the circumstances of the case do exclude any supposed long premeditated malice; yet it was urged, that in law every wicked action does presume malice, though instantaneous to such wickedness committed.

To which it was answered in behalf of the pannel, That the circumstances of the case, as laid in the indictment, do even exclude any presumption of malice accompanying the acts charged in the indictment; because every action must be construed in the most favourable sense; and therefore the actions charged against the pannel, must even be construed to have proceeded from a principle of duty in the pannel, in maintaining the peace of the place, and in supporting the authority of the laws, and the guarding of that execution of them, which was committed to him by lawful authority.

In the next place, an exception was taken to the indictment, as not having been laid with sufficient certainty; the indictment no where expressing the particular places of that large street wherein the guilt is charged to have been committed, whereby the pannel was precluded from making his defences with certainty: for had it been laid in the indictment at what places in the street the particular persons, affirmed to have been killed and wounded, were so killed or wounded; the pannel might have had an opportunity of proving, from the circumstances of his situation at the several periods, that it was impossible that such wounds could have been received from his hands. And though it may be true, that such part of the indictment as charges the pannel's order to fire, would be of universal influence, and reached over the whole circumstances of guilt charged in the indictment, yet as actual execution made by the pannel was charged separate from his order to fire, such proof of innocence, whereof the pannel pleaded an opportunity, might have afforded him a defence against such part of the indictment as charges his own firing and killing.

To this it was answered by his majesty's advocat, That the lybel was as particular as the law required, describing the street where the execution was committed, which is all that the utmost scrupulosity could expect in this case: because minute circumstances cannot be known to the prosecutor, or certainly discovered, but by proof upon trial, and that every circumstance of the pannel's own acting must be known to him. And therefore, if from the

position or situation in which he was at the time of the firing, the pannel can shew that it was impossible he could have killed the person whom he is charged to have shot; by describing and proving these circumstances, he may have advantage from them, but cannot object to the prosecutor, that he did not minutely describe his situation, which was not known to him; and that by the describing of which, perhaps erroneously, the prosecutor might minister an unjust occasion to a criminal to escape justice.

To which it was replied for the pannel, That though it is true that, in most cases, the describing the street where the guilt was committed, would be a sufficient description; yet, that, in the present case, where it was laid in the indictment, that in a crowd or multitude, various shots were fired by different hands, and thereby wounds given; 'tis even necessary to describe the particular place of the street where such wounds were received, in order to form a judgment from whose hands those wounds had proceeded. The pannel might have fired elusory, or in the air, and the wounds received may have proceeded from the shots of others: that though the pannel knows his own position and situation, and can prove them; yet such proof could not avail him, nor be received by the Court in the point of relevancy; because it would be a simple negative, which could not be admitted of, nor would not apply, unless the particular places of the street, in which the wounds are said to have been received, had been described to him; a situation which the pannel cannot be supposed to know; whereas the prosecutor must be supposed to have known it, seeing the same information that led him to know of the wounds received, must necessarily upon inquiry have certiorated him at what places of the street such wounds were received, seeing the matters and things laid in the indictment, are charged to have been committed at high-day-light, in presence of multitudes. And though the pannel is fully satisfied of the good disposition of the honourable prosecutor, to lay a fair and certain indictment against every pannel, yet it must be admitted, that all indictments ought to be laid with all that accuracy and full description that the nature of the thing can admit of: and, as to such part of the answer for his majesty's advocat, as saith, that such particular description of place, if perhaps erroneously described, might minister an unjust occasion to the pannel to escape justice; its answered, That such erroneous description of place could in no sense affect the trial, because though such description should not be proved, it would not vary the case, providing the act of killing were proved against the pannel, because such description of place is but a circumstance immaterial to be proven by the prosecutor; but for the reasons above assigned, highly material for the pannel to know, in order to lay his defence before the Court.

It was in the next place offered as a defence for the pannel, That the resistance of the mob was so great, and the attack of the city guard so violent against them, in beating, bruising, and wounding the men, as has been above noticed, while they were in the lawful execution of that office, committed to them by lawful authority, that such resistance and attack must have justified the guard, in repelling the violence of the mob; since such proceedings in the guard were acted in support of the due execution of the laws, which the mob were highly criminal in disturbing. That this argument as pled for the pannel, was not only consonant to the rules of reason, but agreeable to sundry judgements and precedents of the Court, particularly that in the year 1692, it appears from the books of adjournal, that James Gordon messenger at the execution of a caption, did, with many others his assistants, armed with guns, swords, and other hostile weapons, shoot several shots, whereby one Alexander Jack was killed dead upon the spot, amidst a numerous crowd, which the alarm of noise and tumult had drawn together, and whereof only part can be supposed to have come there with intention to resist the messenger; and the said James Gordon and the others his assistants, being indicted for murder, the lords sustained this defence to him, relevant to elide the libel simply, viz. That he, in the execution of a caption, haven his blazen displayed, was by force of arms hindered to enter the house of Loanny, by the persons within that house, and that they did threaten and menace the messenger and his assistants, and that they threatened to raise the country, and that the country did accordingly rise, and beset and surround the messenger, either in the house, or without the house; the said country people being armed with guns, swords, and other invasive weapons.

Here your lordships perceive, that the Court justified the messenger in shooting amongst the mob, and killing; because the persons in the house forcibly hindered him from entering, and threatened and menaced him, being armed with invasive weapons; and the present case is more favourable in behalf of the pannel, who acted by lawful authority, as well as Gordon in the other case did, and who was supporting the execution of the laws, as well as Gordon was; with this difference upon the side of the pannel, that he was not only hindered and menaced in the execution of his duty, but he and his guard invaded and assaulted, beat, bruised, and wounded, as has been above-noticed, and whereof a strong proof shall be brought; and that the mob in the present case were not only armed with, but in their attack upon the guard, made use of, big stones, of two or three pound weight, which must be allowed to be very invasive weapons; and therefore the pannel subsumes, that the defence offered for him in the present case, is stronger, and ought rather to be allowed him, than that which was sustained to Gordon. Only the pannel must do the justice to his majesty's Advocat, as to acknowledge, that this precedent was not hitherto offered in the debate; but when the record is inspected,

will be found to stand in the precise terms as above-mentioned.

There was in the former debate, a precedent of the Court offered, as against the pannel, which the pannel, with submission, apprehends makes for him, namely captain Wallace's case, some time after the Revolution. Captain Wallace was indicted in the 1692, for having refused in the 1688, to deliver up himself, in obedience to an order of the president of the council, and several privy councellors, whereof two were officers of state; and the bailiffs of Edinburgh, having gone down to the Cannongate, with a herauld and pursevant, with their coats of arms displayed, to put the order of privie council in execution; notwithstanding which, captain Wallace would not deliver himself up, but retired with the men under his command to the Abbay, and defended himself, and fired upon the bailiffs, heraulds, and pursevants; shot several persons dead upon the spot, and wounded a great many others.

The defence pled for captain Wallace was, That the keeping of the Abbay was committed to him by order of the privie council, which he was obliged to maintain so long as the trust of it was committed to him; that as to the order of privy council, to deliver up his person, it was contrair to an act of parliament James the sixth, whereby any general warrant, for putting the person of any man in ward, except where such warrant was signed by four officers of state, whereof the chancellor, treasurer, or secretary of state to be one, which had not been practised in Wallace's case, was prohibited and discharged.

The lords, after a very learned debate, did sustain these defences to captain Wallace, viz. That on the sabbath night, or shortly before, a rabble did meet in several places, in great numbers, and that severals of them did declare to John Paterson their resolution to trouble the pannel on his guard, and to pillage the Abbay, relevant to restrict to an arbitrary punishment.

Here your lordships perceive, that the Court sustained a previous intention only declared, that they would trouble the pannel on his guard, and pillage the Abbay, sufficient to moderate the punishment; so tender are the laws towards any person committing hostility in defence of his guard: and then the lords sustained the following defence relevant to elide the libel altogether, to wit, That the rabble did, in a tumultuous manner, come down the Cannongate with swords and fire arms, and did beat some of the pannel's centinels; and being desired to stand, they notwithstanding advanced so near, that the pannel could speak with them; and after he had desired them to remove, or be at their hazard, they notwithstanding thereof still persisted to advance.

The application in the present case is easy: The pannel many times exhorted the mob to stand off; notwithstanding of which, they still pressed upon him; he many times advertised them of their hazard; threatned to fire upon them if they would not keep off; his centinels were not only beat, but bruised and wounded; all which is offered to be proved.

Another case was mentioned in the debate to your lordships, which strongly supported the plea of the pannel, because it was a judgement of your lordships pronounced but very lately, after the most solemn declaration of the Court; and wherein, the pannel is informed, the Court was unanimous; and which judgement seemed to be of that importance, as to induce the Court to reverse the proceedings of the high court of admirality, after a solemn trial by jury in that court: a verdict returned, finding the lybel proven, and the defence not proven; and a sentence of death pronounced by the judge of the high court of admirality.

The case before the admirality was this; A corporal and a private centinel in colonel Hamilton's regiment were indicted before the admiral for murder; for that they had, upon the high seas, killed Hugh Fraser younger, of Belnain, by stabbing him with a bayonet in the breast, and afterwards throwing him into the sea, whereof he instantly died.

The defence pled for the pannels, was this, that the pannels were, by military order, appointed to attend the officers of the customs in seizing of goods by law made seizable; and that the pannels being in a boat, upon the seas, along with the custom-house officers, in quest of such goods, the person killed did come up with them in another boat, with others in company with him; and that Fraser the deceased jumped into the boat, where the pannels and the custom-house officers were, and endeavoured to take hold of their arms; which was both a resistance and an attack of the custom-house officers while in the execution of their duty.

Upon the other hand, it was pled against the pannels, that Fraser's jumping into the boat, was with no intention to make resistance, but rather to save his own life from the thrusts of the pannels, their pieces having been aimed at him; that those in the custom-house boat could have no just apprehension of being mastered by Mr. Fraser, he having no invasive weapon about him whatever, and being the only person who offered to get into the custom-house boat, in which there were several persons well armed.

The judge of the high court of admirality admitted of the pannels' plea, in this manner only, "sustains the defence of self-defence proponed by the pannels, that the killing of the said Hugh Fraser, by them, or either of them, was in the necessary defence of their lives, and repelled the whole other defences proponed for the pannels."

The jury returned their verdict, finding the pannels both guilty, art and part, of killing the said Mr. Fraser; and finding it not proven, that the killing of Mr. Fraser was in the necessary defence of the pannels' lives: Upon which verdict returned, the judge sentenced both the pannels to be hanged.

The proceedings of the court of admirality were laid before your lordships for a review,

which, it is believed, is the single instance wherein it was ever contended, that the proceedings of the high court of admirality in matters criminal could be reviewed by any other court.

Notwithstanding of which, your lordships were pleased to reverse the sentence of the judge admiral; no doubt, upon supposed error in his proceedings; because the verdict of a jury, pronounced upon evidence, cannot be reversed; and in consequence of which judgment of your lordships, the pannels were set at liberty.

Now the pannel is advised, that such judgment in your lordships could stand upon no foundation other than this, viz. That your lordships had reversed the judgment of the admiral as erroneous, in not sustaining this defence to the pannels: That they were resisted by Mr. Fraser deceased, while they the pannels were in the execution of their duty.

And as the degree of resistance offered by Mr. Fraser to the pannels, was by the pannels themselves maintained to have been no higher than what has been set forth to your lordships; the forsaid unanimous judgment of your lordships pronounced after many solemn deliberations, does by consequence shew, that it was your lordships unanimous opinion, that a very small degree of resistance of persons in the execution of their duty, will justify the persons resisted in the act of killing the resister.

And if that was the solemn and unanimous opinion of the Court in a case so recent; must not such judgment afford a strong argument to the pannel, that he and his guard were resisted, while in the undoubted execution of their duty, in being beat, wounded, and bruised by an unruly mob; who, there was good reason to apprehend, intended to defeat the execution of the criminal?

To this last case, the pannel met with no other answer from his majesty's advocat, but this, that the pannel cannot plead the benefit of this case: because he neither does, nor can aver that the firing proceeding from him or his order, was necessary for securing of the execution of that trust that was committed to him: his majesty's advocat does admit, that where a person has by lawful authority weapons put into his hands, to be employed either in defence of his life, when attacked, or in support of the execution of the laws, or of the property of the crown, or property of the subject; such person may use those weapons, not only when his own life is so far in danger that he cannot probably escape without making use of them, but also where there is imminent danger that he may by violence be disabled to execute his trust: But witball seems to contend, that the pannel was under none of those circumstances at the time he committed the guilt charged upon him in the indictment; for that the execution of the criminal was over before the scuffle began, or any resistance was made to the pannel, and the guard under his command; and that being the case, the pannel can plead no other defence, than such as might arise from his being put under the imminent danger of his life.

But, with great submission, these positions of his majesty's advocat are assumed without any authority, and, as would appear, not only in plain opposition to the laws, but to the many precedents already offered in behalf of the pannel; for it is hoped it must be admitted, even by my lord advocat himself, and is indeed so admitted by him, that the pannel was once in the lawful execution of his duty, and was obliged at all hazards to support the execution of that criminal who was committed to his guard; surely then, the execution of the pannel's duty can never be said to have been at an end, until once the criminal was fully executed to death, and as such ordered to be cut down by lawful authority; unless it shall be said that it was the pannel's duty, the moment the convict was hung up, to let him instantaneously be cut down, rescued by the mob, and brought to life again; which seems to have been their plain intention: for it seems to be confessed upon all hands that there was danger of a rescue, which seems to have been the occasion of all this extraordinary apparatus: and for preventing of which it is admitted, that the whole guard was sent out with their pieces loaded, and even with orders to fire at all ventures in case of such rescue. Was it not then a necessary part of the pannel's duty to protect and support the execution of the convict, when hanging by the neck in the air, until such time as he was cut down by lawful authority, as supposed fully dead? And it is certain that in answer to the pannel's message, orders were brought from the bailiffs that he should yet hang a quarter of an hour, which surely it was the pannel's duty to see obeyed, and which orders of the bailiffs the mob nevertheless did resist, and cut down the criminal long before that time was elapsed, and which the pannel was in duty bound to oppose; and from this contrast, it is offered to be proved, all the violence in the mob proceeded: but can it be with any justice affirmed, but that the pannel was in the execution of his duty, while he and his guard were standing upon the spot under arms? Is not every person in the execution of his duty while he is either going to, or coming from any lawful expedition? And therefore it seems impossible to maintain, but that the pannel, and the detachment under his command, were in the lawful execution of their duty, until they had once returned, and were dispersed and dismissed from duty, at which time only they were reduced under a private capacity.

And even the protection of the hangman, who had actually received several wounds and contusions, and was in danger of being tore to pieces by the mob, was a part of the pannel's duty: for though he is a minister of the law somewhat odious; yet he is a necessary one for the society, and lies under a greater necessity of being protected, from his being so obnoxious to the resentment of the mob; and

at least in humanity, must have such protection afforded him, as to defend him from having his brains knockt out.

How then can it be said, in any sense, that the pannel was in such situation, that he could only plead the benefite of self-defence? It is a known rule in self-defence, that a person invaded must retire as far as he can with safety: but if that is the case of a city guard (maintained at great expence) that so soon as they are invaded, they must immediately betake themselves to their heels, it will be apparent, that they are but keept up for very useless purposes.

At the same time the pannel can with great candor aver, that he is far from being of that disposition of mind, as to be ready to take the advantage, which the law might afford, against an unruly giddy mob; whereof he has given proof upon many former occasions, as must be allowed him; and whereof even the present case will be an instance in his favours, if he meets with justice from the evidence: but withall, he must be allowed to observe, that it would be a dangerous position, that a guard keept up for the maintenance of the peace of the capital city of this part of the nation, when they are assembled together upon duty, should be allowed to plead no higher privilege, than that of self-defence in the strickest sense.

And whereas my lord advocate seems only to admit, that a person who has weapons put in his hands by lawful authority, for the defence of the property of the crown, or liberty of the subject, may only use these weapons when he is in imminent danger of having the execution of his trust defeated by violence: if such is the case, the execution of duty will become a very ticklish point; and it is apprehended, that few folk will be fond of it, if they can possibly live without it; and of consequence, such doctrine must very much discourage any persons from offering their service, either to the crown or commonwealth.

And as the supreme executive power is by the constitution vested in his sacred majesty, our sovereign; therefore my lord advocate, who, by his office, is of council for his majesty in all causes, will, no doubt, have due consideration, how far an argument is to be pressed against the pannel; which, by plain consequence, must tend to weaken, if not defeat, the execution of the laws.

One would rather be inclined to think, that where a person has the trust of the execution of the laws committed to him, the smallest resistance to this trustee, as such, is a guilty aggression, and that every opposition of such aggression is lawful defence, because no man must be above the laws; and the life of the laws, in which the common good is employed, is of greater value than the lives of any one or number of the individuals, and so ought to be defended at all perils.

His majesty's advocate upon this head, in his information against the pannel, does assume this fact, that the mob or multitude assembled at the execution, were behaving themselves peaceably; and from this seems to draw his inferences against the pannel, which indeed will run high enough. The pannel very well knows, that no order whatever will justifie the person executing that order, if such order appears evidently to be unlawful; and yet in cases which appear doubtful, an order from a superiour will have its own weight; more especially in military matters, or such other things as resemble them.

But, with submission, this reasoning upon the mob's being supposed quiet and peaceable and innocent, is entirely out of the case; for, as we are now upon relevancy, the facts must be supposed, and then the argument considered in that view: and as the pannel does aver, that he and his guard, while in the execution of their duty, did meet with strong resistance from the mob, in so much that many of the men were greatly hurt and bruised: and if that was the case, it was an unlawful invasion of persons, to whom the execution of the laws were committed; and so might be by them, in support of those laws, resented to a pretty great length; except it shall be maintained, that in the situation of the pannel and his men were posted, they could plead no higher privilege than that of self-defence; which, with great respect, cannot be maintained, but rather seems to be a contradiction; because they had not only their own defence to take care of, but also the defence of the peace and quiet of this city, and of the execution of the laws, and that due obedience was given to them.

In a word, upon this head, the pannel's argument is not only supported from the nature of the thing, because a man who fights with the laws upon his side, fights with great advantage against those who are fighting against the laws; and for that reason, if a man were to fight a duel, the laws would be the best second; but also, it is believed, that no instance can be given in this country, or in any other of civilized policy and government, where a person, proceeding to what extremities whatever against persons who had assailed him, while in the due execution of the law, ever suffered the pains lybelled.

My lord advocat seems to insinuate, as if the reading of the Riot-Act had been a duty incumbent upon the pannel, whereby the innocent part of the multitude would have had time to have taken care of their own safety: but then his lordship will be pleased to consider, that no person is by law authorized to proclaim that act, other than a justice of peace, sheriff, mayor, bailiff, or other head officer; and no person, under any of these characters, was left with the unfortunate pannel; but he was abandoned and left to grapple with occurrences in the best manner his own discretion could suggest to him.

But then the reading of that act could not answer the present exigency: for though the

reading of that law may perhaps sometimes answer the end for which it was intended, namely, the preventing the demolition of any house or meeting-house; but if the pannel, in the present case, should be supposed bound to have keep his hands across for the space of one hour, after the reading of this act; then it is certain that the mob might have prevented the execution of the law in far less space. And it is certain, that by the act, the mob is not put in contempt, or exposed to the penalties of it, until once they continue together one hour after the reading thereof.

His majesty's advocat is also pleased to hint, as if the offering of this plea in behalf of the pannel, founded upon the resistance of the mob, was in some sort inconsistent with another to be hereafter mentioned for him, viz. his innocence of the facts: but, no doubt, my lord very well knows, that by the laws of Scotland, there is no inconsistency in such different pleas. And this leads to the consideration of the exculpation offered for the pannel, arysing from his innocence of the guilt, either of the action, command, or order charged against him in the indictment.

And in the first place, as to such part of the indictment as charges him with either having fired himself, or having given orders to fire, whereby Charles Husband was killed: though it is indeed true, that it is impossible, from the nature of the thing, for the pannel to prove an absolute negative; because, as his majesty's advocat very justly argues, if the charge in the lybel is proven, to witt, that the pannel either did fire, or gave orders to fire, at this time himself, no negative evidence can prevail against it; yet as to this point, the pannel offers to prove, what the lawiers call a circumstantiate negative, which in a good measure resolves into an affirmative, viz. That at this time, when Charles Husband fell, and gote the wounds charged in the indictment, whereof it's supposed he died, the pannel, as has been above recited, was in the following situation; that is to say, he was pointing his piece with his face towards the west port, threatning the mob, that if they would not keep off, he would fire; and that immediately, upon this expression, a private centinel of the guard came up from behind him, and discharged his piece, by which it will be proven, Charles Husband received his death wounds; because it shall be proven, by persons of undoubted veracity, that were hard by the pannel all the time, that they not only observed, that he did not fire his own piece, and gave no order for firing; joined with this other circumstance, that no proof will appear, during the whole scuffle, that ever the pannel made use of any firelock, but his own; and that his piece, when returned to the guard, was found loaded; and in such condition, that it was even confessed by the magistrates themselves, and many others, not to have been fired; with this further addition to exclude that further part of the charge in the indictment, of the pannel's having made use at any time of any other piece than his own, viz. that he carried his own piece in his hand the whole time, except during the space of prayer above-mentioned, when he gave it to his serjeant: and it shall also be proved, that there was but one shot fired at this time, at which Charles Husband is supposed to have received his death wounds. And as to the other dropping shots that are charged in the indictment to have followed upon this first shot, if from the evidence adduced, the pannel's proof shall appear to be most pregnant, that he gave no orders to fire at this time, then he is not chargeable with the consequence of such firings.

And this further circumstance must strongly operate in favour of the pannel; to witt, that at the time of this supposed order to fire, the men were not drawn up in a regular line or band; but were either straggling, mixt with the mob, or in a circular form, surrounding the scaffold in the Grass market, which excludes all possibility of any supposed general order to fire; unless it be supposed that the pannel was a madman, seeing any compliance with such order must have led the men to fire each in his opposite neighbour's breast, and a great many into that of the pannel.

It is not altogether impossible that the pannel's expression of the word 'fire,' might have erroneously induced this fellow that came from behind his back (who of himself perhaps was too forward to embrace such order, had it been given) to discharge his piece: and if the person firing was guilty of an error, or of a misconstruction of duty, the pannel is not chargeable therewith; seeing that every person that has the least knowledge of the exercise of arms, must know, that he is not to receive an order to fire from implication, but from some known certain rule of discipline.

And for this reason it is, that the pannel takes it to be a very wise part of the military institution, to avoid misconstructions, that no man receives orders to fire (especially when he is resting or shouldering his arms) but upon a precedent series of exercise attended with some solemnity, to avoid mistakes; greater or less indeed according to the nature of the occasion.

Sometimes indeed, as was observed in the debate on the side of his majesty's advocat, persons will, very justly, fire upon so short advertisement as the tuck of a drum; but it is believed, that is never practised, but during the noise or tumult of battle; when it is supposed that the voice of verbal order cannot reach the men; and then this tuck of the drum, or any other signal of firing, must be previously advertised to be the signal of such action.

Another thing falls also to be noticed here, touching this first charge in the indictment, and which may be even taken through the whole; that when two or more persons are nigh together, levelling their pieces at the same time, it is not easy for the sharpest eye, especially if at any distance, to determine from what piece the fire proceeded; and of this point

military men, best acquainted with the exercise of fire arms, can give the best account.

And lastly, upon this head, the best conjecture the pannel can make, is this, that upon this first fellow's firing, without either order or example from the pannel his commander, the other dropping shots that ensued, proceeded from other rash fellows of the guard; who encouraged by this first example, directed and discharged their pieces against such part of the mob, as they respectively supposed any injury or invasion upon them had proceeded from.

The next material circumstance, charged in the indictment, is that, touching the pannel's behaviour at the West-bow; where it is charged, That he commanded the men to face about, and fire upon the people; and that at or about the same time, he fired a musket or firelock that was in his own hand; having either reloaded, or caused to be re-loaded, his own piece, or taken another out of the hand of one of the guard; and that upon this second example and command of the pannel's, several others of the guard, under his command, did fire; whereby the persons mentioned in the indictment were killed and wounded.

As to which part of the charge, the pannel offers the following proof: and first, as to order, he shall prove by multitudes of persons nigh him at the time, and who were narrowly observing him (and orders are generally given with an audible voice), they heard no such order given, nor heard no expression of the pannel, that, by the most remote consequence, could have been interpreted an order to fire: and here the pannel's memory, upon the most serious reflection, cannot divine what could have given occasion to any body's conjecturing that he gave an order to fire at this time. And here also the former observation falls to be noticed, touching the solemnity of an order for firing.

2do. As to the action of firing charged against the pannel himself, for firing at this time; the pannel offers to prove the very centinel, at least, that it was a centinel of the guard, who gave the first fire at this time, which was the shot at Robertson's closs-head. And the pannel is informed, as has been above noticed, that at the time of taking the precognition, an offer was made to the magistrates to single out the fellow, if they would suffer the guard to be drawn out, who fired that shot towards Robertson's closs-head, by which the two or three people fell. And further, the pannel offers to prove, upon this head, not only that this fellow was the first person that fired, without any order from the pannel circumstantiated, as is above noticed, but also by many persons of undoubted credite, that they could not observe the pannel fire, or discharge any piece himself, during the whole time that this firing is supposed to have continued. And here the pannel could evidently cast up many inconsistencies to your lordships, that must necessarily be implied, and many presumptions that strongly exclude any supposed order or example of the pannel at this time; but does not think it altogether so prudent to mention them at present.

As to the taking a piece out of another man's hand, and firing of it, such action was a remarkable occurrence, and must have fallen out under observation; and so the pannel can say nothing about it, but leave it to evidence, with this only observation, that as it was a notable event, it will operate almost as strong in the negative as in the positive. And it must be left to the jury to balance the evidence, if a contrariety shall appear; and to lean to that side attended with the greatest credibility, taking the known rule of the law into the compass, namely, favour to the pannel in case of dubiety. Only this observation falls to be made to your lordships, that the circumstances of the case call aloud for the pannel's being allowed a proof upon this part of the indictment.

The pannel does agree with his majesty's Advocate, that no negative evidence can take away a positive proof; but the pannel humbly thinks he has offered a pretty circumstantiate one: and as my Lord Advocate seems to admit the necessity of a proof on both sides, so the pannel will not labour that point with your lordships; not doubting but you will allow him in general, to prove what he can, to exculpate him from the guilt laid in the indictment; and that your lordships by your interloquitur will allow him as much scope in that particular, as any precedent of your lordships' court can authorize. And there are several instances, and one very particular one, wherein great latitude was allowed, both as to the circumstances precedent, concomitant, and even subsequent to the acts charged in the indictment.

Some general useful reflections might be made, but this paper is already drawn out into too great length, and as the pannel has learned judges, and a discerning and candid jury, the less needs be said; because it is supposed they will naturally occur to these interested in the trial; and no doubt such will lay aside all prejudices and prepossessions; and will never once think of, but utterly despise the consequences of popular rage or vulgar clamour.

If the pannel is guilty of the charge in the precise way and manner it is laid against him in the indictment, he is of opinion himself he deserves to suffer: but if on the other hand it shall come out, that he is entirely innocent of the blood of those men wherewith he is charged; he thinks his case deserves singular commiseration: because, if bonds and imprisonment, loss of employment and bread, obloquy, and reproach of blood-guilt and massacre, and of consequence loss of character be calamities in human life; then has he had as great a share of them as ever attended innocence.

Sic Subscribitur, JA. GRAHAME, Jun.

CURIA JUSTICIARIÆ, S. D. N. Regis, tenta in Prætorio Burgi de Edinburgo, Decimo sexto Die Mensis Julii, Millesimo septingentesimo trigesimo sexto, per Honorabiles Viros, Andream Fletcher de Milton, Justi-

clarium Clericum, Dominum Jacobum Mackenzie de Roystoun, Magistrum Davidem Erskine de Dun, Dominos Gualterum Pringle de Newhall, et Gilbertum Eliot de Minto, Commissionarios Justiciariæ dicti S. D. N. Regis.

Curia legitimè affirmata.

Intran'

John Porteous, lately one of the captain lieutenants of the city guard of Edinburgh, pannel.

Indicted and accused as in the former Sederunt.

The Lords Justice Clerk, and Lords Commissioners of Justiciary, having considered the indictment pursued at the instance of Duncan Forbes, esquire, his majesty's Advocate, against John Porteous, pannel, with the foregoing debate thereupon, Find, That the pannel having at any of the times and places libelled, fired a gun among the people assembled at the execution libelled, or having given orders to the soldiers under his command to fire; and thereupon they the soldiers, or any of them, having, accordingly fired; and upon the firing, either by himself or them, the persons mentioned in the indictment, or any of them, were killed or wounded; or the pannel's being art and part of any of the forsaid crimes; all *separatim* relevant to infer the pains of the law: but allowed the pannel to adduce what evidence he could with respect to his behaviour at the time the forsaid crimes are libelled to have been committed, for taking off the circumstances which should be brought for inferring his being guilty, or art and part of the crimes libelled; and remitted the pannel and the indictment as found relevant to the knowledge of an assize.

Sic Subscribitur, ANDR. FLETCHER, I. P. D.*

The Lords Justice Clerk, and Lords Commissioners of Justiciary, continued the above diet at the instance of his majesty's Advocate against captain John Porteous, till Monday next at seven of the clock in the morning; and ordains assysers and witnesses then to attend, under the pain of law, and the pannel to be carried back to prison.

CURIA JUSTICIARIÆ, S. D. N. Regis, tenta in Novo Sessionis Domo Burgi de Edinburgo, Decimo nono Die Mensis Julii, Millesimo septingentesimo trigesimo sexto, per Honorabiles Viros, Andream Fletcher de Milton, Justiciariæ Clericum, Dominum Jacobum Mackenzie de Roystoun, Magistrum Davidem Erskine de Dun, et Dominum Gilbertum Eliot de Minto, Commissionarios Justiciariæ dict. S. D. N. Regis.

Curia legitimè affirmata.

Intran'

John Porteous, lately one of the captain lieutenants of the city guard of Edinburgh, pannel,

Indicted and accused as in the former Sederunts.

Thereafter the Lords proceeded to make choice of the following persons to pass upon the Assize of the said John Porteous:

ASSIZE.

Sir John Inglis of Cramond.
Alexander Gibson of Pentland.
George Halyburton of Fordell.
James Baird of Chester-hall.
John Hogg of Cambo.
Thomas Dundas of Letham.
Alex. Brand of Brandsfield.
John Jollie, vintner in Edinburgh.
James Hunter, wright in Edinburgh.
William Wight, baxter there.
John Bell, brewer there.
James Davidson, bookseller there.
David Inglis, merchant there.
Alexander Sharp, merchant there.
Patrick Manderstoun, merchant there.

The above Assize being all lawfully sworn and no objection of the law in the contrary.

The pannel, John Porteous, judicially confessed, that time and place libelled, the several persons mentioned in the indictment to have been killed and wounded, viz. Archibald Ballantyne, son to John Ballantyne, the younger, dyster in Dalkeith; Margaret Arthur, alias Airth, residenter in the Cannongate, near the Water-gate thereof; John Anderson, son to George Anderson in Craighead, drover; John Peat, servant to James M'Dowal merchant in Edinburgh; David Wallace, journey-man wright in Edinburgh; James Philp, late servant to Lauder, esq. residenter in the Cannongate; David Kidd, taylor in Edinburgh; Patrick Spaldan, apprentice to David Mitchell jeweller in Edinburgh; James Lyll, and Alexander Wallace, both servants to James Wight staymaker in Edinburgh; John Miller, taylor in Edinburgh; David Ogilvie, writer in Edinburgh; and James Nevin, late servant to William Sellers writer in Edinburgh, now residenter in the Potteraw; Alexander M'Niel, son to Edward M'Niel, indweller in Mettounhall; Margaret Gordon servant to William Ogilvie, taylor in Saint Mary Wynd, in Edinburgh; and Henry Grahame, taylor in Cannongate; and Charles Husband servant to Paul Husband, confectioner in the abbay of Holy-rood-house, were so killed

* Concerning Interlocutors of Relevancy, see in this Collection the Cases of James Stewart, A. D. 1752, and of Nairne and Ogilvy, A. D. 1755.

It appears (New Parl. Hist. vol. 10, p. 201,) that in the House of Lords, this Interlocutor in Porteous's Case, was censured, as being objectionable from (int. al.) "an error or mistake with regard to the law of Scotland, and indeed of every well regulated society in the world."

or wounded by firing, proceeding from the party of the city guard then under his command, as mentioned in the indictment.

Sic Subscribitur, JOHN PORTEOUS.
ANDR. FLETCHER, J. P. D.

His Majesty's Advocate for proving his lybel, adduced the witnesses after deponing, viz.

James Drummond, merchant and residenter in Edinburgh, aged thirty years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, that time and place libelled, and after Andrew Wilson had hung some time upon the gallows, about a quarter of an hour, as the deponent thinks, he saw the executioner going up the ladder, as the deponent apprehended, to cut him down; upon which he saw some small stones thrown by the mob at the executioner; some whereof the deponent believes might have fallen upon the guard: upon which he saw the pannel advance from the guard westward, resting his firelock upon his thigh, as if he had been bending it, and thereafter saw him raise it to his breast, moving it from one point to another: and soon thereafter the deponent heard a shot from the place where the pannel was standing, but did not observe whether the shot came from captain Porteous's firelock; and much about the same time observed one of the soldiers go out of his rank westward, and upon the north-side, and saw him go further west than the place where captain Porteous was; the side of the window, where the deponent was standing in Robertson's house, covered the said soldier from the view of the deponent, by the time the first shot was fired; and which soldier had a gun and a screwed bayonet in his hand, levelled with the butt end of it at his breast; and the deponent did apprehend at the time that captain Porteous had fired, because he saw him in a firing posture, and immediately heard a shot, and saw a man in a few minutes thereafter, as soon as the mob dispersed, lying upon the street, upon a line whither the deponent saw captain Porteous's piece directed; and that the above-mentioned soldier came from the body of the guard which was behind captain Porteous. *Causa scientiæ patet*. And this is the truth as he shall answer to God.

Sic Subscribitur, J. DRUMMOND.
ANDREW FLETCHER.

Sir William Forbes, Advocat, aged thirty years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That time and place libelled, and after the deceased Andrew Wilson had hung about twenty or twenty-five minutes upon the gallows, the deponent, from a window in Orr the stabler's house, opposite but a little to the westward of the gallows, saw the executioner go up some steps of the ladder, as the deponent believes, to cut down the said deceased, and saw thereupon stones thrown at the executioner; upon which the executioner immediately retired to the guard, and the mob continued throwing of stones; so that the deponent does believe some of the stones might have touched the guard; and about this time the guard were drawing together to the north and west of the gallows, where the captain was standing, and did soon thereafter see the pannel advancing westward fire his gun among the people assembled at the execution; and observed the fire and smoak issuing out of the muzzle of his piece, to the best of the deponent's observation; which he thought at the time very distinct, and that the said shot was the first which the deponent heard; and the deponent at the time did imagine, that the pannel had fired his shot high; but whether that proceeded from the situation that his firelock was in, or from the appearance that the fire and smoak made that issued out of his piece, the deponent cannot now particularly charge his memory. That thereafter the deponent heard several dropping shots, about twenty, but cannot be positive as to the number; that when the aforesaid facts happened, the deponent was upon the south-side of the street, and the pannel to the north of the middle of the street, almost opposite to the window where the deponent was; and when the pannel so fired, the deponent did not observe any soldier so far advanced westward from the body of the guard as the pannel was. *Causa scientiæ patet*. And this is the truth as he shall answer to God.

Sic Subscribitur, WILLIAM FORBES.
ANDREW FLETCHER.

Mr. *William Fraser*, son to the lord Saltoun, aged twenty-four years, or thereby, unmarried, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That he was in a window in one Orr's house, in the Grass-market, the south-side of the street, that day that Andrew Wilson was execute; that after Wilson had hung some time on the gallows, he saw the executioner go up some steps of the ladder, as he apprehended, to cut him down; and then saw the mob throw stones and dirt at him; upon which the hangman came down and went in amongst the soldiers that were standing at the foot of the scaffold: that soon after the hangman had come down, he saw the pannel present and level his gun, moving the muzzle to and fro, and then saw him fire; and to the best of his knowledge or apprehension, saw the smoak issue out of the mouth of the piece; that immediately thereafter, within a second or two, he heard several dropping shots fired by the soldiers, who were there on their arms: that he thinks the dropping shots he then heard came from near the place where the pannel was standing.

And deponed, That at the time forsaid the pannel fired his gun, he did not observe any of the soldiers advance before him and present their guns. *Causa scientiæ patet*. And this is truth as he shall answer to God.

Sic Subscribitur, WILLIAM FRASER.
JA. MACKENZIE.

Mr. *William Urquhart* of Meldrum, aged thirty-eight years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That he was present at Andrew Wilson's execution the time libelled, in the house of one Orr, on the south-side of the street, in company with sir William Forbes and Mr. Fraser, the preceding witnesses; that after Wilson had hung some time, he saw the executioner go up some steps of the ladder, in order to cut him down, as he apprehended, and saw the mob throw several stones at him; upon which he came down, therefore the mob continued to throw stones, some of which fell among the guard; whereupon he heard several dropping shots fired by the soldiers; that he saw the pannel present his piece, immediately heard a shot, which he apprehended was shot by the pannel, but did not observe it so narrowly as to see the smoak or fire issue out of his piece. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, WILLIAM URQUHART.
JA. MACKENZIE.

James Dewar of Vogrie, aged sixty-four years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That time and place libelled, at Andrew Wilson's execution, he was in a window in his own house at the foot of the West-bow, in the east-side of the way; that he saw the hangman go up some steps of the ladder, after Wilson had hung some time; and saw the mob throw some stones, one of which hurt the executioner on the face; upon which he came down the ladder; whereupon he saw the pannel present his piece and fire, which was the first shot he heard or saw; that when he saw the pannel fire, his side was to the deponent, and that the pannel was then standing on the east-side of the gibbet; and that he fired his piece to the west: and deponed, he saw the fire of the powder from the pan, and heard the report of the shot. Depones, That when the pannel fired, as aforesaid, he was standing on the south-east side of the scaffold. Deponed, That Wilson was cut down not by the hangman, but by some that were standing at the foot of the gallows, and that Wilson was cut down before he heard any shots: Depoued, That he stood at his own window before Wilson was thrown over, and continued looking at the place of execution till he was cut down, and heard the shots as before mentioned. And being interrogated what kind of cloaths captain Porteous had then on, declares he cannot be positive, but believes they were red cloaths: but is positive tha the knew captain Porteous' face when he saw him fire. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, JAMES DEWAR.
JA. MACKENZIE.

George Drummond, esq. one of the commissioners of the customes, aged years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, that at the time and place libelled, the deponent was in the house of Baillie Halyburton] on the right hand, on the north side of the corner of the Strait-bow, the third-story, at the time of the execution of Andrew Wilson, and from a window of the said house, after the criminal was thrown over, and had hung for fifteen or sixteen minutes, the executioner was about going up the ladder; and after he went up two or three steps, he observed several stones thrown at him; which made him return; and while he was on the ground, he observed his nose blooding: and at this time he observed one or two persons or more standing at the foot of the gallows; one of whom stretching up his arm with a knife, he observed cut the rope; the executioner having mixed with the soldiers, he did observe the throwing of stones to continue, and some of them fell among the soldiers. Depones, that immediately thereafter he observed one of the soldiers advance a little before Mr. Porteous to the westward, with a gun in his hand, which he presented; and immediately thereupon the deponent heard a shot, which he imagined to be from that soldier, but did not observe fire or smoak; though at the time he concluded it was from that soldier's gun, and is positive that that was the first shot that was fired; and the deponent did not think that the stones that were thrown did give any just cause for the firing. Deponed, that about the time when he observed the soldier present his gun, as said is, he also observed the pannel holding his gun in his hand in a level, but is not sure of his putting the butt of it to his shoulder. Depoued, that after the said first shot, within a minute he heard another, and so it continued till about the number of eighteen or twenty; and this was at the time of the firing observed by the deponent; but within some minutes thereafter, there was a second firing, which he did hear, and upon hearing came to the window, and observed some lime fallen from an opposite house, which he judged to have been occasioned by the bullets: And as to the eighteen or twenty dropping shots, in the first firing, they were from the soldiers immediately behind the pannel, betwixt whom and them, he observed no person interposed; and he observed the time of the first shot the pannel's face was looking westward, as was all the soldiers' behind him. Deponed, that the soldiers at that time, who fired, were to the deponent's best remembrance to the northward of the scaffold; and the pannel was then, to the best of his remembrance, either upon a line to the gibbet, or a little westward of it. Further deponed, that the soldier who first fired, as said is, advanced from behind the pannel, and past upon his right hand to the northward of him. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, 1736. GR. DRUMMOND.
DA. ERSKINE.

William Johnstoun, druggest in Edinburgh, aged forty years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, time and place libelled, he the deponent being present at the execution of Andrew Wilson, he did observe the pannel take a gun out of a soldier's hand, at which time he was standing 'twixt the Corn-mercate and one Tod's shop, which is under baillie Halyburton's house; thereupon he observed the pannel advance some steps westward, and did see him present and level his gun, that is to say, hold it out and fire amongst the multitude; and did observe the smoak come out of the gun: And deponed, that this was the first shot he heard, which shot immediately followed after the criminal was cut down by a hand standing at the foot of the gibbet; and the deponent, at the time was standing in a window in the house of one Gairdner, horse-ferrier by the Muse Well; and when the pannel was taking the gun out of the soldier's hand, he appeared to be in passion, and it was some short time before he was master of the gun. Deponed, that to the best of his remembrance the pannel was cloathed in red, but he being well acquainted with the pannel's face, he is positive, that he was the person that took the gun and fired as aforsaid. And deponed, that he believes there was about thirty yards distance betwixt the window where the deponent was, and the pannel, at the first firing, *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, WM. JOHNSTOUN. DA. ERSKINE.

Mark Sprott, skinner, and one of the constables of Edinburgh, aged 28 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That time and place libelled, as he stood on William Orr stabler's window, south-side of the Grass-mercate, he saw Wilson the criminal cut down from the gibbet: upon which occasion he did not observe that there was any greater disturbance than usual at executions: that a very little while after the criminal was so cut down, he observed the pannel advance before the soldiers, and upon the north-side of the scaffold over-against the gibbet, he saw him fire his piece towards the west, and the smoak issue out of the mouth of his gun; this he says was the first shot that was fired; but immediately, upon the back of that, a tall man with his own hair, about the third behind the pannel, as he thinks, fired off his piece likewise towards the west, but up in the air over the heads of the multitude: that very soon after several other dropping shots followed, after which when the people fell back and opened, he observed a young man lying upon the ground as dead, directly opposite to the place where the pannel fired. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, MARK SPROTT. GILB. ELIOT.

George Campbell, wright in Edinburgh, aged 28 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That time and place libelled, the deponent stood in the window of Mr. Carmichael's house, in the south-side of the Grass-mercate, directly opposite to the gibbet; that a very little after Wilson was cut down, he observed the pannel with four or five of his men about him, and that as he pointed his piece to and fro towards the multitude, he observed him receive a stroak by a stone thrown from behind the scaffold, off which it rebounded and struck him; upon which he immediately fired his piece; but whether this was the first shot or not, the deponent cannot tell, for there was three or four fired much about the same time; but that the pannel fired, he is sure, for he saw fire and smoak issue from his piece. That upon these shots already mentioned, he saw a man fall down upon his back on the street: that after this he saw the pannel raise his musket, and put his hand to his cartrage-box, as if he intended to load again; but does not know what followed upon this, because he immediately lost sight of him. Deponed, That when the pannel fired his piece as above, he was standing towards the south-east corner of the scaffold, and pointed his piece towards the south-west: that the pannel's fire, with the shots that went off at the same time, were the first that were made on that occasion. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, GEORGE CAMPBELL. GILB. ELIOT.

James Bald, merchant in Edinburgh, aged 32 years, or thereby, widower, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That time and place libelled, the deponent stood in the same window with the immediate preceding witness, or at least in a window in the same room: that a little after Wilson was cut down from the gibbet, he saw the pannel advance a little westward from the Corn-mercate, towards the south-side of the gibbet, and fire off his piece west-ward, toward the Muse Well: that at this time he saw none of the soldiers near him, nor observed any other fire but his; and before there was any more firing, when the multitude fell back, he saw a man lying dead, towards the place that the pannel pointed his piece; that he is sure the captain fired, since he saw the fire and smoak issue from his piece. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, JAMES BALD. GILB. ELIOT.

Andrew Daw, servant to James Montgomery, brewar in Potteraw, aged 22 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That time and place libelled, the deponent was standing at the foot of Robertson the stabler's close, when Wilson was

cut down from the gibbet: immediately after which the pannel, who was standing in the middle of the street, between the deponent and the Corn-mercate, fired his piece toward the place where the deponent was standing; upon which a baxter in the Abbay, called Charles Husband, dropt just by the deponent; and his the deponent's coat was some in the shoulder with the same shot; that he heard the report of the captain's piece, though he neither saw the fire nor the smoak, yet he is sure the pannel fired, because he saw no other piece presented at the same time: that the pannel when he fired as above, was as near to the deponent, as the end of the table where he now stands is to the west-end of this room. Deponed, That the shot mentioned to be made by the pannel was the first he heard that day. Deponed, That during the whole time of the execution he never came nearer the scaffold than Robertson's close-foot (by Robertson's close-foot is meaned the end nearest the Grass-mercate). *Causa scientiæ patet.* And this is the truth as he should answer to God, and declaired he cannot write.

Sic Subscribitur, GILB. ELIOT.

Walter Sheargold, indweller in Edinburgh, aged 28 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That he was present the time and place libelled; and after the criminal Wilson was cut down, he saw captain Porteous fire his gun, holding the same straight out at the multitude; and that the deponent was then within three yards of the captain, when he saw him fire, and that after he had fired, he heard him call, Fire; then heard some shots, but does not know from what hands they came, for he immediately retired to the Lawn-mercate. Deponed, That when the pannel fired, his left hand was towards the scaffold, and he fired towards the west-port. Deponed, That the scaffold was nearer to the west-port than the pannel was when he fired, that is, the pannel was nearer to the Corn-mercate. Deponed, That this shot by the pannel, was the first that he heard at that time, and that he was present all the time of the execution; that he was so near as to see the fire and the colfine fly out of the pannel's gun. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, WALTER SHEARGOLD.
WALTER PRINGLE.

John Ritchie, servant to Mr. Archibald Murray, advocate, aged 17 years, or thereby, unmarried, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That the time and place libelled, the deponent was present at the execution of Andrew Wilson; and after the criminal was cut down, he saw and heard about three shots fired, and then he heard a fourth shot, which was by captain Porteous; and that he saw a man fall down, but the deponent imagined it was from the pressure of the crowd; that there was very short time betwixt the shots, but that which was by captain Porteous was the last in order. That after the criminal was cut down, the guard drew towards the north-side of the scaffold; that the deponent was standing within two or three yeards of the foot of Robertson's close, when he saw and heard the firing. Deponed, he heard the pannel mention the word, Fire, before the firing. Deponed, That the pannel was, to the best of the deponent's remembrance, standing as far west as the gallows; but he cannot be very positive; the mob and crowd was such, that he could not very distinctly discern. Deponed, That the shots mentioned by the deponent, first three, and then a fourth, was the first he heard that time. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, JOHN RITCHIE.
WALTER PRINGLE.

Thomas Crookshank, servant to Thomas Frotter, brewar in Edinburgh, aged 22 years, or thereby, unmarried, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That the time and place libelled, the deponent being upon the causey on the south side of the scaffold, saw the pannel, who was then standing upon the north side of the scaffold, fire the gun that was in his hand upon the multitude, the point of the piece being directed westward; and saw the fire and smoke issue out of the muzzle of the gun, that was in the pannel's hand. And further deponed, that the pannel was standing at the north side of the scaffold, and at that end of it, which is next the Bow. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, THOMAS CROOKSHANK.

And being further interrogate, if the said shot that the pannel fired, was the first shot, deponed, That it was the first shot; but that several other shots followed immediately thereafter. And this is likewise the truth as he shall answer to God.

Sic Subscribitur, THOMAS CROOKSHANK.
ANDR. FLETCHER.

James Neilson, gardener in the Bull-Close of Edinburgh, aged 31 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, Time and place libelled, the deponent being standing within the foot of a turnpike near the Muse Well, saw the pannel who was then standing upon the north side of the scaffold, a little to the eastward, where the gallows was; and saw the pannel advance westward, towards the multitude, with his firelock in his hand, moving it to and again, as if he had been beating back the people; and at the third or fourth motion, saw the pannel fire the piece that was in his hand upon the multitude, pointing it westward, and saw the smoak issue out at the muzzle of the said piece. That this was the first shot which the deponent heard, which was soon followed by others; for the deponent observed the pannel after he had fired his piece, retire some yards to the soldiers, and saw five

or six of these soldiers advance and fire upon the multitude; and soon thereafter when the multitude were beat off the deponent saw a boy with black hair lying within ten yards of the turnpike where the deponent was standing, and saw four other persons lying at different places upon the street; and saw the first mentioned boy blooding at the ear. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, JAMES NEILSON.
ANDR. FLETCHER.

William Gordon, baxter, and servant in the common bakehouse in Haslies Close in Edinburgh, aged 21 years, or thereby, unmarried, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That the time and place lybelled, the deponent being at the head of the turnpike at the back of the Muse Well, did from thence see captain Porteous, pannel, who was then upon the north-west corner of the gibbet, wave his firelock to and again; and thereafter saw the said firelock while in his hand, go off, and saw the fire and smock go out at the mussle of it; and this was the first shot which the deponent heard that day, but heard several shots thereafter; and that the shot which the pannel fired, was soon after the deceased Andrew Wilson was cut down. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, WILLIAM GORDON.
ANDR. FLETCHER.

James Nasmith, servant to Colin Alison, wright in Edinburgh, aged 26 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogate, deponed, That time and place libelled, and soon after the deceased Andrew Wilson was cut down from the gibbet; the deponent being upon the causey of the north-east end of the scaffold, beginning to take down the scaffold; and did then hear the pannel, who was towards the north end of the scaffold, say several times to the soldiers under his command, Fire and be damn'd! and at the same time saw the pannel advancing westward, with his piece presented in his hand; and immediately after hearing the forsaid words, he heard several shots go off; and when the forsaid words were spoken by the pannel, he was passing by the deponent westward, about a yard or two distant from him. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, JAMES NASMITH.
ANDR. FLETCHER.

David Broun, servant to Colin Alison, wright in Edinburgh, aged 28 years, or thereby, unmarried, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That time and place libelled, and after the deceased Andrew Wilson was cut down from the gibbet, the deponent being standing at the east end of the scaffold, assisting to pull it down; and then saw the pannel going along the north side of the scaffold westward, and heard him give orders to the soldiers under his command to fire; but does not remember the particular expression; and immediately upon the orders being given as aforesaid he heard several shots; and when the deponent heard the pannel give the forsaid orders, he was about the distance of the breadth of the scaffold from him. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, DAVID BROUN.
ANDR. FLETCHER.

Matthew Kid, servant to Thomas Milln, deacon of the measons in Edinburgh, aged 33 years, or thereby, married, solemnly sworn, purged of malice, and partial council, examined and interrogated, deponed, Time and place libelled, and soon after the deceased Andrew Wilson was cut down from the gibbet, the deponent being standing upon the plain stones near capt. Todd's shope, he saw the pannel going from the well at the Bow-foot westward, and saw him fire the gun that was in his hand, and thereafter give orders to the soldiers under his command to fire; thereafter heard him call to the said soldiers to level their pieces; and saw the said soldiers fire; and that the shot fired by the pannel as aforsaid, was either the first or second shot; which shot he fired standing to the north-east of the scaffold, half way 'twixt that and the Bow-foot well; and that when the pannel ordered the soldiers to level their pieces, he was some yeards nearer the foot of the Bow. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, MATTHEW KID.
ANDR. FLETCHER.

James Maxwell, servant to Colin Alison wright in Edinburgh, aged 32 years, or thereby, married, solemnly sworn, purged of malice, purged of partial council, examined and interrogated, deponed, That the time and place libelled, after Wilson was cut down and put in his coffine, there was some stones thrown by the mob amongst the guard; upon which he heard the pannel to order the soldiers to turn in; and immediately heard him give the soldiers orders to fire, and be damned; and then saw him advance two or three paces, and saw his gun cocked, and his thumb upon the dog-head, and saw him fire the gun; and immediately before he heard any other shot, he saw a boy fall near a coppersmith's shop, to the north-west of the place from which the pannel fired his gun. There were six or seven more shot after the orders were given; and then he saw three men and a woman fall, one of which had a wound in his forehead, and another in the side of his head: that after the soldiers fired as aforsaid he heard the pannel say to one of the soldiers, That if he did not fire, he would take his piece from him. Deponed, That he the deponent was then standing on the south side of the scaffold, helping to pull it down, when he heard and saw what is above deponed upon; and that the pannel was upon the north side of

the scaffold, about ten yards from it, over-against the middle of the scaffold: and deponed, That the pannel's shot at that time was the first he heard then shot. Deponed, That he was present at the time from Wilson's coming down to his execution, till after he was cut down and carried away; during which time he heard no shot fired, until that fired by the pannel. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, JAMES MAXWELL.
JA. MACKENZIE.

William Douglas, one of the soldiers in the city guard, Edinburgh, aged 47 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That the time and place libelled, as the executioner was going up the ladder to cut down Wilson, there were several stones thrown at him, which obliged him to come down the ladder; at the same time there was several stones thrown amongst the guard, before Wilson was cutt down, at which time he heard the pannel say to the soldiers, Be damn'd to you, bougars, fire; after which he heard several shots fired by the men, but knows nothing of the pannel's having fired; and that these were the first shots he heard fired that day, to the best of his knowledge. Deponed, That the pannel, when he uttered the words before-mentioned, was standing at the south side of the gallows. Deponed, That the first shots were fired before Wilson was cut down, and likewise some of them thereafter. *Causa scientiæ patet.* And this is the truth as he should answer to God; and declares he cannot write.

Sic Subscribitur, JA. MACKENZIE.

Archibald Yetts, litster in the abbay of Holyrood-house, aged 48 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That the time and place libelled, a little after Wilson was cutt down from the gallows, he saw the pannel fire his piece among the multitude; and immediately heard him say to his men, Levell your pieces, and fire and be damn'd! Whereupon there were a great many shots fired by them, and saw the pannel take a gun from one of the men, which he the pannel fired. Deponed, That he the deponent was within six yeards of the pannel when he fired, and spoke the words before-mentioned. Deponed, That at the time when the pannel took the gun from the soldier, he laid his own upon the scaffold, and that there were some persons, but very few, then standing upon the scaffold. Deponed, That betwixt the time that the pannell fired his own piece, and his taking the gun from the soldier, as aforesaid, it might be about eight or nine minutes: And deponed, That at the time he fired the second gun, there were several other guns fired at the same time. Depones, That there was no shot fired before the first fired by the pannel; and that the second shot fired by the pannel was near the same place where he fired the first: and that he had not moved above six or seven yeards betwixt the first firing and the second; and that some of the soldiers followed the pannel in that space, and returned with him again to the place where he fired first. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, ARCHIBALD YETTS.
JA. MACKENZIE.

William Murray, barrowman and indweller in Edinburgh, aged 27 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, Time and place libelled, the deponent being present at the execution of Andrew Wilson, he did observe two of the soldiers under the pannel's command, fire their guns; but the guns were fired up in the air; thereafter he observed the pannel fire his gun amongst the multitude; whereupon he observed a boy drop down, and did hear the pannel call out to the soldiers, Damn them for bougars, why did they not fire even forward, and clean the street? At which time the deponent was standing about the south pillar of the Corn-mercate, about twenty yards distance from the pannel, as he apprehends: Further deponed, that after the said first firing, he observed the pannel take a gun out of a soldier's hand, and fire again; directing it towards a man he was pursuing; which he did thirty or forty yeards; and upon firing, he observed the person so pursued, fall down: And being interrogated how long his present dulness of hearing remained with him; deponed, he has been as dull of hearing these seven years past. Deponed, that the two shots from the two soldiers were the first firing he heard upon that occasion. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, WILLIAM MURRAY.
DA. ERSKINE.

James Nicoll, watch-maker in Cannon-gate, aged 36 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That he was present, time and place libelled, at the execution of Andrew Wilson; and then he did observe the pannel fire his gun, holding it out straight before him, amongst the multitude there assembled; and as he heard the report of the gun, so he observed the smoak of the powder coming from the gun; and this shot was the first he heard upon that occasion; and the pannel when he thus fired, was standing betwixt the gibbet and one Mr. Cunnyhame's shope on the north side of the street near the north east end of the scaffold. *Causa scientiæ patet:* And this is the truth as he shall answer to God.

Sic Subscribitur, JAMES NICOLL.
DA. ERSKINE.

William Jameson, merchant in Edinburgh, aged 24 years, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That he was present,

time and place libelled, at the execution of Andrew Wilson; and about the time when they were cutting down the criminal, the deponent then standing within three or four yeards of the pannel, did hear him give orders to the soldiers that were behind him to fire, and immediately thereafter he did hear the pannel fire the gun that was in his own hand; and upon his firing, observed the smoak of the powder come from it; thereafter he observed the pannel take a gun from one of the soldiers, but what use he made thereof, he knows not; and it was very short time 'twixt the pannel's firing, and his taking the gun from the soldier, as also, a very short distance betwixt the place where he fired, and where he took the said gun; the place of his firing, to the deponent's memory, being near to Robertson's Closshead; and where he took the gun, was a very little way up the street from it: And the shot he heard from the pannel's gun, was the first he heard that day. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, WILLIAM JAMESON,
DA. ERSKINE.

John Moffat, baxter, and servant in the common bake-house in Haelies close in Edinburgh, aged 26 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That at the time and place libelled, the deponent was standing in Mr. Orr's door, on the south side of the Grass-mercate; and some short time after Wilson was cut down, he saw the pannel take a gun out of one of the soldier's hand, before Mr. Todd's shops door, which he immediately fired off towards the north-west; a little before which the deponent saw him fire his own gun from the same place; that upon the captain's firing, the deponent saw some of the soldiers, who stood behind the Corn-mercate, fire their guns up in the air. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, JOHN MOFFAT,
GILB. ELIOT.

John Stewart, merchant in Edinburgh, aged 30 years, or thereby, unmarried, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That at the time and place lybelled, the deponent was standing in a window of Wine Garden's house, on the south-side of the scaffold: that some short time before Wilson was cut down, upon some stones being thrown at the hangman, he observed the pannel jump down from the south-side of the scaffold, and walk up briskly towards the place where the disturbance was, but nothing in his hand but a cane; immediately after this Wilson was cut down; upon which the guard that attended the execution, began to march up the Bow; and that at the north-west corner of the gallows, he observed the pannel take a gun out of a soldier's hand, with which he pushed back the multitude; and that when the pannel came the length of the Bow-foot, being upon the rear of his men, he saw him receive a stroke with a stone; upon which he suddenly turned about, and waved his piece to and again, towards the multitude, but without firing; but a very little after that, he turned about all at once, and stepped some steps forward, and fired off his piece towards the crowd westward: that this was the first shot which the deponent either heard or saw made that day. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, JNO. STEWART.
GILB. ELIOT.

John Gibb, cow-feeder in Cannongate, aged 44 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, that time and place libelled, he was standing at Mr. Robertson's close-head, in the Grass-market; that a very little after the hangman had been on the ladder, as he thought, to cut down Wilson, he observed the pannel with his gun in his hand, advance towards the crowd, where the disturbance was, and present his piece three times; the last of which times, the deponent thought he fired her off; for he saw the primine burn in the pan, but could not see the fiery smoak at the muzzel, because of the crowd; neither could he with certainty distinguish the report, because several other pieces were fired off at the same time: that upon these pieces being so fired, he saw one Mr. Niel drop down at the Muse Well: that before the firing abovementioned, he neither heard nor saw a shot made that day. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, JOHN GIBB.
GILB. ELIOT.

Followes the Witnesses adduced for the Pannel.

George Smeiton, writer in Edinburgh, aged 30 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, that time and place libelled, he was present at the execution of Wilson: that when the executioner was doing his duty, he saw captain Porteous come off the scaffold, because the mob was crowding upon the guard; and while the pannel was endeavouring to keep off the mob, he saw a man with a silk napkine about his neck, press upon the pannel, and seem to endeavour to gresp at; but that a young gentleman there, in green cloaths, keept him off; and then the pannel returned to the scaffold; but about the time the criminal was cutting down, or to be cut down, the pannel went off the scaffold again; and about that time there was stones thrown by the mob at the hangman, and the guard; and some of them fell amongst the guard: That so far as the deponent could observe, being upon a bartisine, upon the south side of the scaffold, five story high, the stones seemed to be pretty large; but the deponent cannot tell the dimentions; and then he soon observed a shot, which was the first that he observed, and came from

one of the soldiers; and this shot was after the criminal was cut down; and after this shot, in a very little followed three or four other shots; and at this time the pannel had his piece presented towards the multitude; and that he saw the flash of the pan of the soldier's gun that fired the first shot. Deponed, that the pannel was pretty near the soldier that fired the first gun. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, GEO. SMEITON.
WA. PRINGLE.

Thomas Harton, doctor in the regiment of Welsh fuzieleers, in the Cannon-gate, aged 39 years, or thereby, unmarried, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, time and place libelled, he was present at the execution of Wilson, when he saw several stones thrown by the mob at the guard, of such bigness, that was sufficient to have killed them, in case they had hitt them in a proper place; which continued some little time. Deponed, that while the criminal was hanging upon the gallows, the deponent saw a man press towards the pannel; and being come near him, he held up his hand to him, in a threatning manner; but the deponent did not hear what words he uttered. Deponed, that when the pannel was upon the scaffold, he had no gun in his hand; but when he came off again, he took a gun from a soldier. Deponed, that when the pannel came off the scaffold, he went about to the west-side, and turned about towards the north, endeavouring to get his men together, which he could not weel do, they being so much interspersed with the mob; and they continuing still to throw the stones, the pannel turned about with his face towards the west; and having his fuzie in such a manner in his hand, as if he had not designed to fire, but waving it from side to side, rather seeming to intimidate them: And at this time there was a soldier came upon his right hand, and fired close by the pannel; and this was the first shot the deponent observed: And deponed, that he had his eyes strictly upon the pannel all this time. Deponed, he did not see the pannel fire; and he is very well assured, that he did not fire at that time. Deponed, that this shot was immediately after the criminal was cut down. Deponed, that after this, the pannel endeavoured to carry off his men. Deponed, that the soldier that came up by the pannel's right side, came up from behind him. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, THO. HARTON.
WA. PRINGLE.

David Rannie, merchant in Edinburgh, aged 40 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, Deponed, That after the first firings were over, the deponent from his own window in the land above baillie Dewar's at the foot of the Bow, saw the pannel draw off his men, and marching up the Bow, halt at baillie Crocket's shop, at which time the deponent heard some soldiers fire, which the deponent apprehended was in the rear; the deponent looking upwards, and they that fired not being under his eye. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, DAVID RANNIE.
ANDR. FLETCHER.

John Clark, serjeant in the regiment of Welsh fuzieleers, aged 33 years, or thereby, unmarried, solemnly sworn, purged of malice, partial council, examined and interrogated, Deponed, That the time libelled, the deponent was sent by the captain who commanded the detachment of the king's forces in the Lawnmercate to the place of execution to get orders from the magistrates or the pannel; and having gone up to the scaffold, and while the deponent was conversing with the pannel, he saw a stone thrown at the executioner, which cut him in the nose so that he bled; and about the same time, there was a stone, about the bigness of the deponent's two fists, hit the calf of the deponent's leg; upon which the deponent with the pannel came down from the scaffold, and thereafter saw the pannel moving his fuzie in order to keep off the crowd, who had by that time pressed upon the guard, and drove them about four or five yeards from the place where they were posted at first; and thereafter the deponent saw captain Porteous endeavouring to keep off the mob with his fuzie, waving it to and again, telling them to keep off, or he would fire, but that there was no fire at that time: and the deponent then walking towards the West-bow, saw four or five of the soldiers presenting their pieces, and saw one of them advance to the right where the deponent was standing, and fire upon the crowd; which was the first shot the deponent heard; at which time the deponent saw the pannel upon his left-hand, about seven yeards from him; and then the deponent saw two other of the soldiers come up betwixt the pannel and the deponent, and fire in the air; and thereafter heard four or five more shots, which the deponent thinks was fired betwixt the place where the deponent was standing and the pannel; and the deponent during that time had his eye fixt upon those who fired, and did not observe captain Porteous fire, or give orders to fire; and upon the first shot as aforsaid, the deponent observed a man drop at the entry of Robinson's close. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, JNO. CLARK.
ANDR. FLETCHER.

Colin Campbell of Ardonnick, aged 44 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, Deponed, That at the time and place libelled, the deponent in a window from Mrs. Carmichaell's opposite to the scaffold, observed no disturbance till once the executioner was going up the ladder to cut down the deceased

Wilson; and then saw some stones thrown at the executioner, upon which he retired; and as he was passing the Corn-mercate, the deponent observed one of the stones hit him, and saw some stones thrown at the guard, who were upon the north side of the scaffold; and saw the pannel making motion with his fuzie to keep off the mob; and afterwards turned towards the foot of the Bow very civilly; and then saw a stone hit one of the soldiers; and which soldier the deponent saw present his firelock; and saw another stone hit the same soldier; and thereupon the said soldier pointed his firelock westward, and fired immediately; and another soldier fired immediately after him; which firings took the deponent's eyes from off the pannel; and which two firings, the deponent thinks, were the first that were fired by the said two soldiers who had advanced among the crowd from their party. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, C. CAMPBELL.
ANDR. FLETCHER.

William Meanie, serjeant in the city guard of Edinburgh, aged 48 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, Deponed, The time and place libelled, and about the time the deceased Andrew Wilson was cut down, there was showers of stones thrown at the guard, particularly one big stone lighted betwixt the deponent and serjeant Finlay; above three pound weight; and that the drummer was cut in the head with a stone, and the drum struck with a stone; and that Alexander Muscheat, centinell, one of the guard, had his shoulder blade broke with a stone; and that before these strokes were given, the deponent, by order of the pannel, was drawing off, and forming his men in the foot of the Bow; that the pannel gave the deponent his fuzie, which was the fuzie the pannel ordinarily carried, to keep, while he attended the execution, and the prayers; which the deponent returned to the pannel again, upon the sign's being given to cut down Wilson, and before the pannel came down from the scaffold, *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, WILLIAM MEANE.
JA. MACKENZIE.

Alexander Campbell, apprentice to George Young, surgeon in Edinburgh, aged 18 years, or thereby, unmarried, solemnly sworn, purged of malice, partial council, examined and interrogated, Deponed, That at the time and place libelled, he saw several stones thrown among the guard after Wilson was cut down; and saw two of the soldiers of the guard step aside from among the rest and fire; and these were the two first shots that he heard. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, ALEX. CAMPBELL.
JA. MACKENZIE.

Matthew Howert, soldier in the city guard of Edinburgh, aged 40 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That he was present at Wilson's execution at the time libelled; and that before, and after Wilson was cut down, there was a great many stones, both great and small, thrown among the guard by the mob; that after the pannel came down from the scaffold, he saw him wave his piece he had in his hand, but did not offer to present it; then he saw a soldier step out from the rest, and fire his piece in the air; as likewise two or three soldiers that fired thereafter, did likewise fire their pieces in the air; and that these, who fired first, were standing close by the pannel, and the deponent; and these were the first shots he heard that day; and he heard the soldiers say, one to another, Fire, or we shall all be knocked down; and upon more stones being thrown among them, several of them did fire; but before that time he heard the pannel say to the soldiers twice, Do not fire. After these shots were fired, the captain marched up towards the Bow, and the men followed him; that at the time that the shots were fired, as aforsaid, the pannel was standing at the foot of the steps of the scaffold, with his face towards the castle: and deponed, he was one of those that followed the captain, nor did he see the captain fire, as he was going up the Bow: that when the captain was marching on the head of the men, up the Bow, he heard a dropping shot or two fired from the rear; nor did he see the captain return again towards the scaffold, but marched straight on up to the town. *Causa scientiæ patet.* And this is the truth as he shall answer to God. And declared he cannot write.

Sic Subscribitur, JA. MACKENZIE.

David Martine, soldier in the city guard of Edinburgh, aged 40 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That he the deponent was one of the party of the city guard, who attended the execution of Andrew Wilson; and before there was any firing he did hear the pannel call to them, not to fire; and before that, the deponent had his shoulder blade disjointed with a stroke he received upon it with a stone. *Causa scientiæ patet.* And this is the truth as he should answer to God. And declared he cannot write.

Sic Subscribitur, DA. ERSKINE.

William Byres, soldier in the city guard of Edinburgh, aged 51 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That he was one of the city guard, who attended the execution of Andrew Wilson; and that he did not hear captain Porteous give any orders to fire; but when the firing happened, he was at some distance from the pannel; after the firing of several shots, the pannel called unto the soldiers, to fall into their ranks, and

follow him; which accordingly the deponent and the rest did; falling in gradually as they were able; and followed him to the guard-house till they were dismissed; and in their march up the Bow, did hear one shot that came from the rear, but by whom he knows not. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, WILLIAM BYRES.
DA. ERSKINE.

James Armour, writer to the signet, aged 50 years and upwards, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That he was looking over a window, to see the execution of Andrew Wilson; after the criminal was thrown over, and cut down, he observed the croud of people throwing stones of considerable bigness, but against whom they were directed, he knew not, but they fell among the soldiers; upon which he heard two or three shots, but from whose hands he did not observe: thereupon there was an intermission for two or three minutes; but thereafter, when the pannel with his party were retiring, which they did in great confusion and disorder, the croud pursued after them, renewed the throwing of great stones, and in great number; upon which some of the soldiers turned about, and marched back, some eight or ten paces, still in disorder; and then heard a good number of more shots fired; which to his grief he saw did great execution. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, JAMES ARMOUR.
DA. ERSKINE.

John Robertson, stabler in the Grass-mercate of Edinburgh, aged 30 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That at the time libelled, as he stood in his own window, in the Grass-mercate, he saw the pannel with his piece in his hand, moving it to and again, keeping off the mob; and heard him say, Fire, or I will fire, does not know which of the two: that immediately after this, he saw a single man step out three or four paces before captain Porteous, and fire his piece; and the deponent verily believed, that the people who fell near his close, gote their wounds by that shot; because they were lying in that place towards which the man seem to point. Deponed, that he heard some firing towards the foot of the Bow, before the last-mentioned shot. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, JOHN ROBERTSON.
GILB. ELIOT.

George Vint, coal grieve to sir William Baird of Newbyth, aged 46 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That at the time libelled, he was in John Robertson's window in the Grass-mercate; when he observed the pannel moving his piece to and again, as if keeping off the mob; and at the same time he saw one of the soldiers, a black-haired man, step forward before the pannel and fire his piece; upon which the pannel turned about to him and pushed him into his rank: deponed, That he did not see the pannel fire at that time, or any other; and that the mentioned shot was the first he heard or saw that day. *Causa scientiæ patet.* And this is the truth as he shall answer to God.

Sic Subscribitur, GEORGE VINT.
GILB. ELIOT.

Alexander Thomson, town officer in Edinburgh, aged 40 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That being upon the scaffold on the 14th of April last, when Wilson was executed; the pannel sent him to the magistrates, who were in William Orr's house, to know of them how long the criminal should yet hang upon the gallows; that he returned to the pannel with the magistrates direction; which was, that he should still hang a quarter of an hour; but before the half of that time was expired, Wilson was cut down. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, ALEX. THOMSON.
GILB. ELIOT.

Peter Coulstoun, merchant in Edinburgh aged 25 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That time and place libelled, and after the first firing, the deponent being standing under the north-west corner of the Corn-mercate, saw the pannel march the guard under his command up the West-Bow; and saw several of the rear of that guard fire upon the people assembled at the execution; and at the same time observed, that the pannel was within the first turn of the West Bow, and so out of the deponent's view. *Causa scientiæ patet.* And this is the truth as he should answer to God.

Sic Subscribitur, PET. COULSTOUN.
ANDR. FLETCHER.

John Kennedy, surgeon in Edinburgh, aged 50 years, or thereby, married, solemnly sworn, purged of malice, partial council, examined and interrogated, deponed, That some short time after the execution of Andrew Wilson, in April last, the deponent attended the persons of the town guard after-mentioned, viz. Alexander Mushet, soldier, the spine of whose shoulder-bone was crushed, and Alexander Braid, soldier, who had a contusion in his right foot; both which persons informed the deponent, that they received these hurts at the execution of the said Andrew Wilson; and that the last mentioned person is lame to this day. *Causa scientiæ patet*, the deponent was employed to visit upon the saids persons. And this is the truth as he should answer to God.

Sic Subscribitur, JOHN KENNEDY.
ANDR. FLETCHER.

The Lords Justice Clerk and Commissioners of Justiciary, ordained the assize to inclose instantly in a room prepared for them in the Exchequer, and return their verdict in the Old Court House to-morrow at four o'clock at night; and the haill fifteen to be then present; each person under the pain of law; and the pannel to be carried back to prison.

CURIA JUSTICIARIÆ, S. D. N. Regis, tenta in Prætorio Burgi de Edinburgo, Vigesimo die Mensis Julii, Millesimo septingentesimo trigesimo sexto, per Honorabiles Viros Andream Fletcher de Milton, Justiciarium Clericum, Dominum Jacobum Mackenzie de Roysteun, Magistrum Davidem Erskine de Dun, Dominos Gualterum Pringle de Newhall, et Gilbertum Eliot de Minto, Commissionarios Justiciarii, dict. S. D. N. Regis.

Curia legittimè affirmata.

Intran'

John Porteous, lately one of the captain lieutenants of the city guard, pannel, indicted and accused as in the former Sederunts.

The persons who past upon the assize of the said John Porteous, returned their verdict in presence of the saids lords: whereof the tenor followes:

EDINBURGH, *July* 20, 1736.

The above assize having inclosed, did choice sir John Inglis of Cramond to be their chancellor; and James Davidson, bookseller in Edinburgh, to be their clerk: and having considered the indictment at the instance of Duncan Forbes of Colloden, esq. his majesty's Advocat for his highness interest against John Porteous, late one of the captain lieutenants of the city guard of Edinburgh, pannel, with the lord justice clerk, and lords commissioners of justiciary, their interloquitor thereupon; and depositions of the witnesses adduced for proving thereof: the pannel's own judicial confession, and depositions of the witnesses adduced for the said John Porteous, pannel, his exculpation: they all in one voice fand it proven, That the said John Porteous, pannel, fired a gun among the people, assembled, at the place of execution, and time libelled. As also, that he gave orders to the soldiers under his command to fire; and upon his and their so firing, the persons mentioned in the indictment were killed and wounded. And fand it proven, that the pannel and his guard were attacked and beat by several stones of a considerable bigness, thrown amongst them by the multitude; whereby several of the soldiers were bruised and wounded. In witness whereof our said chancellor and clerk, in our name, have subscribed their presents, day and place forsaid.

Sic Subscribitur, JO. INGLIS, Chanc.
JAMES DAVIDSON, Clerk.

The Lord Justice Clerk and Lords Commissioners of Justiciary, having considered the verdict of assize returned against John Porteous pannel of this date, they in respect thereof, by the mouth of John Dalgleish, dempster of court, decerned and adjudged the said John Porteous, to be taken from the Tolbooth of Edinburgh, upon Wednesday the 8th day of September next to come, to the Grass mercate of Edinburgh, the common place of execution of the said burgh, betwixt the hours of two and four of the clock of the afternoon of the said day, and there to be hanged by the neck upon a gibbet, by the hands of the executioner, until he be dead; and ordained all his moveable goods and gear to be escheat and inbrought to his majesty's use, which was pronounced for doom. *Sic Subscribitur*, AND. FLETCHER.
JA. MACKENZIE.
DA. ERSKINE.
WA. PRINGLE.
GILB. ELIOT.

The prisoner being thus ordered for execution, presented the following Petition to her majesty:

To Her Most Excellent Majesty,

QUEEN CAROLINE,

GUARDIAN OF THESE REALMS:

The most humble PETITION of JOHN PORTEOUS, late captain-lieutenant of the City-guard of Edinburgh; now under sentence of death:

Sheweth;

That a certain person named Andrew Wilson, being convicted in the High Court of Justiciary of Scotland, for a robbery of the public money, committed on the high-way, was sentenced to death for that offence; and it being apprehended, the populace would rescue the said offender, or commit some outrage at his execution, your petitioner was appointed by the magistrates of the said city, to attend such execution with a detachment of the city-guard, with orders to see the same duly executed, and to suppress any tumults that might happen upon that occasion: and, for that end, the said detachment had powder and ball delivered to them out of the city magazine.

That, while the said offender was hanging upon the gibbet, the populace began to insist to have his body cut down, before the magistrates had given orders for that purpose; and your petitioner having no authority to consent thereto, without such orders, they threatned to cut him down by force; and, in order so to do, crouded in great numbers upon your petitioner and his men, and did actually assault them with large stones, by which several of the detachment were hurt and wounded.

That, during this tumult, divers of the said detachment, without order from your petitioner, unfortunately fired upon the multitude, whereby several persons were killed, and others wounded.

That your petitioner, after having used his

utmost endeavours to restrain such firing by his men, perceiving them to run into confusion, and to act without orders, drew them off as fast as possible to the guard; and committed such as he suspected to have fired, to the custody of the guard, together with their pieces, which he ordered to be kept for inspection, in the same condition as they were then in.

That your petitioner being accused of having himself fired upon the multitude on this occasion, and also of having ordered the detachment to fire, without any just or reasonable cause, your petitioner was put upon his trial in the High Court of Justiciary aforesaid, for the said supposed offence, and the jury empannelled to try your petitioner, by their verdict, found, That it was proved, that your petitioner had fired a gun, and also had given orders to the detachment and guard under his command, to fire upon the multitude so assembled; from which firing, either of your petitioner, or of the detachment of guard under his command, by his order, the several persons specified in the indictment against him, were respectively killed and wounded. And also found it proved, that the mob assembled at the execution aforesaid, did invade and attack your petitioner, and the detachment of guard under his command, with stones, of a considerable bigness, whereby several of the men of the guard were bruised and wounded.

Upon which verdict returned by the jury, the Court decerned and adjudged your petitioner to be hanged upon a gibbet, upon the eighth day of September next.

That though your petitioner is sensible of that deference and respect that is due to the verdict of a British jury, yet he humbly begs leave to represent to your most excellent majesty, the following circumstances as they appeared upon his trial; to wit, That the evidence against your petitioner, as to his having fired, or given orders to fire, was very contradictory and inconsistent; for though some of the witnesses deposed, that your petitioner fired the first shot, yet they differed extremely as to your petitioner's situation, at the time he is alledged to have so fired, as well as in other circumstances; some placing him at one corner, and others at a quite opposite corner of the scaffold: some alledging that none of the soldiers were then near your petitioner, and that no other shots were fired at that time; while others describe your petitioner as encompassed with soldiers, and say, that several shots were fired instantly upon your petitioner's firing such first shot; and some agree, that the first shot was not fired by your petitioner, but by a centinel of the guard, who was close by your petitioner.

Whereas, a great many persons, of undoubted credit and veracity, produced on the part of your petitioner, expressly swore, that during the whole time of the firing, (which continued about four or five minutes) they took exact notice of your petitioner's behaviour and conduct, and could not observe that he fired at all; but that, upon the mob's pressing severely upon your petitioner and his men, and pelting them, with large stones, your petitioner called aloud to keep off, otherwise he would fire; and that upon your petitioner's pointing his piece, in order to intimidate the mob, a centinel of the guard, (unknown to the witnesses) advanced from behind your petitioner, and fired the first shot, upon which one of the multitude fell to the ground: from which example, they supposed, several others fired; by means whereof, the several persons in the indictment mentioned, were either killed or wounded.

And as a farther circumstance, to shew that your petitioner did not fire, it was proved, that upon his return from the execution, your petitioner went directly of his own accord to the magistrates, who examined his piece, and found the same loaded, and in such condition, that they agreed and were satisfied, it had not been fired; and the serjeant of the detachment attested, that your petitioner having delivered his piece to the deponent to keep, while your petitioner attended the devotions at the execution, the deponent restored the same again to your petitioner, just before your petitioner descended from the scaffold, which is a strong circumstance to shew that your petitioner must have fired his own piece, if he had fired at all.

Your petitioner also begs leave humbly to observe, that when a band of armed men are together, and some of them fire, it is very difficult, especially for those at a distance, to discriminate the persons that actually fired; and your petitioner is in charity led to believe, that the circumstance of your petitioner's levelling his piece, and threatning to fire, attended with that of the centinel's having fired just behind your petitioner, may have induced some unwary persons, in the heat of popular fury and resentment, to be too positive in the assertion of facts, in their nature dubious and uncertain.

And as to your petitioner's having given orders to the men to fire, though two or three persons gave evidence against your petitioner as to that fact, yet neither did they agree touching the place where your petitioner was standing, nor in the form of words pretended to be used by your petitioner in the giving thereof. Whereas it was deposed by a great number, particularly of the soldiers, who were close by your petitioner during the whole time of the fray, that they could not observe that your petitioner gave any such orders; but on the contrary, that he called aloud to the men, Don't fire, and that he, pushed back the man that fired the first shot into his rank, (which shews that your petitioner did not approve thereof;) that he drew off the men as fast as he could; and that being pursued and pelted by the populace, divers in the rear turned about and fired, when your petitioner was at such distance, that he could not possibly be privy or consenting thereto.

It was likewise observed at the trial, and not contradicted, that upon many former occasions of tumults, when your petitioner with the guard hath been ordered to quell the same, your petitioner had bore great insults from the populace, even to the danger of his life, without firing, or ordering his men to fire, and that in cases where he would have been well justified by the law in doing either.

So that upon the whole, as your petitioner hath the inward satisfaction of being conscious to himself of his innocence of the facts charged against him, so he humbly apprehends, that the evidence adduced to prove the same, when compared with your petitioner's defence, will not appear to be certain or conclusive.

But in case your petitioner had been guilty either of firing, or ordering his men to fire, upon the occasion aforesaid, your petitioner most humbly intreats your majesty to consider, that your petitioner was in the exercise of a trust delegated to him by the lawful civil authority; that he and his detachment were first unlawfully assaulted and invaded by the populace, and divers of his men bruised and hurt; and if, in the case of such an insult upon the laws, your petitioner had proceeded to repel force by force, your petitioner humbly begs leave to observe, that though he should look back with the utmost sorrow upon so fatal an event, yet he humbly hopes, that the provocation and aggression aforesaid, would be considered by your most excellent majesty, in your profound wisdom, as a great extenuation of an offence, which could not be supposed to be attended with any prepense malice of your petitioner, against persons of whom he had no knowledge; and that your petitioner would be deemed a proper object of the royal clemency.

Your petitioner therefore most humbly prays your most excellent majesty, to take your petitioner's unfortunate case into your royal consideration; and to extend that mercy and compassion to your petitioner, by which your majesty, adorned with all excellent and princely qualities, is so remarkably distinguished; and that your majesty will be graciously pleased to issue your royal warrant for your petitioner's pardon. And your petitioner, whose duty hath hitherto rendered him, on all occasions, most zealously attached to his majesty, and our happy constitution, will, from the additional bond of the most powerful gratitude, devote that life to the service of his most excellent majesty, and his illustrious house, which he shall enjoy as the fruit of your majesty's clemency and grace.

Her majesty was pleased so far to comply with this Petition, as to grant a reprieve, which was signified as follows:

Curia Justiciariæ S. D. N. Regis tenta in Novo Sessionis Domo Burgi de Edinburgo, Tertio Die Mensis Septembris Millesimo septingentesimo trigesimo sexto, per Honorabiles Viros, Andream Fletcher de Milton, Justiciarium Clericum, Dominos Jacobum Mackenzie de Roystoun, Gualterum Pringle de Newall, Commissionarios Justiciariæ dicti S. D. N. Regis.

Curia legittimè affirmata.

The said day the Lord Justice Clerk delivered a letter from his grace the duke of Newcastle, one of his majesty's principal secretaries of state, whereof the tenor follows:

Whitehall, August 26, 1736.

My lords, application having been made to her majesty in the behalfe of John Porteous, late captain lieutenant of the city guard of Edinburgh, a prisoner under sentence of death in the gaol of that city; I am commanded to signify to your lordships her majesty's pleasure, that the execution of the sentence pronounced against the said John Porteous, be respited for six weeks from the time appointed for his execution. I am, my lords, your lordships most obedient humble servant.

Sic Subscribitur, Holles Newcastle.

Directed on the back thus: "To the right hon. the Lord Justice General, Justice Clerk, and other Lords of the Justiciary at Edinburgh."

Thereafter, the said lords gave their warrand to the magistrats of Edinburgh, for stopping the said execution, whereof the tenor follows: By the right honourable the Lord Justice Clerk, the Lords Commissioners of Justiciary: Whereas her majesty, guardian of the kingdome, has been graciously pleased by a letter signed by his grace the duke of Newcastle, one of his majesties principal secretaries of state, to signifie her pleasure to us, that the sentence of death pronounced against John Porteous, late captain lieutenant of the City Guard of Edinburgh, present prisoner in the Tolbooth of Edinburgh, which was to have been execute upon him, upon the eighth day of September instant, be respited for six weeks from the time appointed for his execution: These therefore, in obedience to her majestie's commands, discharge and prohibite the magistrats of Edinburgh, and all other officers of the law, from putting the forsaid sentence of death in execution, upon the said John Porteous, till the 20th of October next to come; on which day the said magistrats of Edinburgh are hereby required and ordained to put the former sentence of death in execution, upon the said John Porteous in all points, as they will be answerable. Given at Edinburgh, the 3d day of September 1736 years.

Sic Subscribitur, And. Fletcher, Ja. Mackenzie. Wa. Pringle.

[Extracted furth of the Books of Adjournal, upon this and the preceding one hundred and twenty four pages. By me John Davidson, Clerk to the Court of Justiciary.

John Davidson, Clerk.]

But the populace being greatly displeased with this favour shewn to captain Porteous, against whom they were mightily incensed, audaciously took upon them to execute the sentence themselves. Accordingly on Tuesday, September the 7th, about 10 o'clock at night, (being the night preceding the day, which had been appointed by the Court for his execution,) some men by surprize entered the city, seized all the fire-arms, battle-axes, and the drums belonging to the City Guards. The mob in a few minutes locked and secured all the city gates, and with drums beat an alarm, then attempted to force open with hammers and other instruments the prison door; but these failing, they set fire to it, and burnt it. When they entered the prison, they called upon the underkeeper, who was within, and made him open the double locks of the apartment where captain Porteous was; it had also a bolt within, but was not bolted, so they had ready access. He begged they would spare him till next afternoon; but they refused his request, and immediately hurried him away, which was about eleven o'clock. When brought out of prison, he was heard to cry. They then marched out with lighted torches before them: In their way to the Grass-market, passing by a barber's sign-post, some called out to hang him up there: but it was resolved to hang him where the murder was committed; so they proceeded to the place that the gallows used to be fixed for execution, where he was about a quarter of an hour till they opened a shop and brought out a rope, one end of which they threw over a sign-post, about 20 foot high, belonging to a dyer in the High-street, near the ordinary place of execution. He desired some time to prepare for death; but they answered, They would allow him no more than those who were shot. They then pulled him up in the dress in which they found him, viz. a night-gown and cap. He having his hands loosed, fixed them 'twixt his neck and the rope, whereupon one with a battle-ax struck towards his hands. They then let him down, and having on two shirts, they wrapped one of them about his face, and tied his arms with his night-gown; then pulled him up again, where he hung next morning till day-light. When he was cut down, and carried to the Grey-Friers church, upon inspecting his body, it appeared his left shoulder was wounded, his back discoloured, and his neck broke.

It was observed, that this mob was under a stricter concert and better conducted than usual; for as marching along to the execution, Porteous observing a gentleman of his acquaintance, he gave him a purse of 23 guineas, which he desired might be delivered to his brother. They left the prison doors open, and liberty to the prisoners to make their escape; and after the execution was over, they left the arms and drums on the place of execution, where they were found the next morning. During the tumult, parties of armed men, with drums, patroled in the different streets, to prevent any surprize from the king's forces, quartered in the suburbs. After the execution was over, they went to the lord provost's house, and told him they were satisfied, and so dismissed, without offering any other violence.

There is one further circumstance, that in order to supply the want of clergymen, they ordered two of the gravest of their number to exhort him, as he went to the place of execution.

The following account of the execution of Wilson, and of the putting to death of captain Porteous, is given in the Historical Chronicle of the Gentleman's Magazine of April and September 1736:

"*Thursday, April* 15.

"One Wilson was hanged at Edinburgh for robbing collector Stark. He having made an attempt to break prison, and his comrade having actually got off, the magistrates had the city guards, and the Welsh fusiliers under arms during execution, which was performed without disturbance; but on the hangman's cutting down the corpse (the magistrates being withdrawn) the boys threw, as usual, some dirt and stones, which falling among the city guard, captain Porteous fired, and ordered his men to fire; whereupon above 20 persons were wounded, 6 or 7 killed, one shot through the head at a window up two pair of stairs. The captain and several of his men were after committed to prison."

"*Tuesday, September* 7.

"Betwixt nine and ten at night, a body of men entered the west port of Edinburgh, seized the drum, beat to arms, and calling out, Here! All those who dare avenge innocent blood! were instantly attended by a numerous crowd. Then they seized and shut up the city gates, and posted guards at each, to prevent surprize by the king's forces, while another detachment disarmed the city guards, and advanced immediately to the Tolbooth or prison, where not being able to break the door with hammers, &c. they set it on fire, but at the same time provided water to keep the flame within due bounds. Before the outer door was near burnt down several rushed through the flames and obliged the keeper to open the inner door, and going into captain Porteous's apartment, called, Where is the buggar Porteous? Who said, I'm here, what is it you are to do with me? To which he was answered, We are to carry you to the place where you shed so much innocent blood, and hang you. He made some resistance, but was soon overcome, for while some set the whole prisoners at liberty, others caught him by the legs and dragged him down stairs, and then led him to the Grass-market, where they agreed to hang him without further ceremony; accordingly, taking a coil of rope from a shop, they put one end of it about his neck, and flung the other end over a dyer's cross-post on gallows, and drew him up;

but having got his hands to the rope, they let him down and tied them, and drawed him up again, but observing what an indecent sight he was without any covering over his face, they let him down a second time, and pulled off one of the two shirts he had on and wrapped it about his head, and hauled him up a third time with loud huzza and a ruff of the drum. After he had hung till supposed to be dead, they nailed the rope to the post, then formally saluting one another, grounded their arms, and on the other ruff of the drum retired out of town. Nothing of this kind was ever so boldly attempted, or so successfully executed, all in the space of two hours, after which every thing was quiet. The magistrates endeavoured to prevent their design, but were attacked and driven away. Next morning at four when the captain was taken down, his neck was broke, his arm wounded, and his back and head bruised.

"In what we mentioned last month, with relation to the obtaining this unfortunate man's reprieve, there was a small mistake; several persons of quality and distinction did apply to her majesty, in favour of the captain, but we are assured the magistrates of Edinburgh did not in the least interest themselves in that matter; and no doubt they had their reasons; since this is not the only instance of the populace of that city, putting into action the brave but unforgiving principle couched under the motto of their nation, *Nemo me impune lacessit.* To mention one: In the beginning of Q. Anne's reign, when the earl Seafield was chancellor, one Green [See his Case, vol. 14, p. 1199, in this Collection], was condemned for the murder of captain Middleton, and the council in Edinburgh ordered him to be reprieved, which the mob hearing, when the earl came out of the council, they broke and overturned his coach, and greatly insulted the earl, and obliged him to go back to the council and get the reprieve changed into an order for his execution, and he was executed accordingly.

"About 14 persons were taken into custody the next day on account of this riot, but no evidence appearing against them, 11 were soon discharged, and the others not long after."

"*Saturday, September* 25.

"A proclamation was published, offering a reward of 200*l.* and his majesty's pardon, to the discoverers of any person concerned in the murder of captain Porteous, and for every person so discovered and convicted 200*l.*"

From the violence committed upon Porteous, arose the following Case.

499. The Trial* of William Maclauchlan, for Mobbing, Murder, and other Crimes: 10 George II. A. D. 1737. [Maclaurin's Arguments and Decisions.]

The Indictment was as follows: "That whereas by the law of God, the common law, the municipal laws and practice of this kingdom, and the laws of all other well-governed realms, privy conspiracies, to raise, procure and move, and the raising, procuring, or moving, seditious commotions of the people mobs or tumults, in violation of the laws repose and tranquillity of the kingdom or any part thereof; the convocating the lieges by beat of drum, and their assembling themselves riotously and tumultuously together, armed with guns, lochaber-axes, or other warlike weapons whatsoever, within borough, without the special licence of the sovereign, or the magistrates of the same; the surprising, invading, or seizing, the guard-room of any borough or city by force or violence, disarming and driving out the soldiers placed there for the preservation of the public peace, and the taking away their arms; the violent and masterful seizing and securing the gates of any city or borough, by numbers of dissolute and disorderly persons riotously assembled, whereby the lives and properties of the inhabitants are put under the power, and exposed to the rage and caprice, of the giddy and profligate part of the people; the insulting, stoning and resisting, magistrates in the due execution of their offices; the raising wilful fire, and forcibly breaking open the doors of public prisons, and by force, threats or terrors, extorting the keys from the lawful keepers, and setting at large prisoners lawfully confined for capital or other heinous crimes; and the committing wilful and deliberate murder, under cloud of night, in derision of public justice, in open defiance and contempt of his majesty's laws and authority, and attended with circumstances of brutal cruelty, are most enormous and detestable crimes, destructive of the public peace, dangerous to the lives, liberties, and property of the subject, subversive of all laws, government and society, odious and abominable in the sight of God and man, and most severely punishable: yet true it is and of verity, That you have presumed to commit, and are guilty

* See the preceding Case.

It appears by the Gentleman's Magazine for March, 1737, that during this trial it was surmised that a body of footmen had conspired to carry off the pannel, in consequence of which the magistrates ordered the city guards to be under arms, and took other precautions; and it is stated that no disturbance occurred.

of all or one or other of the foresaid abominable crimes, aggravated as aforesaid; in so far as, upon the 7th day of September, in the year of our Lord, 1736, or one or other of the days of the said month, certain seditious and bloodthirsty persons, shaking off all fear of God, regard and reverence to his majesty's laws and authority, guided by disloyal and diabolical principles, or instigated by dangerous and desperate incendiaries, having feloniously conspired unlawfully to raise, move and procure, mobs and tumults, insult the laws and public authority, and, in an outrageous manner, to break and disturb the public peace in the city of Edinburgh, to do murder, and commit the other black and odious crimes after mentioned, did assemble themselves together within the said city and county of Edinburgh, about the hour of nine, or some other hour that night; and being armed with clubs and other offensive weapons, seized a drum in the possession of the drummer of Portsburgh, part of the suburbs of Edinburgh, and by beating the same within the said borough, convocated and brought together great numbers of dissolute, profligate, and disorderly persons, who proceeding to the Netherbow port of the said city, by force and violence seized upon the keeper and keys thereof, shut and locked the gate, and marching to the guard-room, where the city-guard, constituted by act of parliament, was in use to be kept, by force and violence seized the centinel standing at the door, entered the same, and disarmed and drove out the soldiers placed there, by the authority of the magistrates, for the preservation of the public peace, and arming themselves with the guns, halberts, lochaber-axes, and other weapons, kept in the said room for the defence of the city, sent parties to the several ports, and took possession of the same, shutting the gates, nailing or rolling stones to secure the said gates: And having thus made themselves masters of the city, to the great fear, terror, and trouble, of his majesty's lieges, to the imminent danger of shedding much blood, pillaging, plundering, and burning the houses of the inhabitants, they advanced towards the public prison of the said city, and planted some of their accomplices, armed as a guard, from the north side of the said prison, commonly called the Purses, across the high-street, to stop all who did not unlawfully associate themselves with them, from passing to the pleadin-gate, and with sledge-hammers beat on the door of the said prison, in order to break it open; and among the rioters so planted as a guard, and at the prison-door, and in divers other places, during the said tumult and sedition, you the said William Maclauchlan, armed with a lochaber-axe, or other offensive weapon, was unlawfully and riotously assembled with them: And when the magistrates of the city, as in duty bound, went in a body toward the said prison, to disperse the riotous and unlawful assembly, showers of large stones were by you, or your accomplices, poured upon them; whereby some of them were bruised, and all of them, under great terror, were obliged to fly, and save themselves from the fury of an armed mob: And further, you, or your accomplices, by burning torches, links, whins, or other combustible matter, wilfully and maliciously set fire to the said prison-door, to the great danger of the adjacent wooden houses, and other houses and shops; and having burst and beat the same open, seized the keeper, and by force and fear extorted the keys of the rooms of the said prison from him, and dismissed William Grimell, imprisoned there for murder, James Ratcliff, imprisoned for theft, robbery, and housebreaking, and divers other persons there, also committed by lawful warrants: And you, the said William Maclauchlan, having conceived a deadly hatred and malice against John Porteous, commonly called Captain Porteous, there also confined under sentence of death, the execution whereof, by the amiable power and prerogative of the crown to shew mercy to subjects condemned, had been respited by her sacred majesty the queen, then guardian of the kingdom, you, or your said accomplices, laid violent hands upon him, with intent to murder and bereave him of his life; and having dragged him by the heels down the said tolbooth-stair, crying for mercy for Christ's sake, lengthening out your cruelty towards him, alternately led, dragged, and carried him, fainting and falling on the street, to the Grass-market, within the said city of Edinburgh, the place of common execution, in derision of public justice; and making a stand at the gallows-stone, where the gibbet is usually placed, you consulted together in what manner to put him to death; and about the hour of eleven, or some other hour that night, having hurried him to a dyster's tree near the said place, while in most moving manner he was supplicating for a little time to recollect himself, as a dying man, and to beg mercy from God, you or your wicked accomplices, renouncing all Christian compassion, and even human nature, fixing a rope about his neck, instantly drew him up upon the said tree; and when he endeavoured to save himself, by catching hold of the rope with his hands, you, or one or other of your vile associates, barbarously beat them down with a paddle, or other instrument, and brutally struck him upon the face with a lochaber-axe, or other weapon; and wantoning in your wickedness, making loose the rope that was fixed about the said dyer's tree, you or some of your accomplices, let him down to the ground, and pulled him up again, where he hung by the neck till he was dead. All which detestable facts and crimes were impudently, wickedly and maliciously done and committed, by the said dissolute and disorderly persons, riotously and tumultuously assembled, in manner above described; and the said John Porteous was cruelly murdered, at the time and place aforesaid, in a daring and outrageous manner, to the dishonour of God, the contempt of his majesty's laws and authority, and to the lasting infamy of the barbarous

and bloody actors; and you were art and part of all, or one or other, of the foresaid crimes, aggravated as aforesaid. Which facts, or part thereof, or your being art and part in all or any of the foresaid crimes, being found proven by the verdict of an assize, before the lords justice general, justice clerk, and commissioners of justiciary, you ought to be most exemplarily punished with the pains of law, to the terror of others to commit the like in time coming."

The Court assigned the prisoner counsel. He pleaded, Not Guilty; and in point of fact it was set forth for him, "That he was footman to my lady Wemyss at the time, and was sent by her ladyship the forenoon of that day, the 7th of September, to Craigie-hall and Gogar on an errand, and got drunk to such a degree, that when he returned he was not capable to deliver the letter he had received, but which behoved to be done by another.

"The pannel, soon after his return from Craigie-hall, went from my lady Wemyss's house to John Lamb's, an alehouse in the same stair, half an hour after nine. When he entered Lamb's house he staggered with drunkenness, and was detained there till within a quarter of eleven, and then went out, in order to go to his own house in the Canongate. That, in passing, he called at Mr. Cassie's, vintner, and drank a chopin of ale or two with the servant there; and betwixt Lamb's and Cassie's fell once or twice.

"That, strolling in his drunkenness through the street, he met with two bakers, who carried him away with them to the mob; and whether they put a lochaber-axe in his hand, or not, he does not remember; but, from the computing the time, the mob had proceeded so far that Mr. Porteous was in their hands on the street before he mingled with the rioters; that he had no active part in what remained, nor indeed was capable, being overpowered with liquor.

"That all this while the pannel was in his ordinary livery-habit, and went home to his bed, and did not attempt to fly or abscond next day, or at any time thereafter."

In point of law it was pleaded for him, That the facts libelled, viz. the breaking prison by an armed multitude, setting felons at liberty, and the putting to death a man who had been reprieved by the sovereign, amounted to high treason, and could only be tried as such, according to the mode prescribed by 7° Ann.: Case of Peter Messinger*; Case of Daniel Dammarie.†

Ans. 1. The same *species facti* may be the foundation of different actions; and the prosecutor may insist upon what statute or ground in law he chuses. If a traitor in rebellion kill one of his majesty's subjects, the act is treason, and may be prosecuted as such; but at the same time it is felony, and may be tried accordingly. Civilians treat of this question: "Si delictum aliquod reperiatur punitum pluribus legibus, an debeat reus delinquens ex una, vel ex omnibus, vel ex aliqua accusari et condemnari?" Gomez. Resol. Jur. Civ. tom. 3, c. 1, n. 38; and certain rules are established for determining when one trial does, or does not, exclude a second upon a different ground in law. But it was never doubted, that the prosecutor has it in his power to insist against an offender, for any crime he has committed, though the *species facti* afforded a ground for a prosecution of a different nature.

2. The Court would have been competent, though the prosecution had been for high treason; because though by 7° Ann. her majesty, her heirs and successors, are empowered to issue commissions of Oyer and Terminer in Scotland; yet it is provided, "That the justice court, and other courts having power to judge of high treason and misprision of treason in Scotland, shall have full power and authority, and are thereby required, to enquire of all high treasons and misprision of high treason; and thereupon to proceed, hear and determine, the said offences, whereof any persons shall be indicted before them."—Hence, had this been a trial for treason, the Court would have been competent, though another method of proceeding would have been requisite.

3. The indictment, as framed, does not amount to high treason. The chief aim of the conspirators and their associates was to murder captain Porteous. For this purpose they armed, broke the prison, and committed the other offences set forth in the minor proposition; therefore the convocation being on a private and particular design, it was not levying war against the king. In the Case of Messinger and others, it was agreed by all the judges, that if their intention was to pull down two or three particular bawdy-houses, it was not high treason; Hale, Keyling. In Dammarie's Case, the chief article found to be treason was, the levying war to pull down meeting-houses in general, not one or two particular meeting-houses.

Replied. By the laws relative to high treason, if it be not tried within a certain time the guilt is abolished; but according to the prosecutor's argument, after the crime has been abolished as to the highest effect, it may be still prosecuted under another denomination; and though a man has been absolved upon an indictment for treason, he may be still tried for a lesser offence; or if he has been absolved on an indictment laid for a lesser offence, he may afterwards, on the same *species facti*, be indicted for treason. All which is absurd; and was not allowable in this country, even before the English laws as to high treason were extended to Scotland; *e. g.* theft in landed men before that time was high treason in this country; and therefore it could not be prosecuted before an inferior court, nor could the prosecutor restrict his libel; Mack. tit. Theft, sect. 22.

Upon supposition the trial could proceed on this indictment, it was pleaded for the pannel,

* See it in this Collection, vol. 6, p. 879.
† See his Case, vol. 15, p. 523.

That the libel does not charge him with having been in the conspiracy; according to it, the rioters had not only formed their plot, but in a great measure executed it, before he came among them; and as it is not said he was one of the contrivers of the mischievous design, he is only answerable for what part he acted himself, not for the deeds of others; consequently all the alternatives in the libel must go for nothing. All lawyers are agreed, that bare presence in a mob or tumult is not criminal. People very often mix with the mob from curiosity, or an intention to quell the disturbance; therefore bare accidental presence cannot fix guilt on a man, though he was armed, unless he was aiding and assisting; which is not libelled in this case. Clarus, lib. 5, sect. Homicidium, n. 37; Menach. De Arb. Jud. Cas. 362; Matthæus, tit. 5, c. 3, sect. ult.; Mackenzie, tit. Murder, sect. 12.

In the trials for the mob at Edinburgh in 1700, and that at Glasgow in 1725, the Court did not find simple presence, though with arms, relevant, but only aiding and abetting. This is likewise the doctrine of the law of England; Case of Messinger and others; and this holds even in treason. The libel, therefore, against the pannel is not relevant; as it does not charge aiding and abetting, but only, that he was unlawfully assembled with the rioters.

Ans. The rising of commons, hindering the common law, or being found in manrent, or in fear of weir with any man, but with the king or his officers, within borough, are discharged under this penalty, that the lives of the offenders shall be in the king's will, and their moveables escheated; act 77, parl. 14, Ja. 2; act 83, same parliament; act 17, parl. 18, Ja. 6. These statutes are not in desuetude: many trials have proceeded upon them; Case of Strachan, 26th November, 1664; Chinzie, 1662; Mowbray, 8th February, 1686; and Keith in the same month. These laws are reasonable: when there is a commotion within borough of persons unarmed, many are led to join them by curiosity; and it would be hard, that *nuda assistentia*, or bare presence, should infer a severe punishment: but when a commotion of the people within borough, where a multitude is soon and easily assembled, proceeds so far as that they arm themselves, the community is endangered, and such rioters may justly be punished with death. So stands the law in other countries, l. 38, ff. De Pœnis; l. 1, ff. Ad Leg.; Jul. Majest.; Sande, lib. 5, tit. 9, def. 12, takes notice of a commotion and outrage not unlike that in question, which happened in Friesland; and he says, the seditious persons were put to death. In the Case of Weir in 1700, the fray in which he joined was raised suddenly, without any previous conspiracy. In the case 1725, it was not libelled, that they were in arms. In this case there was a conspiracy, the aim of which was to murder captain Porteous; and this was known from the beginning of the tumult. The assembling riotously and tumultuously in arms within borough, was criminal, and contrary to law; but the joining such assembly, their intention being known, was criminal in the highest degree. Therefore, as the intention of this mob was to murder, and murder was actually committed by them, there is no reason why the law should not be put in execution against the persons assembling in arms within borough without a licence from the king or the magistrates. The reason is plain: If a number of persons make a fray for an unlawful end, the deed of one becomes the deed of the whole; because they are "versantes in re illicita;" Hale, c. 34, p. 445.; case of lord Daire, there stated. And in burglary, standing as a guard, though at a distance, will make the person who watches aiding and assisting to the burglary.* Since, then, the libel charges that the pannel, armed with a lochaber-axe, was among the rioters, and stationed as a guard when his associates were breaking open the prison-door; and as they did actually burn and break it open, and murder captain Porteous; this is relevant *per se* to infer the pains of death.

Replied, The old statutes are only levelled against confederacies; as is plain from the title of the first; which bears, "that no leagues or bands be made within borough, or manrent." In arbitrary times they have been extended to common tumults within borough, but unjustly; and they have been laid aside since the Revolution. Besides, they are virtually repealed by 1 Geo. 1, c. 4, commonly called the Mob-act; which must be the rule as to all riots, whether within borough or elsewhere. It does not distinguish between presence with arms, and presence without them; and it is plain, no man can be subjected to a capital punishment, unless precisely within the statute; which is an additional reason why one present with a mob can only be liable for his own actions.

The passage from Hale is misapplied. In all the English cases, nothing was sustained against the prisoners but acts of violence done by themselves. When a mob assembles with design to commit a particular crime, all against whom an act of force is found by the jury, are liable to the punishment of that crime, though they did not themselves perpetrate it: but when a mob accidentally gathers, without a previous intention, to commit a particular offence; those present, though they have been active, are punished only according to the degree of their criminal activity. But in both cases, unless acts of force are found against the persons accused, they can only be punished arbitrarily for being in an unlawful assembly. Hale, in the place quoted, is talking of the case in which all conspired to do an unlawful act; but in the very next page he refers to the case of Salisbury, and says, different persons may be guilty, some of homicide, some of murder. It is plain this pannel was not in the conspiracy: for if he had, he would have disguised himself,

* See Vol. 6, p. 612; Colonel Turner's case.

and not gone in his livery-coat; nor would he have returned home, but absconded.

It was next objected for the pannel, That the libel was improperly laid, because it did not name his accomplices; Mack. tit. Art and Part.

Ans. This neither is, nor can be, required by the law of this or any other country in the world. All that Mackenzie says, which is founded on act 76, parl. 6, Ja. 6, is, that an indictment or summons, charging accomplices in general to appear, cannot be the foundation for trying any person not named, as if the indictment in this case had not been against William Maclauchlan, but against the accomplices in the murder of captain Porteous.

Replied. Mackenzie would not put a case that could admit of no doubt. If a man is indicted, he certainly must be named. His meaning therefore must be, that when a person is brought to trial for deeds done by others, those persons must be named, and proof brought, that they were his accomplices, by entering into a concert with him: and if this be not done, the pannel cannot bring proof to exculpate himself.

In case the libel be found relevant, the pannel offered two defences; first, *Alibi*.

Ans. By the law of Scotland, and that of other countries, (Bald. in l. fin. C. de Prob.) defences contrary to the libel are inadmissible, it being a maxim, "Quando delictum est plene probatum per testes affirmantes, non est admittenda contraria probatio per testes negantes." However, the defence of *alibi* is so favourable that it has been admitted; but then it must be so qualified, as to render it impossible that the pannel could be guilty of the crime libelled; Mack. tit. Exculp. sect. 22. In this case it is not, and cannot be pleaded, to exculpate from accession to all the criminal acts, but only some of the first. Besides, it is hardly possible the pannel can prove *alibi* sufficiently in this case: Lamb's house is but 150 yards from the prison-door and the Purses, where it is libelled he was placed as a guard.

Replied. The import of the defence is, That he was none of the original promoters of the mob, nor with them from the beginning: and it is a rule, that even in a rebellious insurrection, those who are not found to have been with the assembly from the beginning, but only to have suddenly joined them, are guilty of no greater offence than a riot, if they have done no acts of violence; Hawkins, c. 17, sect. 26. The notion, that no defence is admissible which is contrary to the libel, was long ago exploded; and "it were contrary to the rules of law and humanity, to give the prerogative of probation to the pursuer against a poor pannel swimming for his life;" the libel does not specify the precise time the pannel stood at the Purses.

Second defence, The pannel was mortally drunk at the time libelled.

Ans. In civil questions, as to contracts and deeds, drunkenness may be taken into consideration; not in crimes. Were it otherwise, full scope would be given to commit crimes: but, by law, those who presume to commit capital crimes when drunk, must submit to capital punishments when sober. Some lawyers hold drunkenness to be an aggravation: "Peccat duplicitor," Gail. Obs. lib. 2; Obs. 110, sect. 25. And all agree, that "Levis et modica ebrietas nec excusat nec minuit delictum." The pannel could not have acted the part he did had he been overpowered with liquor. Hale, c. 4, is clear against this defence. Mackenzie says, he never found it sustained; and that in a case of murder it was repelled; Spott against Douglas, 1667.

Replied. That drunkenness exempts from the ordinary punishment, is expressly laid down in L. 11, sect. 2, ff. De Pœnis; L. 6, sect. 7, ff. De re Milit. Mackenzie gives it as his opinion, that on account of it, in circumstantial cases, the privy council should mitigate the punishment. And as we have no privy council now, the Court ought to take it into consideration; though while the privy council subsisted, they never sustained it, even to the effect of mitigating the punishment. In England it is allowed to be proved, and goes to the jury with the other circumstances, as in Daupnarie's Case, who pleaded, too, that he was accidentally present when he fell in with the mob.*

March 19, 1737. The Court found, "That time and place libelled, a number of people having unlawfully, riotously and tumultuously assembled, armed with clubs, and other warlike or offensive weapons, to which unlawful convocation the pannel William Maclauchlan, armed with a lochaber-axe, or other offensive weapon, joined himself; or that the said pannel was aiding or assisting in all or any of the facts libelled; or his being art and part thereof, relevant to infer the pains of law; but allowed the pannel to adduce what evidence he could with respect to his behaviour at the time the foresaid crimes were libelled to have been committed, for taking off the circumstances which should be brought for inferring his being guilty, or art and part, of the crimes libelled: and repelled the haill other defences," &c.

* As to this, see vol. 15, p. 604, (Dammaree's Case), and pp. 797, 798, of the present volume; in the former of which places I have, agreeably to the mention in Fielding's book, referred to Æschines a sentiment upon which I inserted Fielding's comment; but having searched for such a passage in Æschines, until I found myself in the circumstance which Fielding predicates of a reader who should search in Milton for a quotation of Mrs. Western's concerning patience, I suspect that for Æschines we should read Æschylus, and that the passage intended is

"Κάτοιν' ἐγὼ λίαν χαλαὶς ἡνίαις ἅπτω πόνον."

For other old authors in which the same sentiment occurs, see Schweighæuser's edition of Athenæus, note to book 10, ch. 7, s. 31.

The Jury found him Not Guilty; upon which he was dismissed from the bar.
Act. CH. ARESKINE. *Alt.* AND. MACDOWAL. J. CAMPBELL.

In 1738, Thomas Linning also was tried for the same offence, and found Not Guilty by the Jury.

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500. The Trials of SAMUEL GOODERE, esq. MATTHEW MAHONY, and CHARLES WHITE, for the Murder of Sir John Dineley Goodere, bt. (Brother to the said Samuel Goodere) on Board his Majesty's Ship the Ruby: At the Sessions of Peace, Oyer and Terminer, and General Gaol-Delivery, held in and for the City of Bristol, and County of the same City, in the Guildhall of the said City; before the Right Worshipful Henry Combe, esq. Mayor of the said City, Michael Foster, esq. Serjeant at Law, Recorder; and others his Majesty's Justices of Gaol-Delivery. Begun on Tuesday the 17th of March 1741, and continued by Adjournment to Thursday, the 26th of the same Month. Published with the Approbation of Mr. Recorder: 14 GEORGE II. A. D. 1741.

ON Wednesday, the 18th of March, 1741, a bill of indictment was found by the grand inquest for the city of Bristol, and county of the same city, against Matthew Mahony and Samuel Goodere, for the murder of sir John Dineley Goodere; when Dr. Middleton (Mr. Goodere's physician) acquainted the Court, That, in his opinion, Mr. Goodere was, through bodily indisposition, unable to undergo the fatigue of his trial. But being asked by Mr. Vernon (of counsel for the king) whether the prisoner's health would not permit him to be brought into court and plead to his indictment; and the doctor declaring his opinion, that he might be brought up, Mr. Recorder was pleased to order, that he should be brought up the next day, in order to plead to his indictment. Accordingly, on Thursday the 19th, Mr. Goodere and Matthew Mahony were brought to the bar; when the Court proceeded thus:

Cl. of Arraigns. Matthew Mahony, hold up thy hand; Samuel Goodere, hold up thy hand (which they severally did). You stand indicted by the names of Matthew Mahony, late of the parish of St. Stephen in the city of Bristol, and county of the same city, labourer; and Samuel Goodere, late of the same parish, city and county, esq.* for that you, not having the fear of God before your eyes, but being moved and seduced by the instigation of the devil, on the 19th day of January, in the 14th year of the reign of our sovereign lord George the 2d, by the grace of God, of Great-Britain, France, and Ireland, king, defender of the faith, and so forth; with force and arms, at the parish aforesaid, in the city aforesaid, and county of the same city, in and upon one sir John Dineley Goodere, in the peace of God, and of our said sovereign lord the king, then and there being, feloniously, voluntarily, and of your malice afore-thought, did make an assault; and that you, the aforesaid Matthew Mahony, a certain cord, of the value of one penny, about the neck of the said sir John Dineley Goodere, then and there feloniously, voluntarily, and of thy malice afore-thought, did put and fasten; and that you the aforesaid Matthew Mahony, with the cord aforesaid, (by you the aforesaid Matthew Mahony, so about the neck of the aforesaid sir John Dineley Goodere put and fastened) then and there him the aforesaid sir John Dineley Goodere feloniously, voluntarily, and of your malice afore-thought, did choak and strangle; of which said choaking and strangling of him the aforesaid sir John Dineley Goodere, by you the aforesaid Matthew Mahony in manner and form aforesaid done and perpetrated, he the aforesaid sir John Dineley Goodere then

* It should seem that upon the death of sir John Goodere the prisoner became a baronet, and if he could have proved that, he might have successfully pleaded in abatement to this indictment. See Com. Dig. Abatement, F. 19, F. 23, 25. Indictment, G. 1, Hawkins Pl. Cr. book 2, ch. 23, sect. 105. *et seq.* chap. 25, sect. 70 *et seq.* ch. 35. As to a plea in abatement of a misnomer in a surname, see Shakespeare's Case as cited in the Case of Layer, *ante*, vol. 16, p. 103.

and there instantly died: And that you, the aforesaid Samuel Goodere, then and there feloniously, voluntarily, and of thy malice afore-thought, was present, aiding, abetting, comforting, and maintaining the aforesaid Matthew Mahony in manner and form aforesaid, feloniously, voluntarily, and of his malice aforethought the aforesaid sir John Dineley Goodere to kill and murder; and so you the said Matthew Mahony, and Samuel Goodere, in manner and form aforesaid, the aforesaid sir John Dineley Goodere then and there feloniously, voluntarily, and of your malice aforethought did kill and murder, against the peace of our said sovereign lord the king, his crown and dignity.

Cl. of Arr. How sayest thou, Matthew Mahony, art thou guilty of the felony and murder whereof thou standest indicted, or not guilty?—*Mahony.* Not guilty.

Cl. of Arr. Culprit, how wilt thou be tried?

Mahony. By God and my Country.

Cl. of Arr. God send thee a good deliverance.

Cl. of Arr. How sayest thou, Samuel Goodere, art thou guilty of the felony and murder whereof thou standest indicted, or not Guilty?

Samuel Goodere. Not Guilty.

Cl. of Arr. Culprit, how wilt thou be tried?

Samuel Goodere. By God and my country.

Cl. of Arr. God send thee a good deliverance.

Mr. *Vernon.* Mr. Recorder, I attend as counsel for the king on this melancholy occasion, and it is with no small regret and concern I at any time act in this station against my fellow-creatures, when under circumstances like those of the prisoners at the bar; and the rather, as knowing it almost impossible so to act, in a business of this nature, as not to be thought on the one side to have done too much, and on the other too little: however, Sir, I shall, in the course of this prosecution, endeavour to observe that mediocrity which is ever inseparable from humane minds; and if I can be so fortunate as to conduct myself to the satisfaction of you, Mr. Recorder, and the Court, I shall readily give up the rest, and content myself with the thoughts of having aimed at a just discharge of my duty.

Sir, the prisoners, Mr. Goodere and Mahony have thought proper to plead in chief to their indictment, and put themselves upon their trial in the ordinary course of law; and as far as may be judged from outward appearance, Mr. Goodere seems able enough at present to take his trial on the merits or demerits of his case: and if so, we for the king are ready, on our parts, to enter upon our duty. On the other hand, if, in the opinion of that learned gentleman (Dr. Middleton), Mr. Goodere is not in a fit condition (through bodily weakness or indisposition) to be brought upon his trial, God forbid we should be for pressing it on with such celerity, as to prejudice him in making of his defence. But then, as we would not be for accelerating his trial, so neither would we be for giving into any affected delay. I therefore hope, Sir, such a day will be fixed for the coming-on of this business, as that the sea-faring part of our witnesses, whom at present public justice calls for abroad as well as at home, may be dispatched at due time for the other necessary service of their king and country.

Mr. *Recorder.* I think we ought to proceed to the trial immediately, unless cause be shewn to the contrary.

Mr. *Frederick*, counsel for Mr. Goodere. I appeal, Sir, to the doctor, whether Mr. Goodere's case and circumstances will at present admit of it?

Mr. *Recorder.* Let Dr. Middleton be sworn.

Dr. *Middleton* sworn.

Mr. *Vernon.* Dr. Middleton, I think, Sir, you have attended Mr. Goodere (the prisoner at the bar) during the course of his illness; will you please therefore to give the Court an account of his present state of health?

Dr. *Middleton.* Mr. Goodere has been my patient for some time in a malignant fever, which left him last Sunday evening, and since that time he has been growing better, and on the mending hand; in his fever his head was very much disordered (as at present happens to be the case of many that are seized with this epidemical fever, the head being generally much affected in most of them): I think he will not be able to bear the fatigue of his trial at present. If he is put upon his trial, it will be an hardship.

Mr. *Recorder.* If the case be so, that his head is disordered, whereby he is rendered less capable of making his defence, I think it would be a piece of inhumanity not to put off his trial. What if we adjourn it to this day seven-night?

Mr. *Vernon.* I am heartily glad to find that Mr. Goodere is on the mending hand, and hope he will continue to mend; his counsel seems to think he may now come upon his trial; yet, for the honour of Dr. Middleton, I would not press it on at this juncture.

Mr. *Recorder.* What doth Mr. Goodere himself say to it?

Samuel Goodere. I hope in eight or nine days to be better, or dead.

Mr. *Recorder.* I have proposed this day seven-night.

Samuel Goodere. Whatever you please I submit to.

Mr. *Vernon.* Dr. Middleton, Sir, as you are known to be a gentleman of great honour and abilities, we may safely depend upon your account; therefore I should be glad to know how soon (humanly speaking) Mr. Goodere's bodily health may admit of his taking his trial. I know, Sir, you are a gentleman that has a great regard and care for your patients.

Dr. *Middleton.* I should rather choose to exceed in care than fall short of it.

Mr. *Vernon.* But it is possible to have an

over care: Therefore, Sir, I would ask you, whether, upon your oath, you do not think he will be able, in point of health, to take his trial in three or four days?

Dr. *Middleton.* The captain may put himself on his trial now, if he pleases; but I don't think he is fit for it, upon my oath. If it was left to me, I should desire the whole time the Recorder has mentioned.

Mr. *Frederick.* That is, to this day seven-night; we shall not be able to attend the Court sooner. We hope the trial will be put off till this day seven-night?

Mr. *Recorder.* Let it be so.

Cl. of Arr. Matthew Mahony, you stand charged likewise upon the coroner's inquest for the same felony and murder; art thou guilty or not guilty?

Matthew Mahony. Not Guilty.

Cl. of Arr. Samuel Goodere, you likewise stand charged upon the coroner's inquest for the same felony and murder; art thou guilty, or not guilty?—*Samuel Goodere.* Not Guilty.

Mr. *Recorder.* The prisoners may withdraw.

On Thursday the 26th of March, the Court met according to adjournment; and, being opened, the prisoners Matthew Mahony and Samuel Goodere were brought again to the bar; and the Court proceeded as follows:

Mr. *Shephard,* counsel for the prisoner Goodere. Mr. Recorder, the prisoner Goodere has in a great degree lost his hearing, therefore desires that he may be brought nearer the witnesses, that he may be able to hear what they say.

Mr. *Recorder.* Let him come nearer. Mahony, are you willing to come forward to the bar?

Mahony. Yes, my lord, I am hard of hearing.

Mr. *Shephard.* He desires the same indulgence.

Mr. *Recorder.* If he desires it, let him come forward too.

Mr. *Vernon.* Mr. Recorder, by this indulgence being moved for on the behalf of Mahony as well as Mr. Goodere, I presume these gentlemen attend as counsel for them both, if matter of law should arise.

Mr. *Frederick.* No, Sir, I do not.

Mr. *Shephard.* No, Sir, I do not.

Cl. of Arr. Cryer, make a proclamation for silence.

Cryer. Oyez, Oyez, Oyez; the king's majesty's justices strictly charge and command all manner of persons to keep silence, upon pain of imprisonment.

Cl. of Arr. You Matthew Mahony and Samuel Goodere, now prisoners at the bar, these men which you shall hear called, and will personally appear, are to pass between our sovereign lord the king and you, upon trial of your several lives and deaths; if you, or either of you, will challenge them, or any of them, you must speak unto them as they come to the book to be sworn, before they be sworn. Cryer, make an Oyez, and call the petty jury.

Cryer. Oyez; you good men that are impannelled to try between our sovereign lord the king and the prisoners at the bar, answer to your names, and save your fines.

Mr. *Recorder.* Prisoners, you have each of you the liberty of challenging twenty of the jurors, without shewing cause: But you must now declare, whether you will challenge severally or not; for if you do not join in your challenges, we must try you severally.

Mahony. I leave it to the captain to challenge.

Cl. of Arr. Christopher Bromadge.

Cryer. He appears.

Cl. of Arr. Mr. Bromadge, to the book.

Cryer. Christopher Bromadge, look upon the prisoners; you prisoners, look upon the juror: You shall well and truly try, and true deliverance make, between our sovereign lord the king and the prisoners at the bar, whom you shall have in charge, and a true verdict give, according to your evidence: So help you God.

And the same oath was administered to the rest, (which were sworn) and their names are as follow: Christopher Bromadge, Isaac Brodribb, John Merewether, Christopher Lilly, James Wimble, Joseph Gregory, John Scott, Isaac Bannister, sworn, William England, (challenged) Francis Billow, (challenged), William Jones, Samuel Page, John Perks, William Dyer, sworn.

Cl. of Arr. Cryer, count these.

Christ. Bromadge,	John Scott,
Isaac Brodribb,	Isaac Bannister,
John Merewether,	William Jones,
Christopher Lilly,	Samuel Page,
James Wimble,	John Perks,
Joseph Gregory,	William Dyer.

Cryer. Twelve good men and true. Gentlemen, are ye all sworn.

Cl. of Arr. Cryer, make proclamation.

Cryer. Oyez, Oyez, Oyez; if any one can inform the king's majesty's justices, the king's serjeants, the king's attorney or advocate, before this inquest be taken between our sovereign lord the king and the prisoners at the bar, of any treason, murder, felony or other misdemeanour, committed or done by the prisoners at the bar, or either of them, come forth, and you shall be heard, for the prisoners stand at the bar, upon their deliverance; and all persons bound by recognizance to prosecute them, or either of them, come forth, and prosecute, or you will forfeit your recognizances.

Cl. of Arr. Matthew Mahony, hold up thy hand; Samuel Goodere, hold up thy hand. Gentlemen of the jury, look upon the prisoners, and hearken to their charge; they stand indicted by the names of Matthew Mahony, late of the parish of St. Stephen in the city of Bristol, and county of the same city, labourer; and Samuel Goodere, late of the same parish, city and county, esq. for that they not having (as in the indictment before set forth). Upon this indictment they have been lately arraigned, and

thereupon have severally pleaded not guilty; and for their trials have put themselves upon God and the country, which country you are: Your charge is, to enquire whether they, or either of them, be guilty of the felony and murder in manner and form as they stand indicted, or not guilty. If you find them, or either of them, guilty, you shall enquire what goods or chattels, lands or tenements they, or either of them, had at the time of the felony committed, or at any time since: if you find them, or either of them, not guilty, you shall enquire whether they, or either of them, fled for the same: If you find that they, or either of them did fly for the same, you shall enquire of their, or either of their goods, and chattels, as if you had found them or either of them guilty: If you find them, or either of them not guilty, and that they or either of them did not fly for the same, say so, and no more; and hear your evidence.

Mr. *Vernon.* May it please you, Mr. Recorder, and you gentlemen that are sworn on this jury, I am counsel for the king against the prisoners at the bar, who stand indicted for the murder of sir John Dineley Goodere; they stand also charged on the coroner's inquest with the same murder: and though it is impossible for human nature not to feel some emotions of tenderness at so affecting a sight as now presents itself at the bar; yet, gentlemen, should the guilt of this black and frightful murder be fixed upon the prisoners (as from my instructions I fear it will) pity must then give way to horror and astonishment at the baseness and barbarity of the fact and circumstances; and our sorrow ought to be, that through the lenity of the laws, the unnatural author and contriver of so shocking a piece of cruelty, and this his brutal accomplice in the ruffianly execution of it, should be to share the common fate of ordinary malefactors. Gentlemen, you perceive it is laid in the indictment that the prisoner Mahony strangled the deceased, and that the prisoner Goodere was present, aiding and abetting him in that barbarous action, and so involved in the same guilt; and equally a principal in the murder: but, gentlemen, Mr. Recorder, I believe, will tell you, that the only matter for your enquiry will be, whether the prisoners were concurring in the murder of the deceased, and present at the strangling of him; for if so, whether Mahony, Mr. Goodere, or another in fact strangled him, it will in consideration of law be the same thing, and the act of strangling will be as much imputable to each of them, as if they had both assisted in putting the cord about the neck of the deceased, and been his actual executioners; nor will it be material, whether they strangled him with a rope, a handkerchief, or their hands, so the kind of death be proved. And, gentlemen, as to the crime set forth in the indictment, I have matter, in my brief, for a very heavy charge against both the prisoners, but distinguished against the prisoner Mr. Goodere with this black characteristic, that he was brother of the deceased, and, as such, bound by the ties of blood and nature to have preserved his person from violence; and yet, gentlemen, I am afraid it will appear, that his brother died by his procurement, and in his presence, which is the same, in effect, as if he had perished by his hand. But as it would ill become me to aggravate in a case of this nature, I shall only state to you the most material passages relating to the murder of that unfortunate gentleman, and leave the rest to come from the mouths of the witnesses themselves. And, gentlemen, (as I am instructed) there had been a long and very unhappy difference between the deceased sir John and his brother the prisoner, owing to various occasions; and amongst others, to sir John's having cut off the entail of a large estate in Worcestershire, to which Mr. Goodere (as the next remainder-man) would have otherwise stood intituled, in default of issue of sir John. Gentlemen, this misunderstanding by degrees grew to an inveterate grudge and hatred on the part of Mr. Goodere; which was so rooted in his heart, that it at length worked him into a formed design of destroying his brother, and making away with him at all hazards and events. The great difficulty was, how to get sir John into his power, for he generally travelled armed; nor was it easy to get together a set of fellows so base and desperate, as to join with him in the carrying off his brother. But, unfortunately for the deceased, the prisoner, Mr. Goodere, having been lately honoured by his majesty with the command of the Ruby man of war, happened, in January last, to lie stationed in King-road (as much within the county of Bristol, as the Guild-hall where this court is sitting.) Sir John (who was advanced in years, and very ailing) had, it seems, been advised to come to Bath for the recovery of his health: and having occasion to transact affairs of consequence at Bristol with Mr. Jarrit Smith, Mr. Goodere took this opportunity of laying a snare for his brother's life, as you will find by the event. He applies to Mr. Smith, and taking notice to him of the misunderstanding between himself and his brother, pretends a sincere desire of reconciliation, and desires Mr. Smith, if possible, to make up the breach between them; and Mr. Smith promised to do his utmost towards effecting a reconciliation, and was as good as his word; for, by his interest and persuasions, he at length prevailed upon sir John to see and be reconciled to his brother, and sir John having appointed Tuesday the 13th of January last in the morning for calling on Mr. Smith at his house in College-Green, Mr. Smith soon made his brother, Mr. Goodere, acquainted therewith; and no sooner was he informed of it, but he begun to take his measures for the executing his wicked scheme against his brother's life. For on Monday (the day before sir John was to be at Mr. Smith's) Mr. Goodere, with the other prisoner Mahony, (his inseparable agent and companion in every stage of this fatal business) went together to

the White Hart, an ale-house near the foot of the College-Green, in the view of, and almost opposite to Mr. Smith's, in order to see if it was a fit place for their desperate purpose: and finding it to be so, Mr. Goodere commended the pleasantness of the closet over the porch, and said he would come and breakfast there the next day. And accordingly the next morning (which was Tuesday the 18th) Mr. Goodere, with his friend Mahony, and a gang of fellows belonging to the privateer called the Vernon, whom they had hired to assist them in the waylaying and seizing of sir John, (but whom, one would have thought, the name of that gallant admiral should have inspired with nobler sentiments) came to the White Hart, where having ordered they should have what they would call for, he went himself to breakfast in the closet over the porch, from whence he had a full view of Mr. Smith's house, whilst the others posted themselves below on the look-out for sir John; and it was not long before he came on horseback to Mr. Smith's: but his stay was very short, being obliged to go to Bath; however, he promised Mr. Smith to be in Bristol again by the Sunday following. He was seen from the White Hart by Mr. Goodere and his spies upon the watch; but having a servant, and riding with pistols, they did not think proper to attempt the seizing of him then; but, as he rode down the hill by St. Augustine's back, Mr. Goodere called out to Mahony in these words, "Look at him well, Mahony, and watch him, but don't touch him now." And in fact, gentlemen, the prisoners and their companions followed and watched sir John a considerable way. Afterwards Mr. Smith acquainted the prisoner Mr. Goodere, that his brother was to be with him on the Sunday following; and little thinking that an interview between brothers could be of a fatal tendency, advised him to be in the way, that he might bring them together: which advice the prisoner observed with but too great punctuality, taking care, in the interim, to lay such a train, as that it should be hardly possible for his brother to escape falling into his hands. He ordered the man of war's barge to be sent up for him on the Sunday; accordingly it came up about 2 or 3 that afternoon; of which Mr. Goodere being informed by one Williams a midshipman, whom he had ordered up in it, he enquired of Williams, if he knew the river, and the Brick-kilns going down it? And Williams telling him he did, Mr. Goodere ordered him to get all the boat's crew together, and be sure to place the barge at the Brick-kilns, and leave but two or three hands to look after the barge, and bring all the rest of the men to the White Hart ale-house, and wait for him there, for he had a certain person coming on board. Accordingly, gentlemen, Williams and most of the barge-men came to the place of rendezvous at the White Hart, where Mahony, with several of the privateer's men (I believe all, or most of the same gang that had been there on the watch the Tuesday before) were also met by Mr. Goodere's orders to way-lay and seize sir John, and stood at the window on the look-out, in order to watch his coming out of Mr. Smith's. Thus the ambuscade being laid, the prisoner Mr. Goodere goes to Mr. Smith's about three in the afternoon (the hour at which sir John had appointed to be there;) he went directly towards his brother sir John, and kissed him (what kind of kiss it was, will best appear by the sequel,) and observed to him with an outward shew of satisfaction, that he looked in better health than he had formerly done. Mr. Smith was so good to drink friendship and reconciliation between the two brothers: Mr. Goodere pledged it in a glass of wine, which he drank to his brother sir John; and sir John (being under a regimen) offered to pledge him in water, little thinking his brother designed to end their differences, by putting an end to his life. But that, gentlemen, you'll soon see was the sole end he had in view; for sir John in about half an hour taking his leave, Mr. Goodere was following him: Mr. Smith stopt Mr. Goodere, saying, "I think I have done great things for you." Says Mr. Goodere, "By God, this won't do;" and immediately followed his brother: and meeting some of the sailors whom he had posted at the White Hart, says to them, "Is he ready?" and being answered, "Yes," he bid them make haste. Mahony, and the other fellows who were on the look-out at the White Hart, seeing sir John go down St. Augustine's Bank, immediately rushed out, and (as they had been ordered by Mr. Goodere) seized sir John as their prisoner. Just then Mr. Goodere himself was come up, and had joined his companions, and shewed himself their ringleader: for (according to my instructions) he gave them positive orders to carry sir John on board the barge, and they but too exactly observed the word of command. They hurried on sir John with the utmost violence and precipitation, forcing him along, and even striking him in the presence of his brother, and (as the Romans used to do their malefactors) dragged him through the public way. The poor unfortunate creature made repeated outcries of murder, that he was ruined and undone, for his brother was going to take away his life. He made what resistance he could, and called aloud for help, but all was to no purpose. Several persons indeed followed them, and asked what was the matter? But they were answered by Mr. Goodere and his associates, that the person they were hauling along was a murderer, had killed a man, and was going to be tried for his life. The most of this ruffianly crew being armed (it seems) with bludgeons and truncheons, obliged the people who came about to keep off, holding up their sticks at them, and threatning to knock them down. Gentlemen, when they had thus forced sir John towards the end of the rope-walk, Mr. Goodere (who all along bore them company, and animated them as they passed along) bid them make more dispatch, and mend their pace. Accordingly they took up sir

John, and carried him by main force a considerable way, then set him down again, and pushed and hauled him along, till they had got him to the slip (opposite to the King's head). Sir John cried out, "Save me, save me, for they are going to murder me." There the barge came up, and the prisoner Mr. Goodere had his brother forced on board, and with Mahony and the rest went also into the barge. Sir John then called out, "For God's sake run to Mr. Smith, and tell him I am going to be murdered, or I am an undone man." And crying out that his name was Dineley, Mr. Goodere stopt his mouth with his hand, to prevent his telling his other name: And though sir John was in an ill state of health, yet his hard-hearted brother forcibly took his cloak from off his back, and put it upon himself: And having thus got him into his power, he ordered the men to row off, telling his brother, that now he had got him into his custody, he would take care of him, and prevent his making away with his estate. But, gentlemen, in fact, so little did he think himself concerned in what sir John did with the estate, that he was of opinion, no act of sir John's could affect it longer than his life; and that it must necessarily devolve to him (as the next in remainder) on his brother's dying without issue. And this, gentlemen, he declared to Mr. Smith but a few days before. And indeed his brother at once saw what kind of prevention it was he meant; "I know, says he to Mr. Goodere, (soon after his being forced into the barge) you intend to murder me this night, and therefore you may as well do it now, as carry me down." Poor gentleman, his heart misgave him, that the design of this base and daring outrage was to make the ship his prison, one of his cabbins his slaughter-house, and the sea his grave, and therefore he made it his choice to be thrown overboard in the river (where his body might be found) rather than buried in the ocean. The prisoner Goodere denied, indeed, he had any such design, but yet could not refrain from the usual exhortation to dying persons, that he would have him make his peace with God. At the Redcliffe the privateer's men were set on shore; and I think about seven in the evening the barge reached the Ruby man of war, then in King-road. Mr. Goodere had in their passage talked of bleeding and purging his brother to bring him to his senses, pretending he was a madman; for he knew very well that very few of his own men would have assisted him in such an enterprize, had they not been under a belief that his brother was really mad. And to keep up such a notion, as soon as he had got him on board the Ruby, he hurried him down what, I think, they call the gangway, into the purser's cabbin, making an apology, that he had brought a mad fellow there; then ordered two bolts to be clapt on the cabbin-door, for the making his prison more secure, which was accordingly done. And now having made his brother a prisoner, his next step was to destroy him. He took Mahony with him into his own cabbin, and there the cruel means of murdering his brother was concerted between them. They agreed to strangle him; and engaged one White (who is hereafter to stand to the justice of his country) to assist them in the butchery. I should have told you, gentlemen, that it is usual in ships of war to place a centinel over persons under arrest; and accordingly one was placed by Mr. Goodere's orders, with a drawn cutlas in his hand at the door of the cabbin where sir John was confined. This centinel, about twelve at night, was relieved by one Buchannan. It was impossible for the prisoners to put their wicked design in execution, whilst this Buchannan remained at the cabbin door; so, to remove that obstacle, Mr. Goodere (after having been in close conference with Mahony and White) comes down to the purser's cabbin, takes the cutlas from Buchannan, and orders him on deck, posting himself at the door of the purser's cabbin, with the drawn cutlas in his hand. I shall open none of the circumstances disclosed by Mahony in his confession, as being no evidence against Mr. Goodere, but it will be made appear to you in proof, that Mahony and White came to the purser's cabbin whilst Mr. Goodere stood posted at the door of it; that they were let into the purser's cabbin by Mr. Goodere himself. Mahony in particular was seen by one Macguiness (who kept watch in the gun-room) to go into the purser's cabbin, Mr. Goodere at the same time standing centinel at the door of it, and waving his cutlas at Macguiness, to make him keep back. He did so; but Mr. Goodere waved the cutlas at him a second time, and bid him keep back. Then, gentlemen, it was that Mr. Goodere and his two accomplices effected the cruel murder of his unfortunate brother. Mahony was heard to bid him not stir for his life; and then in conjunction with White, whilst Mr. Goodere stood watch for them at the cabbin door (which Mr. Recorder will tell you was the same as being actually within it) fell on this unhappy gentleman as he lay in the cabbin: And one of them having half throttled him with his hands, they put a rope about his neck, and at length strangled him. Great were his agonies, and long and painful the conflict between life and death. He struggled violently, and kicked against the cabbin, crying out several times very loud, "Murder! must I die! Help, for God's sake; save my life, here are twenty guineas, take it:" For he well knew they were strangling him by his brother's orders, and therefore offered them a bribe to spare his life; but the ruffians were relentless and inexorable. The ship's cooper (one Jones) and his wife, lying in the adjoining cabbin, heard his dying out-cries, and the noise occasioned by his kicking; his cries too were heard by others far beyond the cabbin door. Nature at length gave way, and he expired under these cruelties. Then Mahony called for a light, that they might have all the evidence of their eye-sight that sir John was actually dead; and (which is a shocking circumstance in the case)

Mr. Goodere himself handed them in the candle on that occasion. Buchannan perceiving the light disappear, was coming to him with another; but Mr. Goodere waved his cutlas at him to stand off. Such, gentlemen, was the fatal conclusion of this tragical business. What was seen by the cooper and his wife after the candle's being handed in, with regard to rifling the deceased, I choose shall come from their own mouths. The murder being thus effected, Mr. Goodere locked the door, and withdrew to his own cabbin; Mahony and White were, by his order, put aboard the yawl, and sent to Bristol. They did not fly the city, gentlemen, depending that their fellow-murderer would some-how smother this deed of darkness, and take care of their security for the sake of his own: But Divine Providence ordered otherwise. The honest cooper, though he durst not give the alarm whilst the murder was committing, for fear of sharing the same fate with sir John, yet as soon as he could with safety, made a discovery of the whole that he had heard and seen. It was concluded Mr. Goodere had made away with his brother, which too evidently appeared on the cooper's forcing open the purser's cabbin door where sir John lay murdered, and thereupon the cooper had the resolution to seize the murderer, who remained on board (though his captain). He pretended innocence; and when brought by warrant before Mr. Mayor, and other of the city magistrates, publicly declared, he did not then know that his brother was murdered, and went so far as to deny his having had any hand in either the seizing, detaining, or murdering him. But, gentlemen, if my instructions don't mislead me, we shall fix the thing at least as strongly upon Mr. Goodere as Mahony, and more strongly upon them both than I am willing to open it. We shall therefore call our witnesses, and, upon the whole of the evidence on both sides, appeal to your judgments, and to your consciences, whether both the prisoners, by the parts they bore in this horrid action, have not forfeited their lives to the justice of their country as accomplices in guilt, and principals in the murder of the unfortunate sir John Dineley Goodere.

Mr. *Shephard.* Mr. Recorder, I beg leave, before the witnesses are examined, to say, that there are a great many circumstances in the case laid before this court, and I don't know how material it may be for the witnesses to withdraw, and not be in the hearing of each other during the time of examination; I submit it to you, as is usually done in cases of this nature, whether it ought not to be done in this case, where it appears from the gentleman's own opening, there are variety of circumstances. I doubt not, Sir, but that you will see equal justice done between the king and the prisoner.

Mr. *Recorder.* It cannot be insisted on as a matter of right, that the witnesses be examined apart; but it is generally so ordered, if it is desired. I hope, Sir, you will observe too, that the prisoner hath no right to be heard by counsel, unless in matters of law. If any such matter arise, I shall be ready to hear you.

Mr. *Vernon.* If Mr. Shephard moves this as a matter of right, I would just remind him of what lord chief justice Treby says in Peter Cook's trial,* that it is not of necessity that the witnesses should be examined apart at the instance of the prisoner, though an indulgence generally granted. Sir, the crown, perhaps, has a right to such examination, but not the prisoner. We have a great number of witnesses, all of whom attend here on the public service (and some of them persons of figure;) and it would, I doubt, be casting a sort of blemish on their credit to examine them apart. Could that gentleman shew the least glimmering of suspicion as to the fairness of our witnesses, they ought in justice to withdraw; but as they are free from the least imputation in that respect, I see not why they should be incommoded, and hope he will not contend for it.

Mr. *Shephard.* I own it is not of necessity that the witnesses be examined apart in favour of the prisoners, nor do I intend to throw any imputation on the witnesses; but by Mr. Vernon's opening, some of them appear to be witnesses who were concerned in taking away the deceased gentleman to the ship, and all these, I suppose, are intended to be called as witnesses. I own it is a matter of indulgence, and I dare say, Sir, that you will indulge a prisoner, in these unfortunate circumstances, the benefit of making the best defence he can.

Mr. *Recorder.* Let the witnesses withdraw. Officers, clear the way.

Mr. *Vernon.* We hope, Sir, it is not intended that all our witnesses in general should withdraw without distinction.

Mr. *Jarrit Smith.* (Solicitor for the prosecution.) We desire there may be a room for our witnesses, where they shall be together, or I may lose half my witnesses. I am myself a witness, Mr. Recorder, must I withdraw?

Mr. *Recorder.* No, you shall not go out.—Who do you call first, Mr. Vernon?

Mr. *Vernon.* Cryer, call Thomas Chamberlayn, esq. [Mr. Chamberlayn sworn.] I think, Sir, you have been for some time acquainted with Mr. Goodere, the unhappy gentleman at the bar.

Chamberlayn. A late acquaintance.

Mr. *Vernon.* Pray, Sir, will you give an account to Mr. Recorder and the jury, whether Mr. Goodere, at any time, and when, desired your interposition with Mr. Jarrit Smith to bring about a reconciliation between him and his brother sir John Dineley Goodere?

Chamberlayn. Yes, Sir, he did. The captain applied to me to go to Mr. Smith to interpose for him with sir John; and I did apply.

Mr. *Vernon.* Pray, Sir, how long was it before this unhappy affair happened?

Chamberlayn. About three weeks, I believe.

* See vol. 13, p. 348. See too Vaughan's Case, vol. 13, p. 494.

Mr. *Vernon.* And did Mr. Smith undertake that good-natured office?

Chamberlayn. Mr. Smith said, he should be ready to do it, and promised me to do all he could in the affair.

Mr. *Vernon.* When you applied to Mr. Smith, were you alone, or was Mr. Goodere with you?

Chamberlayn. I went first alone; afterwards captain Goodere went with me to Mr. Smith's house.

Mr. *Vernon.* What was the occasion of your going to Mr. Smith's?

Chamberlayn. To intreat him to use his good offices, to get a reconciliation between sir John and the captain.

Mr. Vernon. Be pleased, Sir, to tell us what passed on that occasion, and whether Mr. Goodere acquainted Mr. Smith with the nature of the misunderstanding between him and his brother?

Chamberlayn. Yes, Sir; that they had both been at law a great while, and spent a great deal of money, and therefore Mr. Goodere was willing to have Mr. Jarrit Smith to reconcile the matter between them, to prevent the ruin of the family, and many more such expressions as these.

Mr. *Jarrit-Smith* sworn.

Mr. *Vernon.* Mr. Smith, will you give an account of what you know of this fatal business?

Smith. Some few weeks before this murder happened, Mr. Chamberlayn applied to me, and told me, that Mr. Goodere (the prisoner at the bar) desired that I would use my utmost endeavour with sir John Dineley Goodere to be friends and reconciled with Mr. Goodere, and that I would suffer him to bring Mr. Goodere to my house. I told him, I often heard sir John say, that there had been warm disputes between them, but would make use of all my endeavours to reconcile them, and that it was pity they should live in hatred, as they were the only two brothers. Some time after, Mr. Chamberlayn brought Mr. Goodere to my house, where they staid about a quarter of an hour, when Mr. Goodere gave me thanks for the promise I had made to Mr. Chamberlayn, and he then desired I would do all I could to promote a reconciliation. I told him, I should be glad to be a happy instrument of that sort; and that the first time I saw sir John I would speak to him on the affair, and endeavour to prevail on him to meet Mr. Goodere. The captain said, If any man in England could do it, I could. I told him, I hoped to succeed. Mr. Chamberlayn and Mr. Goodere went away. Some little time after they were gone, I saw sir John, and told him, that Mr. Goodere had applied to me to do all I could to reconcile them. Sir John seemed to speak much against it at first, and thought it would be to no purpose; for that he had been a real friend to the captain, who had used him very ill; but at last he was pleased to pass a compliment on me, and said, I cannot refuse you any thing you ask of me. He then mentioned several things the captain had said; and in particular told me, that at the death of sir Edward Goodere his father, Mr. Goodere the prisoner had placed several persons in the house where sir Edward lay dead, in order to do him some mischief, and he apprehended to take away his life.

Mr. *Shephard.* I must submit it to the Court, that what sir John said at that time is not matter of evidence.

Mr. *Recorder.* It is not evidence, but perhaps it is introductory to something Mr. Smith has further to say: if it be not, it should not have been mentioned.

Smith. And that he had endeavoured to set aside a common recovery, and made strong application to the Court of Common Pleas for that purpose.

Mr. *Shephard.* Whether this be evidence, I insist upon it in point of law that it is not, and it may have an effect on the jury.

Mr. *Recorder.* I will take notice to the jury what is not evidence. Go on, Mr. Smith.

Smith. After sir John had repeated several stories of this sort, he concluded at last (as I told you before) and why, Mr. Smith, if you ask it of me, I can't refuse. I saw Mr. Goodere soon after, and told him, I had seen sir John, and talked with him, and he was pleased to tell me, that he would see him, and bid me contrive a convenient place to bring them together. I told Mr. Goodere about the attempt to set aside the recovery. I wonder, said Mr. Goodere, he should mention any thing of that, for I can set it aside when I please. I told him, I thought he could not; for, said I, I have had a good opinion on it, and am to lend a large sum of money upon the Worcestershire estate. He said, I wonder that any body will lend him money upon that estate; I am next in remainder, and they will run a risk of losing their money, I do assure you; and he cannot borrow a shilling on it without my consent: but if my brother was reconciled, then, if we wanted money, we might do it together, for he cannot secure it alone. He told me, that he should take it as a great favour, if I could fix a time as soon as I could to bring them together. Soon after I saw sir John, and he told me he was very deaf, and was advised to go to Bath, and then appointed to be with me on Tuesday the 13th of January last in the morning, when he would talk with me about the business of advancing the money on his estate. After this I saw Mr. Goodere, and told him that I had seen his brother; that he was to be with me on Tuesday the 13th of January last, and desired him to be in the way, for sir John was always very punctual to his appointment; and if business or any thing happened to prevent him, he always sent me a letter. Mr. Goodere thanked me, and told me, he would be in the way; and on the Tuesday morning sir John came to me on horseback, just alighted, and came into my office. I asked him to sit down, which

he refused, saying his head was bad; that he must go for Bath, having been advised to go there for some time, and then he did not doubt but he should be better. I told sir John, that his brother knew he was to be in town, therefore hoped he would sit down a little, for that I had promised him to bring them together. He said, I can't now; but you shall see me again soon, and then I may do it. I asked him, When shall I see you again, to finish the business you and I are upon, the writings are ready, name your own time, the money will be paid? He appointed to be with me on Monday morning to settle that business; and said, I shall come to town the Saturday or Sunday before, and when I come I will let you know it: he then mounted his horse and rid off. Shortly after (as I was going to the Tolzey) at, or under Blind-gate, I met Mr. Goodere, and told him I was glad to see him, and that his brother had been in town. He said, he had seen him, and thought he looked better than he used to do. I told Mr. Goodere, that his brother had appointed to be with me Monday morning next on business, and I expected him to be in town either the Saturday or Sunday before. I then had many compliments from Mr. Goodere, and he said, how good it would be to make up the matter between him and his brother. I heard nothing of sir John being in town till Sunday the 18th of January last in the morning, when he sent me a letter to let me know that he came to town the night before, and would be glad to call upon me at any time I would appoint. I sent him for answer, that I was to dine from home, but would return, and be at home at three o'clock that afternoon. And as I was passing by, I stopt the coach at captain Goodere's lodgings in Princes-street. I asked if he was at home? Found him alone, and then shewed him sir John's letter. He read it, and asked the time I appointed. I told him three o'clock that afternoon. Said he, I think my brother writes better than he used to do. I said, Mr. Goodere, I think it would be best for you to be accidentally on purpose at that time at my house. No, says he, I don't think that will be so well, I think it would be better for you to send for me. I returned to my house, and my servant told me that sir John had called, and that he would be here again presently. Whilst my servant was telling this, sir John came in; I took him by the hand, and asked him how he did? I thank God, says he, I am something better; and after I have settled this affair with you, I will go to Bath for some time, and then, I hope, I shall be better. I said, captain Goodere is waiting, I beg you will give me leave to send for him; you know you said you would see him. With all my heart, says sir John, I know I gave you leave. I then sent down a servant to captain Goodere's lodgings, to let him know that sir John was with me, and desired him to come up. The servant returned, and said, Here is captain Goodere; on which I said, sir John, please to give me leave to introduce your brother. He gave me leave: captain Goodere came in, went directly and kissed him as heartily as ever I had seen any two persons who had real affection one for the other. I desired them to sit down. Sir John sate on one side of the fire, and captain Goodere on the other, and I sate between them. I called for a table and a bottle of wine, and filling a full glass, I said, sir John, give me leave to drink love and friendship. Ay, with all my heart, says sir John; I don't drink wine, nothing but water; notwithstanding, I wish love and friendship. Captain Goodere filled a bumper, and pledged it, spoke to his brother, and drank love and friendship, with his brother's health. We sate some time, all seemed well, and I thought I could have reconciled them. The cork lying out of the bottle, captain Goodere takes up the cork in his hand, put it into the mouth of the bottle, and struck it in very hard. I then said, though sir John will not drink wine, you and I will. No, says captain Goodere, I will drink water too, if I drink any more: and there was no more drank. After they had talked several things (particularly captain Goodere of the pleasantness of the situation of the estate in Herefordshire, and goodness of the land) in a very pleasant and friendly way, sir John rose up, and said, Mr. Smith, what time would you have me be with you to-morrow morning? I appointed nine o'clock. He said, Brother, I wish you well; then said to me, I will be with you half an hour before. Sir John went down the steps; the captain was following; I stopt him, and said, Pray don't go, captain, let you and I drink a glass of wine. No more now, I thank you, Sir, said he. I think, said I, I have done great things for you. He paused a little, and said, By God, it will not do; and in a very short time the captain went very nimbly down the steps. I followed him to the door, and observed him to go after sir John down the hill; and before he turned the churchyard wall, to be out of my sight, I observed some sailors come out of the White-hart alehouse, within view of my door, and they ran up to captain Goodere. I heard him say, Is he ready? (I thought he meant the boat) they said, Yes. He bid them make haste. Then they ran very fast towards the lower-green, one of them having a bottle in his hand; captain Goodere went very fast down the hill, and had it not been by mere accident I should have followed him, (but some people think it was well I did not) for I promised my wife to return to the house where we dined in Queen's-square, where I went soon after.

Mr. Recorder. Mr. Smith, did they all go toward the lower green?

Smith. No, Sir; but some towards the boats on St. Augustin's back. Sir John went that way, and captain Goodere followed him; but the men who came out of the alehouse went towards the lower green some of them. About 5 o'clock in the evening, as I was riding up the hill towards the College-green, I observed a soldier looked hard at me into the coach, as

if he had something to say, and seemed to be in a confusion. I walked into the court, the soldier with me, and then he said, I am informed, Sir, your name is Mr. Jarrit Smith. Yes, says I, it is. (What I am now going to say, Mr. Recorder, is what the soldier told me.) He told me, that as he was drinking with a friend at the King's Head ale-house at the Lime-kilns, he heard a noise, and ran out to see what was the matter, when he saw a person dressed (as he described) like sir John's dress.

Mr. *Vernon.* Pray, Sir, how was sir John dressed?

Smith. Sir John was dressed in black clothes, he had a ruffled shirt on, a scarlet cloak, a black velvet cap (for the sake of keeping his ears warm) and a broad-brimmed hat flapping. He described this exactly, and told me likewise, that the captain of the man of war and his crew had got the person into custody, and by force had put him on board the man of war's barge or boat lying near the Slip, by the King's Head; that the gentleman cried out, For God's sake, if you have any pity or compassion upon an unfortunate man, go to Mr. Jarrit Smith, and tell him how I am used: and that the captain hearing him cry out, stopt his mouth with his hand.

Mr. *Recorder.* What did the soldier desire of you?

Smith. The soldier desired me to enquire into it, for that he did not know the intention of taking off a gentleman in that way.

Mr. *Recorder.* Did you do any thing on that request of the soldier?

Smith. Yes, Sir; it immediately occurred to me, that sir John, when he left my house, told me that he was going to his lodgings. I went to his lodgings, (which was at one Mr. Berrow's near the mint) I there asked for him, and related the story I had heard; they told me they had not seen him since he went to my house.

Mr. *Vernon.* Mr. Smith, Sir, will you inform us by what name the unfortunate gentleman (you are speaking of) was commonly called.

Smith. Sir John Dineley Goodere; his mother was a Dineley, and there came a great estate from her side to him, which occasioned his being called by the name of Dineley.

Mr. *Vernon.* When sir John went from your house on Tuesday, was he alone, or had he any attendants with him?

Smith. Sir John was well guarded; he had pistols, and I think his servant had pistols also.

Mr. *Vernon.* I think you told us but now, that sir John was to be with you on the Sunday; pray, when did you let Mr. Goodere know it, Sir?

Smith. I met captain Goodere that very day at Blind-gate, and told him of it; and he said, he had met his brother himself.

Mr. *Vernon.* Pray, Sir, did Mr. Goodere tell you, to whom the estate would go on sir John's death?

Smith. Yes, he has often said he was the next remainder man, and that the estate would come to himself on his brother's death.

Mr. *Recorder.* Well, Mr. Goodere, you have heard what Mr. Smith hath said, have you any questions to ask him?

Mr. *Shephard.* Mr. Recorder, what I have to ask of you, with submission, in behalf of Mr. Goodere, is, that you will indulge counsel to put his questions for him to the Court, and that the Court will then be pleased to put them for him to the witnesses. It is every day's practice at the courts of Westminster, Old Bailey, and in the circuit.

Mr. *Vernon.* This, I apprehend, is a matter purely in the discretion of the Court, and what can neither in this or any other court of criminal justice be demanded as a right. The judges, I apprehend, act as they see fit on these occasions, and few of them (as far as I have observed) walk by one and the same rule in this particular: some have gone so far, as to give leave for counsel to examine and cross-examine witnesses; others have bid the counsel propose their questions to the Court; and others again have directed that the prisoner should put his own questions: the method of practice in this point, is very variable and uncertain; but this we certainly know, that by the settled rule of law the prisoner is allowed no other counsel but the Court in matters of fact, and ought either to ask his own questions of the witnesses, or else propose them himself to the Court. I have one more question to ask of Mr. Smith before we part with him.

Sir, I think you were present when Mr. Goodere was brought to Bristol, after his brother's being killed; I'd be glad to know whether you then heard him say any thing, and what, concerning this foul business?

Smith. I was present when Mr. Goodere was brought to Bristol after this murder happened, when he was asked (before the justices) about the seizing, detaining and murdering sir John Dineley; and he then directly answered, that he did not know that his brother was murdered or dead. He was then asked in relation to the manner of seizing him, and carrying him away; he said he knew nothing of it till he came to the boat, and when he came there he saw his brother in the boat; but he did not know that his brother had been used at that rate.

Mr. *Shephard.* Mr. Smith, Sir, you are speaking about sir John; by what name did you commonly call him?

Smith. Sir John Dineley Goodere.

Mr. *Recorder.* Mr. Goodere, have you any questions to ask Mr. Smith?

Samuel Goodere. Yes, Sir. Mr. Smith, I ask you what sir John Dineley's business was with you, and how much money were you to advance?

Smith. Five thousand pounds, Sir; and I told him that I was satisfied that it was a good title.

Samuel Goodere. I ask you, if you knew him to be a knight and baronet?

he refused, saying his head was bad; that he must go for Bath, having been advised to go there for some time, and then he did not doubt but he should be better. I told sir John, that his brother knew he was to be in town, therefore hoped he would sit down a little, for that I had promised him to bring them together. He said, I can't now; but you shall see me again soon, and then I may do it. I asked him, When shall I see you again, to finish the business you and I are upon, the writings are ready, name your own time, the money will be paid? He appointed to be with me on Monday morning to settle that business; and said, I shall come to town the Saturday or Sunday before, and when I come I will let you know it: he then mounted his horse and rid off. Shortly after (as I was going to the Tolzey) at, or under Blind-gate, met Mr. Goodere, and told him I was glad to see him, and that his brother had been in town. He said, he had seen him, and thought he looked better than he used to do. I told Goodere, that his brother had appointed with me Monday morning next, and I expected him to be in town the Saturday or Sunday before. [illegible] compliments from Mr. Goodere, [illegible] how good it would be to [illegible] between him and his brother, [illegible] of sir John being in town, [illegible] of January last in the [illegible] me a letter to let [illegible] town the night [illegible] call upon me a[illegible] sent him for [illegible] home, but [illegible] o'clock th[illegible] by, I ste[illegible] ings i[illegible] home [illegible] him [illegible] th[illegible] t[illegible]

captain Goodere came in, wept [illegible] for kissed him as heartily as ever [illegible] two persons who had [illegible] the other. I desired [illegible] John sate on one [illegible] tain Goodere on th[illegible] them. I called [illegible] wine, and fillip[illegible] give me lea[illegible] Ay, with [illegible] don't dr[illegible] withsta[illegible] Capt[illegible] it, [illegible] fr[illegible] directs, that indict- [illegible] process of outlawry is [illegible] degree or mystery of [illegible] superadded to his name, [illegible] ing one person for another. [illegible] great submission, that statute [illegible] taken to extend to any other but the [illegible] dant. All the law requires, as to the person on whom the offence is laid to have been committed, is a convenient certainty in the description of him; and surely a description by the right Christian and surname is such, and sufficient to ascertain the person murdered, especially where it does not appear there was any other of the same name. In the indictment against Coke and Woodburne on the Coventry act, for disfiguring Mr. Coke's brother-in-law Mr. Crispe, and which was settled with great advice, the person disfigured is described as here, one Edward Crispe only; and all the modern precedents of indictments at the Old Bailey are silent, as to the addition of the person on whom the offence is said to be committed; and it is certainly best and safest to omit it. Lord Coke in his first Institute lays it down, that a person may have divers surnames, and that a purchase by either of them is sufficient, and yet but one of them is his true name; which shews the law is not so over-curious in the manner of describing persons: and, if I mistake not, it has been held that even the indictee himself can take no advantage of a mistake of his surname, if his Christian name be right, and he be otherwise described with convenient certainty. Besides, Sir, this is begging the question; for it does not appear in proof that the deceased was a baronet, he might for aught appears judicially to the Court have been baptized by the name of Sir John. Baronetage as a patent-dignity we know is matter of record, which is a thing proveable only by itself; therefore if they would have taken any advantage of it, they should have had the letters patent of creation, or an exemplification of them, at least en poigne (as the law terms it) ready to produce in court: and for an authority in point, Sir, I beg leave just to mention the case of sir Richard Graham†*

[illegible] of sir John Dineley was a baronet by patent, it amounts to the same the Christian name; baronet, then he is im- and then the prisoners on this indictment. The guilty you, Sir, is, whether this before you be asked the witness? Can I presume him to have Mr. Recorder, or can I admit of parole evi- been a baronet, or can prove him so?

Mr. Ferson. Mr. Recorder, I beg leave to be heard in answer to this observation of Mr. Shephard's, which I apprehend to be one of the most extraordinary I ever heard from a gentleman of the long robe, and am bold to say, the learned gentleman who made it (if in earnest), is much mistaken in it, and in the doctrine he hath advanced concerning it. With great deference to your judgment, Sir, I speak it, his objection (if I apprehend it rightly) is, that the person mentioned in the indictment to have been murdered, is there described by the name of sir John Dineley Goodere only, and that by the evidence it appears the person murdered was sir John Dineley Goodere baronet; and he would from thence infer, that there is a mistake in the description of the person murdered, and a variance between the indictment and the evidence. Our baronets, it is well known, are but of modern institution, and their creation by patent from the king, as the fountain of honour; and whoever reads lord Coke's 12th report, will find it to have been resolved, at a learned conference in the time of James the first, that the king could erect such a dignity by patent descendable to the heirs male of the

* See their Case, vol. 16, p. 54.

† See his Case, vol. 13, p. 615.

(titular lord Preston); he was indicted as a commoner, and objected that he was a lord, and as such triable by his peers. But lord chief justice Holt, and others then present, acquainted him they could take no judicial notice of his being a lord (though they themselves called him so out of courtesy when they spoke to him) unless he produced the patent of creation, or a copy of its inrollment, because matter of record; so his objection vanished, and so I hope will this gentleman's. Had we called the deceased in the indictment sir John Dineley Goodere baronet, then, Sir, we should probably have been told, that we had failed in proof of the identity of the person, for that the baronettage was in its creation annexed to, and made a concomitant on the patentee's surname of Goodere, and waited only on that name; and that the deceased, considered as a baronet, was not of the maternal name of Dineley, and so upon the matter no such person as sir John Dineley Goodere baronet ever in *rerum natura*.

Mr. *Shephard*. Mr. Recorder, Mr. Vernon says it does not appear that sir John Dineley was a baronet, and that we ought to produce the letters patent to shew him such; I think it a pretty hard objection, considering that by law a prisoner cannot look into his indictment, nor have a copy of it, in order to be advised thereon. Here it comes out only on hearing the indictment read, and the person killed is therein described by the name of sir John Dineley Goodere only, without adding the title baronet; so that it was impossible for us to be prepared with the letters patent, or with any evidence of his being a baronet; therefore humbly hope we are proper in asking this question of the witness Mr. Smith, who was so conversant with the deceased gentleman, had the perusal of his writings, all his title deeds lay before him, so that he cannot but know the certainty of his title and degree.

Mr. *Recorder*. It is a great mistake to say, that it is necessary to set forth in the indictment the addition of the person on whom the offence is supposed to be committed; the law requires no such thing, and the prisoners suffer no manner of inconvenience by leaving out the addition; because on this indictment if they should happen to be acquitted, or should be convicted of homicide under the degree of murder, they may plead that acquittal or conviction in bar of a second prosecution for the same fact, with an averment that the party mentioned in both indictments, though under different descriptions, was one and the same person: it is sufficient that the deceased is described by his Christian name, and the surname by which he was commonly called.* The question proposed to the witness is improper; for it is not at all material in the present case, whether sir John was a baronet, or no. I would not deny the prisoners any advantage they are by law intitled to, but I cannot admit of evidence which can serve only to amuse. Mr. Goodere, have you any more questions to ask this witness? Mahony, have you any questions to ask? [Both silent.]

Morris Hobbs sworn.

Mr. *Vernon*. Mr. Hobbs, I think you are the landlord of the White-Hart alehouse.

Hobbs. Yes, Sir.

Mr. *Vernon*. Pray, whereabout is the house?

Hobbs. Over-against St. Augustine's church.

Mr. *Vernon*. Can you see Mr. Jarrit Smith's house from the window of your's?

Hobbs. Yes, Sir, very plain.

Mr. *Vernon*. I presume you are not unacquainted with the prisoners' faces?

Hobbs. I have seen the prisoners several times.

Mr. *Vernon*. I would not lead you in your evidence, but would be glad you'd give an account to Mr. Recorder, and the jury, whether Mr. Goodere (the gentleman at the bar) applied to you about coming to your house; if so, pray tell us when it was, and upon what occasion?

Hobbs. The 12th of January (which was on Monday) captain Goodere and Mahony came to my house; captain Goodere asked my wife, Have you good ale here? She said, Yes; he also asked, What place have you over-head? I answered, A closet, a place where gentlemen usually sit to look out. Will you please to let me see it, says he? Yes, Sir, said I. I went up to shew it, he and Mahony went up; the captain said it was a very fine prospect of the town; he asked for a pint of ale, I drawed it, and he gave it to Mahony, he drank it: and then the captain asked my wife, whether he might have a dish of coffee made to-morrow morning? Sir, said she, it is a thing I don't make use of in my way; but, if you please, I will get it for you. Then he told her, he would be there to-morrow morning by about nine o'clock. Mahony was by then.

Mr. *Vernon*. Did you hear this discourse pass between your wife and Mr. Goodere?

Hobbs. Yes, I did, and then the captain paid for his pint of ale, and went away; and the next morning (being Tuesday the 13th of January) he came again to my house before my wife was up, and I was making the fire (for I keep no servant). I did not know him again, I thought he was another man; says he, Landlord, can't you open them windows in the parlour? I told him, I would, and so I did; he looked out, and I thought that he had been looking for somebody coming from College prayers. He asked where my wife was? Says I, she is a-bed: because, said he, I talked with her about having some coffee for breakfast. I told him, she should come down presently, but I had much rather he would go down to the coffee-house, where he would have it in order. No, says he, I will have it here. My wife came down, he asked if he might go up stairs where he was before; he went up, and by-and-

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 25, s. 72.

Smith. I can't tell; I never saw the letters patent.

Samuel Goodere. Can't you tell how you styled him in the writings?

Mr. *Vernon.* I am very loth to interrupt Mr. Goodere, but must submit it, Sir, that this question is extremely improper, because personal knowledge is by no means legal evidence of his brother's having been a baronet; for baronetage must be derived from letters patent: neither can I see, Sir, (with great submission) how it would be at all material in this case, whether the deceased was a baronet, or not. By the indictment the prisoners stand charged with the murder of one sir John Dineley Goodere, and the witness Mr. Smith proves that the party whom we shall shew to have been murdered, commonly went by that name.

Mr. *Shephard.* With great submission, Mr. Recorder, I think it a very material question in point of law: upon the face of the indictment it appears, that he is described by the name of sir John Dineley Goodere; in a declaration for the king, the party ought to be set forth with his additions and titles, the persons committing the fact, as well as the person on whom it was committed: the deceased is described by the name of sir John Dineley Goodere, and if he was a baronet by patent, it is not his title, and it amounts to the same as if they had mistaken the Christian name; if the deceased was a baronet, then he is improperly described, and then the prisoners can't be found guilty on this indictment. The question before you, Sir, is, whether this question was proper to be asked the witness?

Mr. *Recorder.* Can I presume him to have been a baronet, or can I admit of parole evidence to prove him so?

Mr. *Vernon.* Mr. Recorder, I beg leave to be heard in answer to this observation of Mr. Shephard's, which I apprehend to be one of the most extraordinary I ever heard from a gentleman of the long robe, and am bold to say, the learned gentleman who made it (if in earnest), is much mistaken in it, and in the doctrine he hath advanced concerning it. With great deference to your judgment, Sir, I speak it, his objection (if I apprehend it rightly) is, that the person mentioned in the indictment to have been murdered, is there described by the name of sir John Dineley Goodere only, and that by the evidence it appears the person murdered was sir John Dineley Goodere baronet; and he would from thence infer, that there is a mistake in the description of the person murdered, and a variance between the indictment and the evidence. Our baronets, it is well known, are but of modern institution, and their creation by patent from the king, as the fountain of honour; and whoever reads lord Coke's 12th report, will find it to have been resolved, at a learned conference in the time of James the first, that the king could erect such a dignity by patent descendable to the heirs male of the body, as a fee conditional and forfeitable for felony.—But that where a baronet is murdered, it is necessary to set forth his name (or more properly title of dignity) in the indictment, I must take the liberty to deny: the difference, which I apprehend has been always taken and allowed, is between the indictee, or person charged by the indictment with committing the offence, and the person on whom the offence is laid therein to have been committed. 'Tis indisputably true, that the indictee's addition (whether of title or otherwise) must be set forth in the indictment; but what is the reason? Why, because it is expressly so required by the statute of the 1st of Henry the 5th, which directs, that indictments and writs where process of outlawry is awardable, the estate, degree or mystery of the defendant shall be superadded to his name, to prevent troubling one person for another. But, Sir, with great submission, that statute was never taken to extend to any other but the defendant. All the law requires, as to the person on whom the offence is laid to have been committed, is a convenient certainty in the description of him; and surely a description by the right Christian and surname is such, and sufficient to ascertain the person murdered, especially where it does not appear there was any other of the same name. In the indictment against Coke and Woodburne on the Coventry act,* for disfiguring Mr. Coke's brother-in-law Mr. Crispe, and which was settled with great advice, the person disfigured is described as here, one Edward Crispe only; and all the modern precedents of indictments at the Old Bailey are silent, as to the addition of the person on whom the offence is said to be committed; and it is certainly best and safest to omit it. Lord Coke in his first Institute lays it down, that a person may have divers surnames, and that a purchase by either of them is sufficient, and yet but one of them is his true name; which shews the law is not so over-curious in the manner of describing persons: and, if I mistake not, it has been held that even the indictee himself can take no advantage of a mistake of his surname, if his Christian name be right, and he be otherwise described with convenient certainty. Besides, Sir, this is begging the question; for it does not appear in proof that the deceased was a baronet, he might for aught appears judicially to the Court have been baptized by the name of Sir John. Baronetage as a patent-dignity we know is matter of record, which is a thing proveable only by itself; therefore if they would have taken any advantage of it, they should have had the letters patent of creation, or an exemplification of them, at least *en poigne* (as the law terms it) ready to produce in court: and for an authority in point, Sir, I beg leave just to mention the case of sir Richard Grahme†

* See their Case, vol. 16, p. 54.

† See his Case, vol. 13, p. 615.

(titular lord Preston); he was indicted as a commoner, and objected that he was a lord, and as such triable by his peers. But lord chief justice Holt, and others then present, acquainted him they could take no judicial notice of his being a lord (though they themselves called him so out of courtesy when they spoke to him) unless he produced the patent of creation, or a copy of its inrollment, because matter of record; so his objection vanished, and so I hope will this gentleman's. Had we called the deceased in the indictment sir John Dineley Goodere baronet, then, Sir, we should probably have been told, that we had failed in proof of the identity of the person, for that the baronettage was in its creation annexed to, and made a concomitant on the patentee's surname of Goodere, and waited only on that name; and that the deceased, considered as a baronet, was not of the maternal name of Dineley, and so upon the matter no such person as sir John Dineley Goodere baronet ever in *rerum natura*.

Mr. *Shephard*. Mr. Recorder, Mr. Vernon says it does not appear that sir John Dineley was a baronet, and that we ought to produce the letters patent to shew him such; I think it a pretty hard objection, considering that by law a prisoner cannot look into his indictment, nor have a copy of it, in order to be advised thereon. Here it comes out only on hearing the indictment read, and the person killed is therein described by the name of sir John Dineley Goodere only, without adding the title baronet; so that it was impossible for us to be prepared with the letters patent, or with any evidence of his being a baronet; therefore humbly hope we are proper in asking this question of the witness Mr. Smith, who was so conversant with the deceased gentleman, had the perusal of his writings, all his title deeds lay before him, so that he cannot but know the certainty of his title and degree.

Mr. *Recorder*. It is a great mistake to say, that it is necessary to set forth in the indictment the addition of the person on whom the offence is supposed to be committed; the law requires no such thing, and the prisoners suffer no manner of inconvenience by leaving out the addition; because on this indictment if they should happen to be acquitted, or should be convicted of homicide under the degree of murder, they may plead that acquittal or conviction in bar of a second prosecution for the same fact, with an averment that the party mentioned in both indictments, though under different descriptions, was one and the same person: it is sufficient that the deceased is described by his Christian name, and the surname by which he was commonly called.* The question proposed to the witness is improper; for it is not at all material in the present case, whether sir John was a baronet, or no. I would not deny the prisoners any advantage they are by law intitled to, but I cannot admit of evidence which can serve only to amuse. Mr. Goodere, have you any more questions to ask this witness? Mahony, have you any questions to ask? [Both silent.]

Morris Hobbs sworn.

Mr. *Vernon*. Mr. Hobbs, I think you are the landlord of the White-Hart alehouse.

Hobbs. Yes, Sir.

Mr. *Vernon*. Pray, whereabout is the house?

Hobbs. Over-against St. Augustine's church.

Mr. *Vernon*. Can you see Mr. Jarrit Smith's house from the window of your's?

Hobbs. Yes, Sir, very plain.

Mr. *Vernon*. I presume you are not unacquainted with the prisoners' faces?

Hobbs. I have seen the prisoners several times.

Mr. *Vernon*. I would not lead you in your evidence, but would be glad you'd give an account to Mr. Recorder, and the jury, whether Mr. Goodere (the gentleman at the bar) applied to you about coming to your house; if so, pray tell us when it was, and upon what occasion?

Hobbs. The 12th of January (which was on Monday) captain Goodere and Mahony came to my house; captain Goodere asked my wife, Have you good ale here? She said, Yes; he also asked, What place have you over-head? I answered, A closet, a place where gentlemen usually sit to look out. Will you please to let me see it, says he? Yes, Sir, said I. I went up to shew it, he and Mahony went up; the captain said it was a very fine prospect of the town; he asked for a pint of ale, I drawed it, and he gave it to Mahony, he drank it: and then the captain asked my wife, whether he might have a dish of coffee made to-morrow morning? Sir, said she, it is a thing I don't make use of in my way; but, if you please, I will get it for you. Then he told her, he would be there to-morrow morning by about nine o'clock. Mahony was by then.

Mr. *Vernon*. Did you hear this discourse pass between your wife and Mr. Goodere?

Hobbs. Yes, I did, and then the captain paid for his pint of ale, and went away; and the next morning (being Tuesday the 13th of January) he came again to my house before my wife was up, and I was making the fire (for I keep no servant). I did not know him again, I thought he was another man; says he, Landlord, can't you open them windows in the parlour? I told him, I would, and so I did; he looked out, and I thought that he had been looking for somebody coming from College prayers. He asked where my wife was? Says I, she is a-bed: because, said he, I talked with her about having some coffee for breakfast. I told him, she should come down presently, but I had much rather he would go down to the coffee-house, where he would have it in order. No, says he, I will have it here. My wife came down, he asked if he might go up stairs where he was before; he went up, and by-and-

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 25, s. 72.

by Mahony and three men more came in; I did not know Mahony's name; when they came in, the captain was above stairs; he directed me to make his men eat and drink whatever they would, and he would pay for it; I brought them bread and cheese, they eat what they pleased; Mahony went backwards and forwards, up stairs and down several times; he went out, but where, or what for, I did not know.

Mr. *Vernon.* Did Mahony, when he went up stairs, go in to Mr. Goodere?

Hobbs. Yes, several times; Mahony put the coffee, and some bread and butter, and made the toast, and did every thing for the captain, I thought he had been his footman. When the captain had breakfasted, and had made the men welcome, he shifted himself (some porter brought fresh clothes to him). By-and-by a man rid along, who, I believe, was sir John Goodere's man, with pistols before him; I heard somebody say that it was his man: and soon after the captain had shifted himself, Mahony went out about a quarter of an hour, and came back sweating, and went up to the captain; and I looking out of the window saw the man on horseback, and leading another horse (which I took to be his master's); and by-and-by sir John mounted, and rid down between my house and the church; and I had some glimpse of him, and heard the captain say, Look well at him, but don't touch him.

Mr. *Recorder.* This you heard the gentleman above stairs say to the four men below?

Hobbs. Yes, Sir, he spoke those words to the four who came in.

Mr. *Vernon.* Did sir John and his man appear to have any arms?

Hobbs. Yes, Sir, they had both pistols before them.

Mr. *Vernon.* Those men that were along with Mahony, do you know what ship they belonged to?

Hobbs. There was a young man, I believe something of an officer, came to my wife, and asked her, Is the captain of the man of war here? She answered that she did not know; but there was a gentleman above, and there were six other men besides in the other room in another company, which I did not know belonged to the captain, until he ordered six pints of ale for them. The captain ordered entertainment for ten men.

Mr. *Vernon.* Where were those six men?

Hobbs. In the kitchen; they did not belong to the man of war, nor were not in company with the other four.

Mr. *Vernon.* Now, will you proceed to give an account what followed upon Mr. Goodere's saying, Look well at him, but don't touch him.

Hobbs. As soon as sir John went down the hill, this Mahony stept up to the captain and came down again, and he and the other three in his company went down the hill, and the captain followed them; the clothes which the captain pulled off were left in the room; when the captain was going out at the door with his sword and cloak, I thought I was pretty safe of my reckoning, because of his clothes being left. The captain said at the door, Landlady, I will come back and pay you presently.

Mr. *Vernon.* How long was it before Mr. Goodere returned to your house?

Hobbs. He came again in about a quarter of an hour: When he came again, he went up stairs, changed a guinea, he asked what was to pay? I told him four shillings and one penny halfpenny, and then went away. About an hour and a half after Mahony and the other came again, sweating, and said they had been a mile or two out in the country. Mahony asked credit for a tankard of ale, and said his master would come up on Saturday following, and then he would pay for it: Well, said I, if he is to come up on Saturday, I will not stand for a tankard of ale; but if he don't come, how shall I have my reckoning? Says Mahony, I live at the Scotch arms in Marsh-street. Well, said I, I will not deny drawing you a tankard of ale, if you never pay me. Said he, You had best get the room ready against Saturday, and make a fire, and just dust it.

Mr. *Vernon.* Pray, when Mr. Goodere went away from your house, was he in the same dress as when he came first there that day?

Hobbs. No, Sir. When he came there he had a light-coloured coat, and he looked like a country farmer at his first coming in; but when he was out, he had a scarlet cloak on, wore a sword, and had a cane in his hand; a porter brought him the things.

Mr. *Vernon.* Do you know any thing of what happened on the Sunday following?

Hobbs. Yes, Sir; the Sunday morning Mahony came to my house, having trousers and a short jacket and leather cap on, asked for a quart of ale, this was Sunday: My wife said, Don't draw any more upon tick. Mahony gave a six-pence and paid for it, and said, See that the room be clear, the captain will be up in the afternoon, and then he will be here: And as he was going out of the house, he said to me, If you fortune to see that gentleman go up with the black cap before that time, do you send a porter to me to the Scotch arms. I told him I had no porter, and could not send. About 3 o'clock in the afternoon, when he came again with a person who had a scalled face, and one or two more, a man who lodged in the house came and told me, that they wanted to go up stairs; but I would not let them, because it was in service-time: They all went into the parlour, and had a quart of ale, and when that was drank, Mahony called for another; and then eight or nine men more came and called for ale, and went into the parlour, but still kept looking out; and one of them being a little fellow, I don't know his name, kept slamming the door together, ready to break the house down. Says I, Don't break my house down about my ears, don't think you are in Marsh-street; then the little fellow came up as if he was going to strike me, as I was coming up out of the cellar with a dobbin of ale in my hand, for a gen-

tleman going to the college: I saw this gentleman (pointing to the prisoner Samuel Goodere) and the deceased walk down the hill, I looked after them, and so did Mahony; and then all those men rushed out, and followed them. Mahony paid the reckoning, and went away: I ran in to see after my tankard, for I was more afraid of losing that than the reckoning. And that is all I do know from the beginning to the end.

Mr. *Vernon*. How long did he continue at your house on the Sunday?

Hobbs. I believe, Sir, an hour and an half; and there was some or other of them still looking out, and waiting at the door.

Mr. *Recorder*. You say that Mahony desired you, that if you saw the gentleman in the black cap go by, to send a porter; who did you apprehend that gentleman to be?

Hobbs. The gentleman that rode down the Tuesday.

One of the Jury. To what place were you to send the porter?

Hobbs. To the Scotch arms in Marsh-street, where Mahony lodged, if the gentleman in the black cap did go up to Mr. Smith's.

Mr. *Vernon*. I think, you say, you saw Mr. Goodere on the Sunday go down the hill, after the gentleman in the black cap?

Hobbs. I did, Sir; but nobody at all was with him.

S. Goodere. Did you see me at all that day?

Hobbs. Yes, Sir, I saw you go into Mr. Jarrit Smith's; and when you came down the hill, after the gentleman in the black cap, you called out to Mahony and his company, and bid them to look sharp.

S. Goodere. Did you see any body with me that day? I was not at your house that day.

Hobbs. I did not say you were; but as you was going to Mr. Jarrit Smith's, I heard one of your men say, There goes our captain, or else I had not looked out.

Mahony. I beg leave, my lord, to ask him, who it was that the captain bid Mahony to look sharp to?

Hobbs. The gentleman with the black cap.

Mr. *Recorder*. Was the gentleman in the black cap, at whose going by they all rushed out, the same gentleman whom you had seen before go to Mr. Jarrit Smith's?

Hobbs. Yes, Sir; but Mahony gave half-a-crown for my reckoning, and as they rushed out so hastily, I was afraid they had taken away my tankard; for which reason I went to look after it, and saw no more.

Thomas Williams sworn.

Mr. *Vernon*. Mr. Williams, I think you belonged to the Ruby at the time when this melancholy affair happened?

Williams. Yes, Sir.

Mr. *Vernon*. What station were you in?

Williams. I was ordered to walk the quarter-deck.

Mr. *Vernon*. Will you give an account of what you know in relation to the ill treatment of sir John Dineley Goodere? Tell all you know about it.

Williams. I came up on Sunday the 18th day of January last for my commander, went to his lodgings, he was not at home; I was told there, that he dined that day at Dr. Middleton's, and he was just gone there. I went to Dr. Middleton's after him, and he was just gone from thence; I then returned to his lodgings, and found him there; I told him the barge was waiting for his honour. He asked me if I knew the river, and if I knew the brick-yard at the lime-kilns? I told him that I knew the lime-kilns, and at last I recollected that I did remember the brick-yard he meant. That is well enough, says he. While I was there, Mahony came up to him, and the captain desired of me to go down stairs, for he wanted to speak to Mahony in private. I went down stairs, by-and-by Mahony came down and went away; then I went up to captain Goodere again, when he directed me to get all the hands together, and go down into the barge, and, says he, let it be landed at the brick yard. He asked me, if I knew the White Hart in the College Green? I told him, I did, and he directed me to take eight men up with me to the White Hart, and let two remain in the boat, for I have a gentleman coming on board with me. I did as I was ordered; and when I came to the White Hart, I saw Mahony and some of the privateer's men with him there in a room: I did not like their company; I went into the kitchen; I asked the landlord to make me a pint of toddy; he asked me, whether I would have it hot or cold; I told him a little warm; he was going about it, but before it was made, Mahony and the privateer's men rushed out of the house: I seeing that, followed them; they had the gentleman in possession before I came to them, and were dragging him along. I asked them what they were at? One of the privateer's men told me, if I did not hold my tongue, he would throw me over the key into the river, and immediately captain Goodere came there himself: The privateer's men asked what they should do with him, and he directed them to take him on board the barge, I followed them down the butts, the gentleman cried out Murder, murder! Mr. Stephen Perry the anchor-smith came out of his house, and asked me what was the matter; I told him I did not know: Mahony said he was a murderer, he had killed a man on board the man of war, and that he had run away; they had carried him before a magistrate, and he was ordered back to the man of war to be tried by a court martial.

Mr. *Recorder*. Was the captain within hearing at the time Mahony said that?

Williams. He was just behind.

Mr. *Recorder*. Was he within hearing?

Williams. He was; and when they had brought him into the barge, captain Goodere desired to have the cloak put over sir John to keep him from the cold, but sir John said he did not want a cloak, neither would he have it.

The privateer's men wanted me to put them on the other side the water, but I said I would not without the captain's orders. They asked the captain, and he directed me to do it, and I put them ashore at the glass-house, and just as we came over against the Hot-wells, there was a gentleman standing whom sir John knew, to whom Sir John cried out, Sir, do you know Mr. Jarrit Smith? But before he could speak any more, the cloak was thrown over him to prevent his crying out, and the captain told me to steer the barge on the other side, until we got clear of the noise of the people; and when we were got clear, he directed me to steer the boat in the middle, as I ought to do. I obeyed his orders.

Mr. *Recorder.* Who threw the cloak over him?

Williams. The captain. And the captain being as near to sir John as I am to your lordship, sir John asked the captain what he was going to do with him? Says the captain, I am going to carry you on board, to save you from ruin, and from lying rotting in a gaol.

Mr. *Vernon.* And what reply did sir John make to that?

Williams. He said, I know better things, I believe you are going to murder me; you may as well throw me overboard, and murder me here right, as carry me on board ship and murder me. No, says the captain, I am not going to do any such thing, but I would have you make your peace with God. As I steered the boat, I heard all that passed. We brought sir John on board between 7 and 8 o'clock, he could hardly go up into the ship, he being so benumbed with cold; he did go up of his own accord, with the men's assistance.

Mr. *Vernon.* How was he treated on board the man of war?

Williams. Sir, I don't know how they treated him after he went on board the ship. I was excused from watching that night, so I went to my hammock; but after I was got out of my first sleep, I heard some people talking and walking about backwards and forwards: I was surprised; at last I peeped out of my hammock, and asked the centinel what was o'clock? He said, Between two and three. And then I saw captain Goodere going down the ladder from the deck towards the purser's cabbin, but for what intention I know not. I believe he came from his own cabbin.

Mr. *Recorder.* Whereabout is the purser's cabbin?

Williams. The purser's cabbin is in a place called the Cock-pit, the lower steps of the ladder is just by the door of the purser's cabbin.

Mr. *Recorder.* And it was that ladder you saw the captain go down, was it?

Williams. Yes, Sir, it was.

Mr. *Vernon.* Mr. Williams, you have not told us all the particulars of sir John's treatment between the seizing and carrying him to the barge.

Williams. One of the men had hold of one arm, and another the other, and a third person was behind shoving him along.

Mr. *Vernon.* Where was captain Goodere then?

Williams. He was just behind him.

Mr. *Vernon.* How near was he to him?

Williams. Sometimes he was as near to him as I am to you.

Mr. *Recorder.* How many were there in the company, do you think, in the rope-walk, when they were carrying sir John along?

Williams. There were five of the privateer's men, and Mahony made six, and there were nine belonging to the barge; about sixteen in all.

Mr. *Recorder.* At what distance were you?

Williams. At a pretty great distance; I walked just before them: I saw them take him along in the manner I have said; I heard sir John cry out murder several times as he went, as they took him along the rope-walk.

Mr. *Recorder.* Mr. Goodere, Will you ask Williams any questions?

S. Goodere. What side of the gun-room did you lie in?

Williams. The star-board side of the gun-room.

S. Goodere. Why then it was impossible for you, as you lay in your hammock, to see any body go down to the cock-pit.

Williams. Not at all, Sir; the gunner's cabbin comes out further than ever was known of that sort.

S. Goodere. Are there any other cabbins besides the purser's in the cock-pit? Did you ever examine them how strong they are, and what partitions are there between them?

Williams. I don't know any other cabbin but the purser's in the cock-pit; the cooper lies in the slop-room.

S. Goodere. Were you never in the doctor's cabbin?

Williams. No, never in my life.

S. Goodere. Do you know whereabout the Ruby lay, when you brought that gentleman on board; where did you apprehend the ship was?

Williams. I did not know the situation of the ship, I had no business to know that; I was but a foremast-man.

Samuel Trivett sworn.

Mr. *Vernon.* Will you give an account to Mr. Recorder and the jury of what you know relating to this business.

Trivett. On Sunday the 18th of January last, I was at a public house in the rope-walk; I heard a noise of people cried, Damn ye, stand off, or else we will knock your brains out; I stepped up, and asked what right they had to carry a man along after that manner? I followed them; their answer was, it was a midshipman who had committed murder, and they were taking him down to the ship to do him justice: other people likewise followed, enquiring what was the matter: the gentleman was behind, and ordered them to make more haste.

Mr. *Vernon.* Look upon the prisoner at the bar, Mr. Goodere; is that the gentleman that ordered them to make more haste?

Trivett. I believe that is the man, my lord. On the gentleman's ordering them to make more haste, five or six of them caught him up in their arms, and carried him along; and as they were got down about the corner of Mr. Brown's wall, he insisted upon their making more dispatch, and then they hurried him as far as captain Osborn's dock. By that time his clothes were ruffled and shoved up to his arm-pits; they put him down, and settled his clothes, and then I saw his face, and knew him to be sir John Dineley: he cried out murder several times, and said, they were taking him on board to kill him, he believed. As they were going with him along, he cried out to Mrs. Darby, For God's sake assist me, they are going to murder me. I told Mrs. Darby, it was sir John Dineley: she said she knew him; the cloak was then over his face. As they got him further, he called out to a little girl, to get somebody to assist him, for they were going to murder him. They pushed him along to Mrs. New's house, and made a little stop there, and then they brought him to the water-side, where was a boat; they put out a plank with ledges nailed across: he was ordered to go on board the boat; they got him on board, and put him to sit down in the stern-sheet: then he cried out, For God's sake, gentlemen, if any of you know Mr. Jarrit Smith in the College-green, tell him my name is sir John Dineley. One of the men put his cloak and covered him, and before he could say any more, that gentleman (pointing to the prisoner Goodere) took his hand and put it on his mouth, and would not let him speak any further, and ordered the boat to be pushed off, which was done; and the tide making up strong, the boat got almost to the other side. I heard that gentleman (pointing as before) say, Have you not given the rogues of lawyers money enough already? Do you want to give them more? I will take care that they shall never have any more of you; now I'll take care of you.

Mr. *Recorder.* Prisoners, will either of you ask this witness any questions?

S. Goodere. No; I never saw the man before in my life.

Thomas Charmbury sworn.

Charmbury. On Sunday the 18th of January last, between the hours of four and five in the afternoon, I was on board the ship called the Levant, lying in Mr. Thompson's dock; I heard a noise coming over the bridge of the dock, and I saw a man in a scarlet cloak, and a parcel of people, some before and some behind, guarding of him, and he made a noise. I went towards them, to see what was the matter, and at Mr. Stephen Perry's counting-house (they rested) I asked, what was the matter? They said, he had killed a man on board a man of war; that he had run away; and they had had him before a magistrate, and he was ordered on board the king's ship to be carried round to London to take his trial. Mr. Perry (on hearing the noise) came out and saw him; says Mr. Perry, Gentlemen, do you know what you are about? I would not be in your coats for a thousand pounds, for it is 'squire Goodere. They threatened to knock down any that should come near; a fellow, I take him to be Mahony, came up to me, and threatened to knock me down several times. They took and carried him as far as captain James Day's lofts and warehouse, where he keeps his hemp; and there they rested him again, and threatened to knock down any that should come near them. Then said Mahony, Damn ye, here comes the captain. Immediately I turned about, and saw a gentleman with his cane poised in one hand, and his sword in the other; he had a dark shag coat and yellow buttons, whom I take to be that gentleman the prisoner at the bar. They took up the man in the scarlet cloak again, and carried him so far as coming out from the lower College-green into the rope-walk: the prisoner Goodere came up to them and ordered them to mend their pace; they took him up again, and carried him as far as Brown's garden, at the lower end of the rope-walk, as fast as they could well carry him, where they settled his clothes, and in the mean while the prisoner Goodere came up to them again, and ordered them to mend their pace. With much difficulty they got him between the gate and stile, and carried him as far as the warehouse at the corner of the glass-house, there they rested and settled his clothes again: then they took him up, and carried him down to the Lime-kilns, as far as the lower part of the wall below madam New's; and then brought him down to a place opposite to the King's-head, and then they put him on board a boat (I take it the man of war's barge) having ten oars, and they handed him in. After, the prisoner Goodere went into the boat after him, and set sir John on the starboard-side, and the prisoner Goodere on the larboard-side; then sir John cried out, Murder! you gentlemen that are on shore, pray tell Mr. Jarrit Smith, that my name is Dineley, and before he could say Goodere, the gentleman took up the flap of the cloak, threw it over the face of sir John, and stopped his mouth; and says he, I will take care of you, that you shall not spend your estate; and ordered the barge to be put off: and then he took the gentleman's cloak from his shoulders, and put it on his own.

Mr. *Recorder.* Who was it that stopped his mouth with his cloak?

Charmbury. That gentleman the prisoner at the bar. The boat was so full, had so many people in it, that they were obliged to row but with eight oars: and when they proceeded down the river, it being about three quarters flood, and the gentleman continually crying out, they went out of sight, and I saw no more of them.

Mrs. *Darby* sworn.

Mr. *Vernon.* Mrs. Darby, I think you live at the Lime-kilns.

Mrs. *Darby.* Yes, Sir, I do.

Mr. *Vernon.* What do you know of this tragical affair?

Mrs. *Darby.* I saw sir John Dineley forced along between two men, he crying out Murder, murder, for the Lord's sake save me, save me, for they are going to kill me!

Mr. *Vernon.* Pray what were they doing to him at that time?

Mrs. *Darby.* Forcing him along, Sir; one had him under one arm, and another under the other.

Mr. *Vernon.* Did you then know him to be sir John Dineley Goodere?

Mrs. *Darby.* Yes, Sir; last summer we mended his chair for him, I knew him very well.

Mr. *Vernon.* You say you knew sir John; pray did you know this gentleman? (pointing to Mr. Goodere.)

Mrs. *Darby.* There was a great many other persons there; they told me that the captain of the man of war was behind them, which I believe to be the gentleman at the bar: he was dressed in a dark drab-coloured coat, and his waistcoat trimmed with gold.

Mr. *Vernon.* What further did you see pass?

Mrs. *Darby.* I saw them hurrying him on board the boat, but I did not go any further than over against my own door; but when they were turning the boat, I heard him cry out, but what he said I know not.

William Dupree sworn.

Mr. *Vernon.* Give an account of what you know of this matter.

Dupree. On Sunday the 18th of January last I was at the sign of the King's Head, upon the right-hand side of the Red Lion as you go down to the Hot Well, with a friend of mine, a man that works with me, drinking a pint of ale; there was a young woman, she was reading at the window. She said, she heard a great outcry, we heard the same, we went out, saw a company of men forcing a gentleman along; I saw captain Goodere the prisoner at the bar coming behind them: when they came down to Scriggin's Slip, they gave out a report, that the gentleman had murdered a man on board a man of war, and they were taking him on board for justice. They put him on board the yawl, and captain Goodere stood by whilst they did it. The gentleman cried out, For God's sake go and acquaint Mr. Jarrit Smith, for I am undone, they will murder me. I went into the house again; the people advised me to go to Mr. Jarrit Smith, and inform him of it: as I came home I called at Mr. Smith's, and told him what I had seen and heard, and he told me he would see about it.

Mr. *Vernon.* I'd be glad to know whether upon the gentleman's crying out you saw any thing, and what, done to him?

Dupree. I saw the captain, the prisoner at the bar, put his hand and stop his mouth.

Mr. *Vernon.* Are you positive you saw that?

Dupree. Yes, I am.

Theodore Court, Master of the Ship, sworn.

Mr. *Vernon.* Will you tell Mr. Recorder and the jury what you know concerning the death of sir John Dineley Goodere?

T. Court. On the 18th of January last, being Sunday, the barge went up to fetch captain Goodere from Bristol, and about seven of the clock in the evening he came on board, and when he came into the gangway, says he, How do you all do, gentlemen? Excuse me, gentlemen, from going the right way to-night, for I have brought an old mad fellow on board, and I must take care of him. I saw a gentleman with a black cap coming up the ship's side, and his groans shocked me, so that I could not help him; he looked much surprized, as a person used ill: as soon as he was on board, he was taken into custody, and carried by the captain's orders down to the cock-pit, and put into the purser's cabbin, and a centinel ordered upon him; and I saw him no more at that time. Next morning I was told that the captain's brother was murdered, and that the captain had given Charles White and Mahony leave to go on shore.

Mr. *Recorder.* By whose direction was he put into the purser's cabbin?

T. Court. The captain himself went down, and see them put him in.

Mr. *Vernon.* Whereabout in the ship is the purser's cabbin?

T. Court. In the cock-pit.

Mr. *Vernon.* Was it a place where gentlemen who came on board commonly lay?

T. Court. No, nobody had laid in it for a considerable time. The next morning the cooper met me, and said, Here is fine doings to-night, Mr. Court! Why, what is the matter, said I? Why, said he, about three o'clock this morning they went down and murdered sir John. The ship was in an uproar; the cooper said, if Mr. Perry (the lieutenant) did not secure the captain, he would write to the board: we had several consultations in the ship about it. The captain sent for me to breakfast with him: I accepted of his invitation: I can't say but he behaved with a very good name to all the people on board. About ten o'clock Mr. Perry, myself, and the other officers, with the cooper, consulted about securing the captain. Mr. Perry cautioned us not to be too hot; for, said he, if we secure the captain before we know sir John is dead, I shall be broke, and you too. We sent for the carpenter, and desired him to go down and open the cabbin door, the centinel who stood there having said it was lock'd; the carpenter went down, opened the cabbin-door, and came up, and said sir John was murdered; and that he lay on his left-side, with his leg up crooked. I told them, gentlemen, there is nothing to be done before the coroner comes; and therefore we must not touch him: whereupon the door was ordered to be fastened up: we then consulted how to take the captain, and a method was agreed on for that purpose. And as soon as the captain was taken, he declared

he was innocent of it, that he knew not that his brother was murdered. When the coroner came, I saw the deceased, and my heart ached for him.

Mr. *Recorder.* Who was it put the centinel upon sir John?

T. Court. The captain ordered it to be done.

Mr. *Vernon.* Is it usual to place a centinel at the purser's cabbin-door?

T. Court. No, it is not; unless there be somebody there under confinement.

Mr. *Vernon.* Is there any other cabbin near the purser's?

T. Court. Yes, there is the slop-room just by; there the cooper and his wife lay that night: there is just a little partition of about half-inch deal, parting the slop-room from the place where sir John lay confined.

Mr. *Vernon.* Pray, will you tell us whether any, and what discourse passed between Mr. Goodere and you, about sailing; and when it was?

T. Court. Sir, in the morning he asked me, Will the wind serve to sail? He said, he had another pressing letter from the lords of the admiralty to sail as soon as possible. I told him that the wind was west-south-west, and that we could not go out to sea; for no pilot would take charge of the ship, I believed. And as this is a harbour where a pilot is allowed, I don't pass for this place; otherwise I must have observed his orders.

Mr. *Vernon.* Did he acquaint you how far, or to what part, he would have you sail?

T. Court. Yes, he said, if he got no further than the Holmes, he did not care; and asked me, if it was safe riding there. I told him, it was not; for it was foul ground for such a ship as ours.

Mr. *Recorder.* Mr. Goodere, will you ask this witness any questions?

S. Goodere. What cabbins are there in the cock-pit?

T. Court. I know no cabbins there but the purser's cabbin and the slop-room, &c.

Mr. *Vernon.* Call Mr. Williams.

William Williams sworn.

Mr. *Vernon.* Mr. Williams, have you a watch in your possession belonging to Mr. Goodere?

Williams. I have a watch in my possession.

Mr. *Vernon.* Please to produce it, and let us know how you came by it?

Williams. I had it from a vault in Back-street.

Mr. *Vernon.* How came it to be searched for there?

Williams. The night this thing was under examination, I was at the Council-house, and Culliford who keeps the Brockware-boat on the Back, was there under examination: he then reported that there was a watch and some money left in his house: upon which a person was sent down, and Culliford's wife at first denied the watch, but not the money; but at last, after close examination, she confessed that she had thrown the watch into the vault. Upon which, by the order of Mr. Alderman Day, I, with a mason, opened the vault; where, on search, I found the watch, and took it out. Here is the watch; but whose it is, I know not.

Mr. *Vernon.* Now I desire that watch may be shewn to Mr. Court.

[The watch is delivered to Mr. Court.]

Mr. *Vernon.* Now you have looked upon the watch, tell us if you can, whose it was?

T. Court. I can't swear positively to it; but I believe it was the captain's watch; he had such a one.

Mr. *Vernon.* Did Mr. Goodere use to carry a gold watch about him?

T. Court. The captain did not usually wear a gold watch: but I have seen such a watch as this is, hanging up in the captain's cabbin. I believe it to be the same.

Mr. *Recorder.* Mr. Court, you were asked by Mr. Goodere, how many cabbins there are in the cock-pit?

T. Court. There is the steward's room, the purser's cabbin, and the slop-room.

S. Goodere. Where is the steward's room?

T. Court. That is the place where the centinel stands; and there is a place on the other side where the surgeon lies.

S. Goodere. What persons were in that place that night, do you know?

T. Court. The surgeon, I suppose.

S. Goodere. What other persons were in any other of the cabbins that night?

T. Court. The cooper and his wife.

S. Goodere. Has the cooper a wife?

T. Court. I believe so.

S. Goodere. How long before the 19th of January did you new-moor the ship?

T. Court. Thursday the 15th of January.

S. Goodere. How were the bearings then?

T. Court. (Looking on his journal.) Posset-point west by south, Denny-island north-west and by west, distant by computation about four miles: and the point to the westward of the Hole's mouth south south-east.

Mr. *Recorder.* Were those the bearings on the 18th too?

T. Court. I know no difference; it is said here, ditto 18th:—if there had been any variation, I should have taken notice of it.

Mr. *Vernon.* In what part of the river did the ship lie when sir John was murdered?

T. Court. She lay in King Road.

S. Goodere. Do you know the Denny?

T. Court. Yes, I do.

S. Goodere. Suppose there was a strait line drawn from the south corner of that island to the north part of the water of Avon, would the ship Ruby have been on the east or west part of that line?

T. Court. As to that I am not a judge, unless I saw a strait line drawn.

Mr. *Recorder.* Mr. Court, how long did the ship continue in this mooring?

T. Court. I new-moored the ship the Sunday following.

S. Goodere. Did the wind then blow easterly or westerly?

T. Court. The wind blew hard westerly the Sunday.

S. Goodere. As to the distance from the Denny, I believe, you are right enough; but I have a gentleman here who hath taken a survey of the river: and the situation of the ship, as it lay Sunday the 18th of January, was in the river Severn, very far eastward of the water of Avon.

Mr. *Vernon.* Mr. Recorder, by Mr. Goodere's present enquiries, he seems to be putting his and his fellow-prisoner's defence on the points of the compass; I hope he has some better point to go on: for if not, these I doubt will stand him in very little stead. It appears in proof, that the ship was stationed in King-road, when this murder was committed: now King-road, we all know, has been all along reputed and allowed to be within the local limits of the city and county of Bristol; and the city process runs thither, which shews it to be within the franchise of the city; and the sheriffs of Bristol do there constantly execute writs and other process from above, which shews it to be within their bailiwick as a county, whose bounds and circuit are best ascertained and pointed out by reputation and consentaneous usage, which stand as perpetual monuments of their limits, after other marks are effaced or obscured by time.

Mr. *Shephard.* I don't at all queation but this city has great powers, and its limits are undoubtedly set forth by charter.

Mr. *Vernon.* I should be very sorry to find the jurisdiction of a city (whose rights are dear to me as my own) shaken by a side-wind, and hope an attempt of this nature will not be suffered.

Duncan Buchanan sworn.

Mr. *Vernon.* I think you were one of the company that was at the White Hart upon Tuesday the 12th of January last?

Buchanan. Yes, Sir.

Mr. *Vernon.* Will you give account by whose directions you came up there?

Buchanan. On Tuesday the 13th day of January last the boat and barge were ordered up to Bristol; but upon what account, I knew not. I was ordered to go to the White Hart to attend the captain, and there was Mahony and the privateer's men drinking hot flip. I knew nothing of what they were upon. I saw a gentleman come out of Mr. Smith's, I suppose it was sir John Dineley Goodere; he mounted his horse, and had pistols before him, and his servant followed him with pistols also. Then some of the men ran out; and captain Goodere went out after them, and ordered them to follow the gentleman. I staid there till the captain came back again; and I know nothing more of what was said or done then.

Mr. *Vernon.* Will you give an account what happened on the Sunday following?

Buchanan. On Sunday the 18th day of January about seven o'clock in the evening the barge came along-side the ship with the gentleman in it, I stood in the gang-way to receive him; when he came up, I heard him to make a moan, and the captain said, I have brought a madman on board, bring him along, I will bring him to his senses by-and-by. I saw them take him along the gang-way. You must not mind what he says, said the captain; and he was ordered down to the purser's cabbin; I was ordered centinel there. About twelve o'clock the captain sent for me to come up to him, and I laid down my sword and went up, and Mahony was there with him; and there was a bottle of rum and a glass before them: the captain asked me to drink a dram, I thanked him and drank. He asked me how his brother was? I told him he groaned a little; says the captain, I know the reason of that, he is wet, and I am coming down by-and-by to shift him with dry stockings: so I left the captain and Mahony together. Some time after the captain came down to me, as I was at my post at the purser's cabbin; he asked if his brother made a noise? I told him no: upon which the captain listened a little time at the door, and then said, Give me the sword, and do you walk upon deck; for I want to speak to my brother in private. Soon after this, Mahony went down, and very soon after Mahony was down, I heard a great struggling in the cabbin, and the gentleman cry out Murder! I then thought the gentleman had been in one of his mad fits; but now I suppose, they were then strangling him. As I was walking to-and-fro in the gun-room, I looked down, and saw the captain take the candle out of the lanthorn, which was hanging up there, and he gave the candle into the cabbin.

Mr. *Recorder.* Where was Mr. Goodere when you heard the cry of murder?

Buchanan. In the cock-pit by the purser's cabbin-door, with the sword in his hand.

Mr. *Recorder.* What time of the night was this?

Buchanan. Between two and three o'clock; I lighted a candle at the lanthorn in the gun-room, and was going down to the captain with it, as supposing him to be without light; and as I was going down with it, the captain held up his sword, waved it, and said, Go back, and stay where you are.

Mr. *Recorder.* You said, that sir John Dineley cried out Murder! Was that before you offered the candle to the captain?

Buchanan. Yes, Sir; it was before.

Mr. *Recorder.* How long?

Buchanan. About a quarter of an hour.

Mr. *Recorder.* How long did the cry of murder continue?

Buchanan. About three or four minutes: soon after the captain had ordered me to keep back, he called for a candle, and I carried one down, and he gave me the sword, and bid me stand upon my post; and said he, if my brother makes any more noise, let him alone and send for me; and he locked the purser's cabbin-

door, and took the key away with him: and in the morning the doctor's mate, the cooper and I consulted together about it; and I was willing to know, if sir John was dead, or not: and when we peeped into the cabbin, we saw him lying in a very odd sort of a posture, with his hat over his face, and one of his legs lay crooked: upon which we concluded he was dead.

Mr. *Recorder*. How long were you off your post from first to last?

Buchanan. I can't tell exactly.

Mr. *Recorder*. Recollect as well as you can.

Buchanan. About three quarters of an hour.

Mr. *Recorder*. And could you see who was at the purser's cabbin-door all that time?

Buchanan. Yes, Sir; I saw the captain stand at the foot of the ladder at the door, with a drawn sword, from the time I went up to the time I came down again; he locked the door, and carried the key away with him.

Mr. *Vernon*. Pray, were there any bolts on the purser's cabbin-door?

Buchanan. Yes, there were bolts on the door; they were put on soon after sir John came on board: sir John was in that cabbin when they were put on.

Mr. *Vernon*. You say you heard a noise and outcry of murder, how far were you from the cabbin-door when you heard that cry of murder?

Buchanan. I was walking to-and-fro the gun-room.

Mr. *Vernon*. How far is that from the purser's cabbin-door?

Buchanan. As far as I am from you.

Mr. *Vernon*. Whom did you see go into the purser's cabbin to sir John?

Buchanan. I saw Mahony go in there.

Mr. *Vernon*. Did you see any other person go in besides Mahony?

Buchanan. No, I did not; I saw Mahony go in just before the cry of murder, but no other person.

Mr. *Vernon*. Do you know any thing about securing the captain?

Buchanan. Yes, I will tell you what happened then. We went and secured him. As soon as he was laid hold of, he cried out, Hey! hey! what have I done? We told him his brother was murdered, and that he had some concern in it. He said, What if the villains have murdered my brother, can I help it? I know nothing of it.

S. Goodere. Did you see me in the cabbin at all?

Buchanan. No, Sir, I don't say you were in the cabbin.

Mr. *Recorder*. Mr. Goodere, the witness does not say he saw you in the cabbin, but at the door, and with a sword in your hand, and that you handed in a light after the cry of murder was over.

S. Goodere. I could not have been in the cabbin without Buchanan's seeing me go in, because he stood at the bulk-head of the gun-room.

Mr. *Recorder*. Mahony, will you ask this witness any questions?

Mahony. Are you certain that I was in the cabbin when you heard the groans?

Buchanan. I am positive you were there in the purser's cabbin, when I heard the murder cried out.

Daniel Weller sworn.

Mr. *Vernon*. I think you are the carpenter belonging to the Ruby man of war?

Weller. Yes, Sir, I am.

Mr. *Vernon*. Give an account to Mr. Recorder and the jury of what you know relating to this business.

Weller. The 18th of January last, about seven o'clock in the evening, the captain came on board in the barge; as I attended him, I observed he seemed in a pleasant humour, he came upon the deck at once, and said he had brought a poor crazy man on board, who had been the ruin of himself and family, and that he had now brought him on board to take care of him: he took him down to the cock-pit, and having been there a little while, one of my people came and asked for some bolts; I asked, What for? He told me, it was to put on the outside of the purser's cabbin-door, to bolt the crazy gentleman in. I gave him a bolt; after he had nailed it on, he came and wanted another: I had another, gave it to him, and went down to see the bolts put on. Sir John cried out, What are you doing, nailing the door up? I answered, No. I ordered the door to be opened, to turn the points of the nails. The door being opened, sir John asked whether the carpenter was there? I told him I was the man. The centinel told me no-body must go in there; however, I went in, while they turned the points of the nails. Sir John bid me sit down, and asked me, What does my brother mean by bringing me on board in this manner, to murder me? No, Sir, says I, I hope not, but to take care of you. He asked me, if his brother told me that he was mad? I saw no more of him till next morning.

Mr. *Vernon*. And what did you see then?

Weller. Next morning the lieutenant sent me down to see if sir John was dead. I went down, and asked the centinel for the key; he told me the captain had been there in the night, and had taken away the key in his pocket. I broke open the cabbin-door, and sir John was lying on one side dead, with his right leg half up bent, his hat was over his face, with blood bespattered about his mouth and nose. I went directly up, and told the lieutenant of it.

Mr. *Recorder*. By whose orders did you put the bolts on the door?

Weller. One of my people came to me for bolts, and told me he was ordered by the captain to put the bolts on; and none of them ever came for any thing to be done, without an order of an officer.

Edward Jones sworn.

Mr. *Vernon*. Mr. Jones, I think you are the cooper of the ship Ruby?—*Jones*. Yes, Sir.

Mr. *Vernon.* Were you on board upon Sunday the 18th of January last?

Jones. Yes, Sir, I was.

Mr. *Vernon.* In what cabbin did you lie that night?

Jones. I had no cabbin, but I made bold to lie in the slop-room that night, having my wife on board.

Mr. *Vernon.* Pray what is that you call the slop-room?—*Jones.* It is like a cabbin.

Mr. *Vernon.* How near is the slop-room to the purser's cabbin?

Jones. Nothing but a thin deal-partition parts it from the purser's cabbin.

Mr. *Vernon.* Will you relate to Mr. Recorder and the jury, what you know about the murder of Mr. Goodere's brother; tell the whole you know concerning it.

Jones. About Wednesday or Thursday before this happened, the captain said to me, Cooper, get this purser's cabbin cleaned out, for he said he expected a gentleman shortly to come on board. I cleaned it out; and on Sunday evening the gentleman came on board, when the people on deck cried, Cooper, shew a light. I brought a light, saw the captain going down the cock-pit ladder, the gentleman was hauled down: he complained of a pain in his thigh by their hauling him on board. The captain asked him, if he would have a dram? He said no; for he had drank nothing but water for two years. The captain ordered Mahony a dram; he drank it: he also ordered one Jack Lee to put two bolts on the purser's cabbin-door. The gentleman walked to-and-fro the purser's cabbin while they were nailing the bolts on. He wanted to speak with one of the officers. The carpenter told him he was the carpenter. Says the gentleman, Do you understand what my brother Sam. is going to do with me? And said, His brother had brought him on board to murder him that night. The carpenter said, He hoped not, but what was done was for his good. The captain said, They must not mind what his brother said, for he had been mad for a twelve-month past. And the captain went up again, and went into the doctor's room. I went to bed about eight o'clock. Some time about eleven o'clock at night I heard the gentleman knock, and said, He wanted to ease himself; to which the centinel gave no manner of heed. Is it not a shame, said he, to keep a gentleman in, after this manner? At last, some other person spoke to the centinel, and says, Why don't you go up and acquaint the captain of it, that the gentleman may ease himself? Soon after Mahony comes down with a bucket, for the gentleman to ease himself. Mahony sat down in the cabbin, and he and the gentleman had a great deal of discourse together: the gentleman said he had been at the East-Indies, and told what he had got for his merit; and Mahony said, some by good friends. I heard the gentleman, after Mahony was gone, pray to God to be his comforter under his afflictions. He said to himself, he knew that he was going to be murdered, and prayed that it might come to light by one means or another. I took no notice of it, because I thought him a crazy man. I slept a little, and about two or three o'clock my wife waked me. She said, Don't you hear the noise that is made by the gentleman? I believe they are killing him. I then heard him kick, and cry out, Here are twenty guineas, take it; don't murder me; Must I die! must I die! O my life! and gave several kecks with his throat, and then he was still. I got up in my bed upon my knees; I saw a light glimmering in at the crack, and saw that same man, Mahony, with a candle in his hand. The gentleman was lying on one side. Charles White was there, and he put out his hand to pull the gentleman upright. I heard Mahony cry out, Damn ye, let us get his watch out; but White said he could not get at it. I could not see his pockets. White laid hold of him, went to tumbling him up to get out his money, unbuttoned his breeches to get out his watch; I saw him lay hold of the chain; White gave Mahony the watch, who put it in his pocket; and White put his hand into one of the gentleman's pockets, and cursed that there was nothing but silver: but he put his hand in the other pocket, and there he found gold. White was going to give Mahony the gold: damn ye, says Mahony, keep it till by-and-by.

Mr. *Recorder.* In what posture did sir John lie at that time?

Jones. He lay in a very uneasy manner, with one leg up; and when they moved him, he still remained so; which gave me a suspicion that he was dead. White put his hand in another pocket, took out nothing but a piece of paper, was going to read it. Damn ye, said Mahony, don't stand to read it. I saw a person's hand on the throat of this gentleman, and heard the person say, 'Tis done, and well done.

Mr. *Recorder.* Was that a third person's hand, or the hand of Mahony or White?

Jones. I cannot say whether it was a third person's hand or not. I saw but two persons in the cabbin, I did not see the person, for it was done in a moment. I can't swear I saw any more than two persons in the cabbin.

Mr. *Recorder.* Did you take notice of the hand that was laid on sir John's throat?

Jones. I did.

Mr. *Recorder.* Did it appear to you like the hand of a common sailor?

Jones. No; it seemed whiter.

Mr. *Vernon.* You have seen two hands held up at the bar. I would ask you to which of them it was most like in colour?

Jones. I have often seen Mahony's and White's hands, and I thought the hand was whiter than either of theirs; and I think it was neither of their hands by the colour of it.

Mr. *Recorder.* Was sir John on the floor, or on the bed?

Jones. On the bed; but there was no sheets: it was a flock-bed, and nobody had lain there a great while.

Mr. *Vernon.* How long did the cries and noise which you heard continue?

Jones. Not a great while: he cried like a person going out of the world, very low. At my hearing it, I would have got out in the mean time, but my wife desired me not to go, for she was afraid there was somebody at the door that would kill me.

Mr. *Vernon.* What more do you know concerning this matter, or of Mahony and White's being afterwards put on shore?

Jones. I heard some talking that the yaul was to go to shore about four of the clock in the morning, and some of us were called up, and I importuned my wife to let me go out. I called, and asked who is centinel? Duncan Buchanan answered, It is I. Oh, says I, is it you? I then thought myself safe. I jumpt out in my shirt, went to him; says I, There have been a devilish noise to-night in the cabbin, Duncan, do you know any thing of the matter? They have certainly killed the gentleman, what shall us do? I went to the cabbin door where the doctor's mate lodged, asked him if he had heard any thing to-night? I heard a great noise, said he. I believe, said I, they have killed that gentleman. He said, he believed so too. I drawed aside the scuttle that looked into the purser's cabbin from the steward's room, and cried, Sir, if you are alive, speak. He did not speak. I took a long stick, and endeavoured to move him, but found he was dead. I told the doctor's mate, that I thought he was the proper person to relate the matter to the officer, but he did not care to do it then. If you will not, I will, said I. I went up to the lieutenant and desired him to come out of his cabbin to me. What is the matter, said he? I told him I believed there had been murder committed in the cock-pit, upon the gentleman who was brought on board last night. Oh! don't say so, says the lieutenant. In that interim, whilst we were talking about it, Mr. Marsh the midshipman came, and said, that there was an order to carry White and Mahony on shore. I then swore they should not go on shore, for there was murder committed. The lieutenant said, Pray be easy, it can't be so; I don't believe the captain would do any such thing. That gentleman there, Mr. Marsh, went to ask the captain, if Mahony and White must be put on shore? And Mr. Marsh returned again, and said, that the captain said they should. I then said, it is certainly true that the gentleman is murdered between them. I did not see Mahony and White that morning, because they were put on shore. I told the lieutenant, that if he would not take care of the matter, I would write up to the Admiralty, and to the mayor of Bristol. The lieutenant wanted the captain to drink a glass of wine; the captain would not come out of his cabbin: then the lieutenant went in first; I followed him. I told the captain, that my chest had been broke open, and I desired justice might be done. Then I seized him, and several others came to my assistance.

Mr. *Recorder.* Mr. Goodere, do you ask Mr. Jones any questions?

S. Goodere. Do you know whether the midshipman was sent away on the king's business, or else only to put those two men on shore?

Jones. I know not; you were the captain of the ship.

Mr. *Recorder.* Mahony, will you ask this witness any questions?

Mahony. Did you see me lay hands on the gentleman?

Jones. Yes, I did, as I have already related.

Margaret Jones sworn.

Mr. *Vernon.* Mrs. Jones, pray acquaint Mr. Recorder and the jury, what you know about the murder of sir John Dinsley Goodere (the gentleman ordered by Mr. Goodere into the purser's cabbin).

Mrs. *Jones.* About seven o'clock in the evening, the 18th of last January, the captain (having been on shore) came on board, and came down into the cock-pit, and asked if the cabbin was clean? My husband answered, Yes. On which the captain gave orders to bring down the gentleman; and the captain said to the doctor, Doctor, I have got an old mad fellow here, you must doctor him up as well as you can. They brought the gentleman into the cabbin; the captain asked him how he did now? The gentleman complained that he had a great pain in his thigh, he was hurted by the men's hauling him as they had done. The captain asked him if he would drink a dram of rum? He answered, No; for he said he had drank nothing but water for two years past. The captain gave a dram to several persons there; and he gave orders for some sheets to be brought; and he said to Mahony, As his clothes are wet, do you pull them off. And the gentleman said to Mahony, Don't strip me, fellow, until I am dead. The gentleman said, Brother Sam. what do you intend to do with me? The captain told him, that he brought him there to save him from rotting in a gaol. About ten o'clock Mahony was left there; the gentleman desired him to go; but Mahony said, I have orders to abide here, to take care of you. The gentleman said to Mahony, I can abide by myself. Before the captain went away, he bid Mahony to see if his brother had any knife about him. The gentleman gave up his knife to Mahony, desired him to take care of it, for it was his son's knife. The gentleman asked about the knife several times in the night. About twelve o'clock I went to sleep; about two o'clock I awaked again; I heard the gentleman talk to Mahony, but Mahony advised the gentleman to go to sleep. He said, I cannot sleep. They talked together a great while. Mahony said, I am to go on shore in the morning, and if you have any letters to send to Bristol, I will carry them for you. I heard somebody say to the gentleman, You must lie still, and not speak a word for your life. Some minutes after I heard a great struggling; who it was, I don't know.

The gentleman cried out, Murder! help for God's sake! and made several kecks in his throat, as though somebody was stifling him. I shook my husband, told him that somebody was stifling the gentleman. I heard two people in the cabbin whispering; I don't know who they were. The gentleman cried out murder again, Help for God's sake! He said, I have twenty guineas in my pocket, here take it; must I die! Oh my life! And just about that time, before he was dead, somebody from the outside offered to come into the cabbin: but I heard one of the persons on the inside say, Keep out, you negro; and then a great noise was made; I thought the cabbin would have been beat down. Some few minutes after the gentleman had done struggling, a candle was brought; I soon got up, and looked through the crevice: I saw a man, who I believe to be White, take the gentleman by the coat, and pulled him upright. I saw Mahony with a candle in his hand; I observed the other to put his hand in the gentleman's pocket. One of them said, Damn ye, pull out his watch. Then I saw the person take hold of the watch-string and pull it out, and he said to the other, Here 'tis, take it, and put it into thy pocket. Then one of them put his hand in another pocket, and took it out, said, Here's nothing but silver; and then he searched another pocket, and said, Here it is; and pulled out a green purse: soon after that, the door was unbolted, I heard a person say, Where shall I run? who I believe was Mahony; and the other, Charles White, said, Follow me, boy. And they went to go upon deck through the hatch-hole, which is an uncommon way; and that is all I know.

Mr. Recorder. Mr. Goodere and Mahony, do either of you ask this witness any questions?

S. Goodere. No.

Mahony. No.

James Dudgeon sworn.

Mr. *Vernon.* Mr. Dudgeon, I think you are the surgeon's mate belonging to the Ruby?

Dudgeon. Yes, Sir.

Mr. *Vernon.* Give Mr. Recorder and the jury an account what you know relating to this matter.

Dudgeon. I am very sorry that I should come on this occasion against captain Goodere, because he ever behaved towards me in a genteel manner. The week before this happened, I was told by one of the officers, that the captain was going to bring his brother on board; and on Sunday the 18th of January, about the dusk of the evening the barge came down to the ship. I was at that time walking the quarter-deck; some of our people seeing the barge a-coming, they said, Our captain is coming on board with his brother sure enough; but instead of coming up the quarter-deck, the captain went down upon the main-deck, and I still kept walking on the quarter-deck, expecting to see the gentleman when he went into the great cabbin; but I afterwards found that he was ordered down to the cock-pit. Soon after, I went down there myself; and the captain being there, said, Doctor, I have brought a madman to you, I don't know what we shall do with him, but we must make the best of him that we can; and Mahony came down likewise: the captain sent his steward for a bottle of rum, Mahony had a dram of it. The captain asked sir John, if he would have one? Sir John replied, No; for, said he, I have not drank any thing of that nature for two years past: he groaned several times. There was then one Cole at the foot of the ladder, to whom also the captain gave a dram; then there was a centinel put upon the cabbin-door; but Cole asked the captain if he might go in, and the captain said he might. The old gentleman made a noise as the captain went up the ladder; the captain told him, We have now brought you on board, and will take care you shall want for nothing. After the captain was gone, Cole wanted to go in, but the centinel would not let him; telling him that his orders were to let none in but Mahony: however Cole went up, and got leave of the captain to go in, and he did go in. Soon after this the captain came down again to the cock-pit, and came into my place, and sat down; and after talking of things promiscuously, he said, he believed it would be proper for me to go and feel his brother's pulse; or else, Doctor, he said, do you chuse to leave it alone till to-morrow morning? I made answer, that to-morrow morning might be the best time; because the gentleman may be much confused, by being brought down on the water. Come, said he, let us go in now; for I believe, it will be as well. If you please, Sir, said I, I will; so the centinel opened the door, and we both went in. Immediately after, the captain went out again, and forthwith the door was shut upon me; which very much surprised me, to think that the captain should leave me with a madman, and I observed the captain to peep through: I then asked the gentleman what he mostly complained of? and felt his pulse. He then made some groans, and told me, that he had got a great cold last week at Bath, and that he felt a severe pain in his head. I was going to ask him some more questions, but the captain called me, and said, Don't ask him any more questions, but only feel his pulse. Then the centinel opened the door, and I came out, and the captain and I went into my place again. Well, doctor, said he, how do you find his pulse? Why, Sir, said I, his pulse are very regular. Why, said he, I believe he was pretty much hurried upon the water. Then the captain went up the ladder, and a little while after he came down again; there were two midshipmen with me in my place, and when the captain came in, they went to go out, but he desired one of them to stay, for he had something to say to him, because he was to go up for letters in the morning: so we sat down, and talked of various things; but I informed the captain, that the old gentleman have had

hard lodging to-night. Why, said he, I would put another bed in there, and have given him clean sheets, but he would not hear any thing of this kind. Then said he to me, Doctor, I believe it will not be amiss to take an inventory of every thing he has about him, for fear it should be reported that he is robbed. I replied, Sir, it may not be amiss. By-and-bye, Cole came tumbling down the ladder, the midshipman opened the curtain to see who it was; Captain, said he, that is Cole; and I then told that Cole had been drunk a great part of that day. Soon after that the captain opens the curtain, and sees Mahony stand by the centry. Mahony, said he, I thought you had been about the thing which I sent you to do; which I take to be getting the money out of the gentleman's pocket. No, Sir, said he, I chuse to do it after he is asleep. Very well, said the captain. Then the captain spoke to the midshipman, and said, Mr. Marsh, you are to go up for letters to-morrow, and if any one takes notice of what was done to-day, you may tell the people that it is my brother, and he is very much disordered in his brains, and I have got him on board in hopes of getting relief for him. Sometimes, doctor, says he, he can talk as well as you or I; but at other times, he is very much out of order. About eight o'clock I was for going to bed, but did not till an hour and a half after; and about that time sir John was making a great noise, and asking who is without the door, what must I do my affairs in the cabbin? What a shame is it? Will not you let me have any thing to do it in? But nobody made any reply. Upon which I said to the centinel, Why don't you answer the gentleman? are not you ashamed of it? Upon which, I suppose, one went up to the captain, and he came down, and said, he was sorry that the gentleman should make such a disturbance; but he hoped, that the first night would be the worst: upon which the captain went up, and Mahony went in; and I heard the gentleman and him talking together, and he asked Mahony, what his brother was going to do with him? What, says he, does he say I am mad? Formerly I used to be so, but now I have not tasted any thing stronger than water these two years. But, said he, to be sure these fellows are not sailors, who attacked me this day; they are not sailors, for, if so, they are sadly degenerated from what sailors were formerly; for I myself have been at sea, and might have been a commander. About half an hour after ten, I fell asleep, but was very uneasy. About twelve the centinel was sent for to go up to the captain, but soon came down again; and about half an hour after two I awaked, hearing some stir in the cock-pit; and I heard Mahony's voice in the cabbin, saying, Lie still and sleep, Sir. In a short time after that I heard a struggle, and sir John cried out, Here is 20 guineas for you, take it; must I die? And it seemed to me by his speaking, that they were stifling his mouth. Upon which the person who stood centry on the cabbin turned the key, whereupon Mahony cried out in a terrible pucker, Damn ye, keep the door fast. Upon which I spake, and said, What is the matter? what a noise is that? And the person who stood centinel made answer, Nothing at all, nothing at all; so I lay still a while, and all was pretty quiet. A little time after that, Mahony called for a light, and the cabbin-door was opened, and a light handed in; the cock-pit was then in darkness, so all was quiet again for some time. Soon after that the cabbin-door was opened again, and I heard as if two or three people were coming out of the cabbin, and heard Mahony say, which way shall I go? And somebody made answer, You may go through the hatch-hole. He repeated the question, Which way shall I go? And the other answered, By the ship-side. I then thought somebody had been murdering sir John sure enough, and they are carrying off his body that way; at the same time a person stept up the cock-pit ladder, and I heard the captain's voice, and he said, Centry, if he makes any more noise, let me know it; but I thought within myself, that he was past that. After this was past, all was pretty quiet, and the centinel kept walking without my room: I was cautious of speaking to him, not knowing who he was; but soon after, one of the captain's servants came down to the store-room for liquor, and he asked the centry, whether he had made any noise lately? To which he replied, You may tell the captain that the gentleman hath been at the lock. About half an hour after, the person who was upon the watch came to me, and asked, if I had any commands on shore, for the boat was going up? I told him, No; but perceiving by his voice who it was, I called him to come to me in the dark, and I whispered, and said to him, Mr. Heathorne, here hath been a hellish cabal to night, I believe they have murdered the gentleman; doth Mahony go on shore? He answered, that he did; then, said I, the thing is done. I then asked who was the centry without my door? and he told me; whereupon I called the centry to me, and asked him, what noise and cabal is this that hath been here to-night? He said, He did not know; but the captain, said he, hath been down several times to-night, and that he had taken the sword from him. Just after this, in came Edward Jones, the cooper, and his wife, shaking and trembling; and said, White and Mahony had murdered the gentleman sure enough. I told them, I did believe they were both going on shore; and I would, said I, have you tell the lieutenant what you saw of the matter, and let him know, that I am of the same opinion with you: but do you first go into the steward's room, and draw the scuttle, and then you'll see whether he is dead, or no. Upon which they went and drawed the scuttle, and a cat fled in their face, and they found the gentleman lay in the same posture as White and Mahony left him. I then bid them go and tell the lieutenant the matter, that those fellows might be prevented from going ashore; but

yet, said I, we can't stop them neither, seeing they have the captain's orders. Then went Jones up forthwith, and, I believe, told the lieutenant; and I also stept up to him just after, and told him, that I believed sir John was actually murdered; for, said I, there have been a terrible noise in the cock-pit to night, and the captain himself was there this morning when 'twas almost three o'clock, and the men that were with him are going on shore. The lieutenant answered, that he could not stop these men from going ashore, because the captain hath given them leave; so, said he, we must let it alone till morning, to see whether the gentleman is dead, or no. About eight o'clock in the morning I went to him again; but he told me it was best to defer it till we did see whether the captain sends down to him, or not. It is, said he, no way proper for us to think of seising the captain, till we see that the gentleman is actually dead, and have reason to think he is murdered. When the captain's breakfast was ready, he sent for the lieutenant and me to come and breakfast with him: accordingly we did; and soon after there was a shore-boat came towards us, and then Mr. Chamberlayne came on board, and went to the lieutenant's cabbin; and the lieutenant told that gentleman, that they were then going to seize the captain, for it was believed that he had been accessary to the murder of his brother. Immediately a message was brought by one of the men, that sir John was dead: upon which the captain was forthwith seized by eight or ten men.

Mr. *Vernon.* How far was your cabbin from the purser's?

Dudgeon. I can't say certainly, but believe about three yards.

Mr. *Vernon.* Did you view the body of the deceased whilst he lay dead in the purser's cabbin?—*Dudgeon.* I did.

Mr. *Vernon.* And did you find any visible marks of violence upon him?

Dudgeon. Sir, I saw no rope, but he had a neck-cloth about his neck, and there were some marks in his neck, which looked like the scratching of nails; and I believe that he was strangled, the blood came out of his nose and mouth.

William Macguinis sworn.

Mr. *Vernon.* Were you on board the Ruby man of war, at the time when this matter happened?

Macguinis. Yes, Sir, I was.

Mr. *Vernon.* Then give an account of what you know concerning it.

Macguinis. The night in which the gentleman came on board, I was appointed to be the centinel at twelve o'clock; but when the gentleman came on board, I was in my hammock. I was called up to stand centry in the gun-room; and (please you, my lord) I had not been long on my post before I saw the captain come down; and soon after I saw Mahony, that man there (pointing at the prisoner Mahony) also come down. I stopt him, and asked him where he was going? Damn your blood, you son of a bitch, what is that to you? How busy you make yourself. And when he came to the bottom of the cock-pit ladder, I heard him say to another man, Come here, this is the way. But who it was he spake to, I know not. This was a little after two o'clock. The captain espied me, he made towards me, and waved his naked cutlas, and said, Stand back! stand back!

Mr. *Vernon.* Where was Mr. Goodere, when he advanced towards you, and bid you stand back?

Macguinis. The captain was down in the cock-pit then.

Mr. *Vernon.* Had he any thing in his hand?

Macguinis. Yes; he had a cutlas. Duncan Buchanan had been standing centinel in the cock-pit, but was released by the captain.

Mr. *Vernon.* What more did you see?

Macguinis. I saw Mahony go into the purser's cabbin, and afterwards, I saw the captain and Mahony come up again from the cock-pit.

Mr. *Vernon.* About what time?

Macguinis. I believe it was then about three o'clock.

Mr. *Recorder.* Mr. Goodere and Mahony, do either of you ask this witness any questions?

S. Goodere. No.

Mahony. No.

Mr. *Walker* sworn.

Mr. *Vernon.* I think you are the city mason?

Walker. I am.

Mr. *Vernon.* Look upon that watch, and give an account how you came by it.

Walker. I found it in the necessary-house, at the Brockware-boat, a public-house on the Back.

Mr. *Vernon.* Who kept that public-house at the time you found the watch?

Walker. One Culliford.

Mr. *Vernon.* Was it accidentally, or upon search that you found the watch?

Walker. I searched for it in the necessary-house, by the justice's orders; when I found it, the case was in one place, and the watch in another, about a yard apart.

Sarah Culliford sworn.

Mr. *Vernon.* Look upon that watch, Mrs. Culliford; you live at the sign of the Brockware-boat on the Back, do you not?

S. Culliford. Yes, Sir.

Mr. *Vernon.* Do you take that to be the same watch that was found by Mr. Walker, the city mason, in your necessary-house?

S. Culliford. Yes, Sir; I believe it is the same.

Mr. *Vernon.* From whom did you receive it, before it was thrown into the necessary-house?

S. Culliford. I received it from Mahony's hands, that man there; (pointing to the prisoner Mahony).

Mr. *Vernon.* How long before he was apprehended?

S. Culliford. I had it in my possession about

two hours before, and two hours after he was taken up.

Mr. *Vernon.* And what became of it afterwards?

S. Culliford. This young man (meaning the prisoner Mahony) was drinking in my house, he pulled out the watch, delivered it to me, and desired me to keep it for him until he did call for it: some time after I had business to go out, I went into town, and had the watch in my pocket; when I came back, my children told me that the constable had been there to search the house for it, which much surprized me; I went and threw the watch into the necessary-house, for fear I should come in trouble.

Josias Fussell sworn.

Mr. *Vernon.* Mr. Fussell, look on that handkerchief, and give an account from whom you had it, and when?

Fussell. I had this handkerchief from Mahony on the 19th of January last, the night when we took him, I found it upon his neck; when he was seized, he took it off; I took it out of his hand, it was bloody then as it is now, I put it into my pocket.

Mr. *John Mitchel*, chief clerk to the town-clerk, sworn.

Mr. *Vernon.* Mr. Mitchel, what paper is that in your hand?

Mitchel. The Examination of Matthew Mahony, the prisoner at the bar, taken before Henry Combe, esq. mayor.

Mr. *Vernon.* Did you see the prisoner Mahony sign it in his presence?

Mitchel. Yes, Sir.

Mr. *Vernon.* Did he do it voluntarily?

Mitchel. He did.

Mr. *Vernon.* Did you see Mr. Mayor sign that examination?

Mitchel. Yes, I did.

Mr. *Vernon.* Then I desire it may be read.

Mr. *Recorder.* Read the Examination.

Clerk reads the Examination in these words:

City and county of Bristol, to wit. The voluntary Examination and Confession of Matthew Mahony, a native of Ireland, aged about 21 years. This examinant confesseth and saith, That about sixteen or seventeen days ago, and several times since, he was desired by Mr. Goodere, captain of the Ruby man of war, now lying at King-road, in the county of the city of Bristol, to seize his, the captain's, brother, sir John Dineley Goodere, bart. and bring him on board the said man of war; and that on Tuesday last, this examinant, and the crew belonging to the man of war's barge, and Edward Mac-Daniel, John Mac-Graree, and William Hammon, privateer's men, were placed by the said captain at the White-Hart alehouse, opposite St. Augustine's church, in order to seize sir John Dineley Goodere that day; but it so happened the captain forbid them to do it then. And that on Sunday last, this examinant, the said barge's crew, or the greatest part of them, and George Best, cockstern of the barge, the said Edward Mac-Daniel, John Mac-Graree, William Hammon, and one Charles Bryer, privateer's men as aforesaid, were again placed at the White-Hart aforesaid, to seize the said sir John Dineley Goodere, and waited there for some time; and he coming out of Mr. Jarrit Smith's house, and coming under St. Augustine's church-yard wall, this examinant and his comrades pursued him, and near the pump there they came up with him, and told him there was a gentleman wanted to speak with him; and he asking where the gentleman was, was answered a little way off, and he went quietly a little way; but no one appearing, he resisted and refused to go; whereupon this examinant and comrades sometimes forcibly hauled and pushed, and at other times carried him over St. Augustine's butts, captain Day's rope-walk, and along the road to the Hot-well, (captain Goodere being sometimes a little behind, and sometimes amongst the crowd all the way) till they came to the slip where the barge lay. But sir John was very unwilling to go, made the utmost resistance, and cryed out murder a great many times; and when he was put into the barge, called out and desired somebody would go to Mr. Jarrit Smith, and tell him of his ill usage, and that his name was sir John Dineley; whereupon the captain clapt his hand on sir John's mouth to stop his speaking, and told him not to make such a noise, he had got him out of the lion's mouth (meaning the lawyers hands) and would take care he should not spend his estate; and bid the barge-men row away, which they did; and in their passage to the man of war, the two brothers bickered all the way: But when they came to the man of war, sir John went on board as well as he could, and the captain took him down into the purser's cabbin, and staid a little time with him, and treated him with a dram of rum, and then left him for a considerable time; and in the interim sent for this examinant into his, the captain's cabbin, and there told this examinant he must murder his brother, for that he was mad, and should not live till four o'clock in the morning. And this examinant reasoning with him, and telling him he would not be concerned, and that he thought he had brought him there with intent only to bring him to reason, and take care that he should not spend his estate in law, and to have a perfect reconciliation: but the captain still insisting, that as this examinant had taken him, he should do it; and this examinant then saying, he was not able to do it of himself, the captain replied, if this examinant could get nobody else, he and this examinant must do it themselves. And then ordered him to call one Elisha Cole; and he being too drunk to undertake such an affair, bid this examinant call one Charles White, a very stout lusty fellow, and the captain gave him a dram, and bid him sit down, and soon gave other drams, and asked him if he could fight, and told him, Here is a madman, he must be murdered, and throw

shalt have a handsome reward. And this examinant, the said Charles White, and the captain, being all agreed to murder the said sir John Dineley Goodere, the captain then proposed the method, and produced a piece of half-inch rope about nine foot long, and Charles White having made a noose in the rope, the captain said, applying himself to this examinant and the said Charles White, You must strangle him with this rope, and at the same time gave the handkerchief now produced, that in case he made a noise, to stop his mouth; and said, I will stand centinel over the door whilst you do it; and accordingly instantly went out of his own cabbin, and turned the centinel from the purser's cabbin door, and let this examinant and White into the purser's cabbin, where sir John Dineley Goodere was lying in his clothes on a bed: The captain having pulled to the door, and standing centinel himself, the said White first strangled sir John with his hands, and then put the rope about sir John's neck, and hauled it tight, and sir John struggled, and endeavoured to cry out, but could not. And this examinant confesses, that whilst White was strangling sir John, this examinant took care to keep him on the bed, and when one end of the rope was loose, this examinant drew and held it tight; and thus each bore a part till sir John was dead; and they having rifled the deceased of his watch and money, knocked at the door to be let out; and the captain called out, Have you done? they replied, Yes. He opened the door, and asked again, Is he dead? And being answered in the affirmative, and having a light, swore, by God, he would be sure he was dead; and then went in himself, and returning, locked the door, and put the key in his pocket, and they all went together to the captain's cabbin again, and there this examinant gave the captain sir John's watch, and the captain gave this examinant his own watch in lieu of it; and then the captain gave them both some money, and White afterwards gave this examinant eight guineas as part of the money he took out of the deceased's pocket, and then the captain ordered them to be put on shore in his own boat. And further this examinant confesses and saith, That before and after the murder was committed, the captain, Charles White, and this examinant, consulted what to do with the corpse; and the captain proposed to keep it two or three days in the ship, and, as he expected to go to sea, would sew it up in a hammock, or something else, and there throw it over-board: And that before this examinant and his comrades were sent to seize sir John, as is before set forth, they were ordered by captain Goodere, that, if they met with any resistance, they should repel force by force, and were prepared with short heavy sticks or bludgeons for that purpose. MATTHEW MAHONY.

Mr. *Recorder.* (Speaking to the jury.) Gentlemen, you are to take notice, that this confession is evidence against the prisoner Mahony alone, and so far only ought you to regard it. It is no evidence, nor ought you to lay any stress upon it, as against the prisoner Goodere.

Mr. *Vernon.* Mr. Recorder, we have gone through with our evidence of the fact, and here we should have rested it, were it not that Mr. Goodere, by his strict enquiry into the spot where the ship lay, seems to question whether it was within this county or not: A question, which, I confess, I no more expected to hear of, than whether we ourselves are now within it. However, to obviate all pretence of that kind, and give the gentlemen of this jury as full satisfaction in the point, as undoubtedly the grand inquest for the body of this county had before they found the bill, we shall beg leave to call a witness or two, just to shew that King-Road has been constantly taken to lie within the city and county of Bristol, and that accordingly the sheriffs' officers of Bristol, from time to time, have used to execute both the city and county process in King-Road; which, I apprehend, will of itself be satisfactory evidence, without entering into any other disquisition of the county limits. Call Mr. Wint.

John Wint sworn.

Mr. *Vernon.* Mr. Wint, what officer are you in Bristol?

Wint. I am an officer to the sheriffs of Bristol, and have been so for these thirty years and upwards.

Mr. *Vernon.* Have you been used, as an officer to the sheriffs of Bristol, to serve process in King-Road?

Wint. I have served process in King-Road forty or fifty times.

Mr. *Vernon.* How far down the river?

Wint. Very often down as far as Posset-Point.

Mr. *Recorder.* What kind of process have you served there?

Wint. Town actions out of the mayor and sheriffs court, and out of the Piepowder court.

Mr. *Recorder.* Have you ever executed process there which was directed to the sheriffs of Bristol?

Wint. Yes, Sir, I have served sheriffs warrants, or writs, issued from above, out of the court of King's-bench and Common-Pleas to the sheriffs of Bristol.

Mr. *Recorder.* Mr. Goodere, will you ask this witness any questions?

S. Goodere. Yes, Sir: Is all that is called King-road within the liberty of the city of Bristol?—*Wint.* Yes, it is.

S. Goodere. Are you sure of it?

Wint. I know where the ship Ruby lay was within the city of Bristol.

S. Goodere. How do you know that?

Wint. Because I have been down with the mayor to the Holmes.

Mr. *Vernon.* Call Mr. Lowden.

Mr. *Lowden* sworn.

Mr. *Vernon.* What officer are you, Mr. Lowden?

Lowden. I have been an officer in this city about nineteen years; I have served town actions, town warrants, and warrants made out upon writs from the courts of Westminster-hall, and the Admiralty, in King-road: and any part of King-road on the southward of the Denney, we always take it to be in the liberties of Bristol.

Mr. Vernon. Mr. Recorder, we have done.

Mr. Recorder. Mr. Goodere, and Matthew Mahony, the counsel for the king has gone through with his evidence, and now is your time to enter upon your defence.

S. Goodere. May it please your lordship, I shall endeavour to give you and the jury as little trouble as possible. I shall call evidence to prove that the gentleman was a lunatic, and disordered in his senses, and I was doing my best to take care of him.

Call Mrs. *Gethins.*

Mr. Recorder. What do you call her to prove?

S. Goodere. I call her to prove, that before my brother was taken on board, I was to take an upper-room of her to put him in, where he might be taken care of to cure his madness.

Mr. Recorder. What, Mr. Goodere, do you admit then that you did take your brother on board?

S. Goodere. I do admit that I carried my brother on board. I went in the boat along with him.

Mrs. *Gethins* sworn.

S. Goodere. Mrs. Gethins, did I not speak to you a fortnight or three weeks before my brother was taken on board the ship, to have a garret of you to put him in, and that Mahony was to have 5*l.* a month to take care of him?

Mrs. Gethins. The prisoner, captain Goodere, did ask me if I had not a garret to let him keep his brother in, for that he was a madman: and captain Goodere never made it a secret that he intended to take and keep his brother as a madman.

S. Goodere. Whether I did not tell you that Mahony was to take care of my brother a fortnight or three weeks before he was taken on board? Speak to the time as near as you can recollect; and whether you knew that Mahony was to have 5*l.* a month, and that I made no manner of secret of it, and that I endeavoured to take care of him as a lunatic.

Mrs. Gethins. Sir, I have already said that you spoke to me about a room to put your brother in, but what you mention about Mahony, I know nothing of that.

Mr. Vernon. Pray, is King-road in the road to your house?—*Mrs. Gethins.* No, Sir.

Mr. Vernon. Was your garret a proper place of accommodation for a gentleman, and one who was esteemed an English baronet, think you? Pray, do you keep a madhouse, madam?

Mrs. Gethins. No.

Mr. Vernon. Don't you think such a confinement would have been the way to have made him mad?

Mr. Recorder. Was any person as you know to have taken care of him in your garret?

Mrs. Gethins. I have heard the captain talk with his own doctor about it.

S. Goodere. I shall give you and the jury as little trouble as may be. I have an evidence in relation to Mahony and White's going away at four o'clock in the morning, because it is charged that I sent them away. The boat went away in the king's service to bring letters.

Mr. *Marsh* sworn.

S. Goodere. Did you go ashore in the morning about the king's business, or what business did you go about?

Mr. Marsh. I had an order about eight o'clock the night sir John was brought on board, to go up in the morning to Bristol for the letters from the Admiralty, and about four of the clock in the morning I was called up to go; but the lieutenant seemed much disordered, and bid me come to him before I sat out. I waited on the lieutenant, and told him, that White and Mahony said they had liberty to go on shore, that the captain had given them liberty to go; the lieutenant said, he knew nothing of it. But as it is always my way, before I carry any body off, I said, I would go to the captain and ask leave. I went to the captain, and asked him, if White and Mahony had liberty from him to go on shore? And he said, Yes, let them go.

S. Goodere. Mr. Marsh, did you go upon the king's business, or on purpose to take up these men?

Marsh. I went about the king's business.

Mr. Vernon. But it was after sir John was brought on board, that Mr. Goodere ordered you to go up?—*Marsh.* Yes, Sir, it was.

Mr. Vernon. Did any body else go up with you, besides Mahony and White?

Marsh. No, there did not.

Mr. Vernon. Did Mr. Goodere give you orders to put them on shore in any particular place?

Marsh. I will do justice between man and man; the captain did not give me orders to put them on shore in any particular place.

Mr. Vernon. Were they landed publicly or privately?

Marsh. I put them on shore at the Gibb, about six of the clock in the morning.

S. Goodere. Now, may it please you, Sir, I shall shew that Mahony had business at Bristol that day by appointment, to receive some wages that was due to him; for which purpose I shall call Mr. Dagg.

Abel Dagg, Keeper of Newgate, sworn.

S. Goodere. Do you know any thing of captain Mervin, and of Mahony's coming to Bristol on the Monday to settle an affair with him?

Dagg. There was one captain James Mervin who sailed into this port, and on his coming was charged as a debtor in my house, at the suit of some gentleman in London, in an action of 3 or 400*l.* Mahony was one of his sailors

until he was prest, and he charged the said Mervin with an action for his wages. Captain Mervin had a desire to make up the matter with Mahony. I went to the captain of the man of war the Tuesday or Wednesday before this affair happened, which was the first time I ever saw him, to the best of my knowledge: the captain said he would meet me the Monday following, in order to accommodate the difference.

Mr. *Vernon.* Was Mahony appointed to meet you that day or not?

Mr. *Recorder.* Mind the question, Was Mahony to come that Monday?

Dagg. The captain made an appointment, my lord, to meet on the Monday; and I told Mr. Taylor the attorney, that Mahony was to come on shore that day, to make up the matter between him and Mervin.

Mr. *Vernon.* I would ask you another question; Had White too any affair to make up at Bristol?

Dagg. No, I know nothing of that.

S. Goodere. Now I call Bridget King.

Mr. *Recorder.* What do you call her for?

S. Goodere. Touching the lunacy of sir John Dineley.

Bridget King sworn.

S. Goodere. Mrs. King, will you give the Court an account of what you know of the lunacy of my brother sir John Dineley?

Mrs. *King.* Please you, my lord, I think he was mad; for he would get up at two or three of the clock in the morning, and call his servants up, and fall a singing; and then he would go to bed again, and swear it was but twelve o'clock at night, and lie a-bed all day. He would send his boy out all over his grounds to pick up stones, and have the wheel-barrow rattling about the streets on a Sunday: he hath ringed the bell to call his servants up to his bed-side, and when they were come up, he would ask them what they did there, and swear they were come to shoot him? He himself hath gone over all his grounds on a Sunday to pick sticks, and hath sent his servants to market when there was none; and he would be busy in every thing, and hang on the pot himself; and he hath been quite raving mad.

Mr. *Vernon.* Did you live as a servant to sir John?

Mrs. *King.* I lived as a servant with him in London, and he came down for the air to Tockington; he brought me down to go to Bath.

Mr. *Vernon.* How long did you continue with him?

Mrs. *King.* A twelvemonth, Sir.

Mr. *Vernon.* And how durst you venture to live so long with a madman? He did not go mad for love of you, I hope? Have you lived any time in Bristol?—Mrs. *King.* No.

Mr. *Vernon.* Then I suppose you came but now from London?—Mrs. *King.* Yes, I did.

S. Goodere. Do you believe he was a madman?

Mrs. *King.* In the actions that I have seen by him, I have reason to think he was a madman.

Mrs. *Mary Stafford* sworn.

S. Goodere. Mrs. Stafford, will you tell his lordship and the jury what you know of sir John's being a lunatic?

Mrs. *Stafford.* Sir John hired me for a house-keeper in London, and told me he had a great many servants, and he wanted a house-keeper. When he brought me down, he ordered me to his seat at Teckington; where, he said, he had a great deal of company frequently. When I came there, I found there was nothing in what he had told me; for, instead of a great many servants, he had but one: a poor old shattered house, ready to tumble down about one's ears, and the houshold goods all to pieces: he was a madman: for if I had followed his directions in any thing I should have done mischief. He hath sent me and the rest of his servants to Thornbury market, when there was none; he hath ringed the bell to call his servants to come to his bed-side to him, and when we have come up to him, he hath asked us, what we did there? Sir, said I, you called me up: he hath said he did not: and after we had been there a quarter of an hour, he would take a knife, fork, glass-bottle, or any thing that came in his way, to throw at us, asking of us, What, did we come to rob him? And I was afraid of my life, to live with him. I do believe he was a madman, or else he would never have acted as he did: he would go into the kitchen, and take the pot, and hang it on the fire. I style him a madman by his actions.

Mr. *Vernon.* And must he therefore be hanged himself like a mad dog, think you?

Mrs. *Stafford.* I know nothing of that, Sir.

Mr. *Vernon.* How long did you live with sir John?

Mrs. *Stafford.* Three months, Sir.

S. Goodere. Call Mr. Robert Cock.

Mr. *Recorder.* What do you call him to prove?

S. Goodere. My lord, in order to prove sir John Dineley a lunatic. Mr. Cock, will you give an account to my lord and the jury what you know of the lunacy of sir John Dineley?

Robert Cock sworn.

Cock. My lord, I have known Mr. Dineley at Charlton for some years; I have been several times in his company; I have seen him do several acts of lunacy, as a madman.

Mr. *Vernon.* Where do you live?

Cock. I live in Cumberland, when I am at home.

Mr. *Vernon.* Are you of any business?

Cock. I am an officer belonging to his majesty.

Mr. *Vernon.* What kind of officer?

Cock. A salt officer.

S. Goodere. I will not give your lordship and the jury much more trouble. I am entirely innocent; they have not proved that I was present at the death of sir John Dineley.

Mr. Recorder. Don't deceive yourself; though they have not proved that you was actually in the cabbin, when sir John was murdered, yet they have given evidence of that, which (if the jury give credit to) will amount to presence in the eye of the law.

S. Goodere. I shall now call some witnesses to my character, and likewise to shew how improbable it is, that I should be guilty of the murder of my brother. Call Mr. Pritchard.

Mr. *Pritchard* sworn.

Pritchard. I have known Mr. Goodere, the prisoner at the bar, many years: he always bore the character of a good husband, a good neighbour and a kind friend.

S. Goodere. I shall call a person who saw the will of sir John Dineley; and then any body would think that I should be the maddest man in the world to commit a murder that I knew would be 40,000*l.* damage to me. It was my business, considering the circumstance of the will, and that I was sir John's heir at law, at all events to preserve him. Call Mr. Watkins.

Reverend Mr. *Watkins* sworn.

S. Goodere. Mr. Watkins, did not you see or hear the contents of sir John Dineley's will, and did not you tell me presently after the will was made the contents of it, and how long was that before his death?

Watkins. It was above three months, or half a year before his death, to the best of my knowledge. It was so long ago, as you dined with me at Cropthorne.

S. Goodere. Did you not inform me, that that will did cut me off of every thing, and gave the estate to the Foots; and that sir John told you so?

Watkins. Sir John told me that he had made his will, and had cut his brother off from every thing: and that he had given the estate to the Foots: of which I told Mr. Goodere soon after.

S. Goodere. How long ago?

Watkins. I can't tell exactly; about half a year or three quarters of a year, it might be.

Mr. Vernon. They have been giving sir John the character of being a lunatic; I think, Sir, you are minister of Cropthorne, and must, I presume, have been pretty conversant with sir John, and a frequent witness of his behaviour in that neighbourhood; be pleased therefore to speak what you know, as to his sanity or insanity of mind.

Watkins. Sir John's character in my opinion hath been very much misrepresented to the world. During my acquaintance with him, I have found him to be a good neighbour, and a kind friend: he was a man of strong passions; if any one affronted him, he would let the party know that he did resent it. All his tenants of our country, and those I have conversed with say, that he was one of the best of landlords.

Mr. Vernon. I don't ask you, Sir, concerning his moral character; but whether he was in his senses, or not?

Watkins. In his senses! I saw him last Christmas, he was making up his accounts with several of his tenants; he was then in very good understanding.

Mr. Vernon. Pray, did you ever know him visited with lunacy?

Watkins. I never did; but on the contrary, I take him to have been a man that always had his senses in a regular exercise.

Mr. Vernon. Do you know, Sir, whether there was any misunderstanding between the two brothers?

Watkins. There has been a long misunderstanding between them.

Mr. Vernon. What have you heard the prisoner Mr. Goodere say, in relation to sir John's making his will?

Watkins. I believe he told me, that sir John had not power to make a will: I told him it was my opinion, if they would be reconciled together, sir John's will would not stand.

Mr. *Thomas* sworn.

S. Goodere. Mr. Thomas, how long have you known me, and what was my character?

Thomas. I have known the prisoner, Mr. Samuel Goodere, a great many years, have very often been in his company: I never found but that he ever behaved with all the goodnature that possibly could be. I always took him to be a good-natured well-behaved man, and he is a man well-beloved in his country.

Mr. *Ashfield* sworn.

Ashfield. I have known Mr. Goodere a great many years, I never heard any ill of him till this affair; he is reputed in the country of a general good character. I have been concerned for him in several suits, I never knew any ill of him.

Mr. Vernon. Pray, Sir, what have you heard Mr. Goodere say, concerning his brother's cutting off the entail of his estate?

Ashfield. I have heard Mr. Goodere say, that his brother had no power to cut off the entail, and that he would set the recovery aside; I have heard him say that forty times.

Mr. Vernon. What is your opinion as to the sanity or insanity of sir John?

Ashfield. I never thought him a madman; I always thought him one of the best understanding in the whole family.

Reverend Mr. *Rogers* sworn.

Rogers. I have been acquainted with the prisoner Goodere several years; I know he hath behaved very well, done good offices to all mankind; and I never heard any other of him.

Mr. *George Forcevil* sworn.

Forcevil. The prisoner Goodere hath been my neighbour for fourteen or fifteen years: he hath always behaved well in his neighbourhood, and has a very good character; he constantly attended his church twice a-day Sundays, and

would be there at prayers almost every day; he was always a sober man, and a good-humoured gentleman. I thought him to be a good man.

S. Goodere. Mr. Recorder, I would not give you and the jury any more trouble in relation to my character; all I have to say further is, my being deprived of evidence in my behalf, by reason of my disorder and the sickness in the gaol, which hath prevented my friends from coming to me to advise me about making my defence; and also of having several witnesses from on board the ship, which might have been of great service to me. I had an order from the lords of the Admiralty to require them to stay on shore, if I had occasion for them; but, as the ship was gone before the letter came to my hands, I have no occasion now to tell the names of the persons.

[Mr. Goodere held up the letter in his hand, but the Court did not receive it.]

Mr. *Frederick.* Mr. Recorder, there have been several aspersions published in the newspapers, to the prejudice of Mr. Goodere; there has been a pamphlet also published, which I have here in my hand, entitled, The Bristol Fratricide; but I hope the gentlemen of the jury will take no notice of, nor be influenced by them against the prisoner.

Mr. *Vernon.* I dare say they will have no regard to any book, but that on which they have been sworn: those who know them and their characters must certainly think so.

[The Jury declared they had never seen any such pamphlet, or papers.]

Mr. *Vernon.* Mr. Recorder, we must beg leave to ask Mr. Jarrit Smith's opinion, as to sir John's being a lunatic, or not?

Smith. Mr. Recorder, I am surprised to hear it said by some of Mr. Goodere's witnesses, that sir John Dineley Goodere was mad; I knew him fourteen or fifteen years, and conversed with him both in person and by letter; but never discovered that he was in the least disordered in his senses; I always took him to be a man of sound understanding. On the Sunday, the day before his death, he expressed himself with a great deal of good-nature and affection at the sight of his brother.

Mr. *Shephard.* Mr. Recorder, with humble submission, I am instructed to offer it in evidence, that the place where the ship lay is not within this city and county of Bristol.

Mr. *Vernon.* We have already proved it to be within the county of Bristol; nor is there the least reason to apprehend, that Mr. Recorder will extend the rule of 'Boni Judicis 'est ampliare Jurisdictionem' to the extending of the county an inch beyond its ancient and known limits: he is too just to attempt it. On the other hand, we may depend he will not suffer the county-limits to be abridged, but 'servare jus illæsum;' and (as he hath hitherto done) discountenance all encroachments on the rights and franchises of Bristol.

Mr. *Recorder.* It has been proved, and indeed it can't be denied, that at the time the fact in question was committed, the ship lay in King-road; and I think the evidence which has been given of the exercise of jurisdiction by the magistrates of the city and county of the city in King-road, and of the sheriff's officers executing process of all kinds there, amounts to a full proof that King-road is within the body of the county of the city of Bristol. It is the same sort of proof by which the bounds of every county in the kingdom must be ascertained, the doing acts in the place in question by the officers of the county, which must be done in that county, and no other.

S. Goodere. All King-road is not in Bristol. Will your lordship please to admit me to call Mr. Hill? He is a gentleman that has surveyed the situation of the place where the ship lay, and will describe it.

Mr. *Vernon.* I am sorry to find Mr. Goodere driven to this subterfuge in his defence, I could wish he had one to make on the merits; if he stands upon his innocence, what need of all this stir about the station of the ship, or where on earth can he hope to be tried before a fairer, or more impartial judicature than the present?

S. Goodere. Call Mr. Hill.

Mr. *Recorder.* Mr. Goodere, if you can shew that any part of King-road is, or ever was esteemed to be in any other county than the county of the city of Bristol, I will hear you; otherwise it will be to no purpose to describe the situation of the ship, since it is admitted that she lay in King-road.—Mahony, have you any thing to say?

Mahony. I hope your lordship will consider that I was a poor, press'd servant, and I was drunk when I made the confession, and I was frightened out of my wits.

Mr. *Recorder.* You say you were drunk when you made the confession; it is possible, that night when you were first taken and brought before the magistrates, you were in liquor, but it seems your confession was not taken until the next day.

Mahony. My lord, I was in Bridewell; I did not sleep a wink the whole night.

Mr. *Recorder.* Have you any witnesses to call?

Mahony. No, please your lordships, I am a stranger here, I have no witnesses to call.

Mr. *Vernon.* Mr. Recorder, I apprehend we are in a case exceeding clear against both the prisoners at the bar; and, considering that death and life are in the power of the tongue, I am unwilling to reply, where life is at stake; but, as Mr. Goodere seems to lay some stress on the circumstance of his not being actually in the cabbin, at the time his brother was murdered there, I beg, Sir, you will indulge me in observation or two as to that single point. Not that I imagine the least doubt in law can remain with Mr. Recorder, but being in the case of a capital prosecution, I would leave no objection

unanswered that has the least dependance on the law; and I agree, Sir, that in order to bring Mr. Goodere within the compass of the indictment, he must appear to have been present, as an abettor, at the perpetration of the murder. The law is extremely clear in this particular; but then it is as clear, that if several persons are engaged in a design of murdering another, and one of the party stands upon the watch, at the room or house-door, whilst the rest actually commit the murder, he is, in the judgment of the law, present at the murder, and as much a principal in it as the rest: and the law is the same, though he stood at a considerable distance from the place where the murder was committed, as at the gate or the lane's end; for it is not necessary he should be *in conspectu*, if near enough at hand to embolden his accomplices in the murder, through the hopes of present assistance, or security from the person upon the watch. And so it is expressly laid down, in lord chief-justice Hale's History of the Pleas of the Crown, in the chapter of Petit-treason; where he says, that if a wife or servant conspires with a stranger to kill the husband or master, and be in the same house with the stranger whilst he commits the murder, the wife or servant is guilty of petit-treason, though not in the same room where the murder was committed. The same doctrine is laid down in second Hawkins's Pl. Cr. 312, (whom as a living author I cite, only for the sake of the authorities he has been at great pains in collecting.) And the case of lord Dacre is full in point: My lord Dacre, with Mansel and several others, went by night into another's park, unlawfully to kill deer; my lord waited about the park-gate upon the watch, whilst the rest went a quarter of a mile into the park, where they met and killed the keeper; lord Dacre, though at so great distance when the keeper was killed, was adjudged a principal in the murder, and accordingly died for it. And agreeable to this, was likewise the case of Berry, (the porter of Somerset-house) who was concerned with Green, Hill and others, in the murder of sir E. Godfrey; some of them way-laid that worthy magistrate, and having inticed him into the yard leading to Somerset-house, Green, Hill and others strangled him. Berry was one of their gang, and whilst the others were committing the murder, stood at a great distance from them on the watch, upon the stairs leading to the upper court of Somerset-house: he was indicted with Green and Hill, as being present and abetting the murder, and upon this evidence was convicted and executed. Gentlemen of the jury, in the case now before you, it is fully made out in proof, that the deceased was under one continuing armed force, from the instant of his being seized to that of his death; and that his brother (the prisoner Mr Goodere) put and kept him under that force. Then, gentlemen, Mr. Goodere's displacing Buchanan from the cabbin-door, and placing himself there in his stead, with the drawn sword in his hand; Mahony's entering into, and being let out of the cabbin, whilst Mr. Goodere kept guard at the door of it; Mr. Goodere waving his sword at Macguinis, and handing in the candle; the dying outcries of his brother (which could not but reach his ears, though not his heart), and other black ingredients in this dreadful case, are an undeniable proof that Mr. Goodere was concerned with Mahony and White as their accomplice in his brother's murder, and took his stand at the cabbin-door, with no other intent than to embolden and assist them in the perpetration of that cruel act, and keep off others from coming to his brother's relief, or from disturbing them in the fatal business they were about. Under which circumstance he is guilty in the same degree as Mahony; and in the eye of the law looked upon to have been as much present at his brother's death (as an abettor of the murder), as if he had stood by the bed-side and held the sword over his head, whilst Mahony was strangling him. So that, gentlemen, I apprehend we have made good the indictment against both the prisoners, by clear and convincing evidence; and therefore doubt not but their guilt will stand recorded to future ages by the justice of your verdict.

Mr. *Shephard.* Mr. Recorder, will you please to indulge me a word as to the point of law? Mr. Vernon mentions, in the case of the park that he hath taken notice of, the lord Dacre and his party came by night unlawfully to kill deer, and therefore the law presumed they all came with an intent to oppose all that should hinder them in that design; and so when one killed the keeper, it must be presumed the act of all, because pursuant to that intent. But whether the present case is circumstanced as that case, ought to be considered. I do admit that Mr. Goodere was down in the cock-pit at the time this fact was done, and he was certainly obliged (as hath been observed) by the law of nature to take care of his brother. But if he had no other intention of carrying him on board the ship, than to secure and take care of him as a person whom he looked upon as disordered in his senses, and with a view of reducing him to reason; then surely Mr. Goodere's case is very different from the lord Dacre's. And that Mr. Goodere did look upon his brother to be so——

Mr. *Recorder.* Mr. Shephard, you are going off from the point of law to matter of fact; I shall charge the jury, that if they believe Mr. Goodere stood at the cabbin-door in order to prevent any persons coming, who might have prevented the murder, or to encourage those within the cabbin in the business they were about, they must find him guilty on this indictment; otherwise they must acquit him.

Mr. *Shephard.* If he was not there with that intention, he cannot be guilty; and in this case no such intention appears.

Mr. *Recorder.* His intention is matter of

fact, which must be left to the jury on the whole evidence.

Gentlemen of the Jury; the prisoners at the bar, Matthew Mahony and Samuel Goodere, stand indicted for the murder of sir John Dineley Goodere. And the indictment charges that Mahony strangled him, and that the prisoner Goodere was present, aiding and abetting him in the fact. They are both charged as principals in the murder. For, gentlemen, in the eye of the law, the person who is present, aiding and abetting, is as much a principal in the murder, as the person who actually commits the fact. Whether the prisoners, or either of them, be guilty in manner charged in the indictment, you are to determine upon the evidence you have heard.

The evidence has been very long; but I will endeavour to lay the material parts of it before you in such a light, as may best assist you in your present enquiry.

'Tis out of all doubt, that sir John Dineley Goodere was strangled on board the Ruby man of war in King-road, in the night between the 18th and 19th of January last. And therefore what past at that time, which may affect the prisoners, or either of them, as they stand charged on this indictment, will deserve your principal attention. But as the prosecutors have (very properly I think) gone pretty far back in their evidence, in order to shew by what means sir John was got on board, it will be necessary for you to take that part of the evidence likewise into consideration.

The first witness is Mr. Chamberlayne, who tells you, that about three weeks before the murder happened, Mr. Goodere desired him to use his good offices with Mr. Jarrit Smith, a friend of sir John's, in order to bring about a reconciliation between sir John and him.

Mr. Smith tells you, that Mr. Chamberlayne did apply to him for that purpose; and afterwards brought Mr. Goodere to his house on the same errand: and that Mr. Goodere then repeated the same request Mr. Chamberlayne had before made in his behalf. He says, he proposed the matter to sir John, who with some difficulty consented to give Mr. Goodere a meeting; which was fixed for Tuesday the 13th of January, at Mr. Smith's house in the College-Green, of which Mr. Goodere had timely notice. That on Tuesday the 13th, sir John rode up to his door, and having just alighted and acquainted him that he could not at that time stay; but that the next time he came to town, which would be the Saturday or Sunday following, he would meet his brother; he mounted his horse, and went off, attended by his servant, both armed with pistols. He says, that on the same day he met with Mr. Goodere, and acquainted him, that sir John would be again at his house, on Saturday or Sunday; and it was then agreed that Mr. Goodere should have notice when sir John came. He says, that on Sunday morning the 18th of January, sir John sent him word, that he would be at his house that day, at any hour he should appoint; and accordingly three in the afternoon was appointed. He says, that the same morning he gave Mr. Goodere notice of the appointment. That in the afternoon sir John and Mr. Goodere met at his house, where mutual civilities passed between them: that sir John soon took his leave, the witness and Mr. Goodere waiting on him to the door. He says, that he pressed Mr. Goodere to stay longer; and said to him, I hope I have done great things. To which Mr. Goodere replied with some emotion, By God this will not do; and immediately followed sir John down the hill. He says, that standing at his door he observed a company of sailors gathering about sir John, and heard Mr. Goodere say to them, In *he* ready, or is it ready? (he is not, I believe, positive, what were the words): to which some of the sailors answered, Yes, Sir. Whereupon the whole company went hastily off, some towards the Butts, others towards the Lower Green; and Mr. Goodere followed them by the Butts. Mr. Smith had no suspicion at that time, that the sailors were offering violence to sir John, and so made no further enquiry into the matter; till a soldier, who is likewise produced as a witness, told him what happened at the barge.

The next witness they produced is Maurice Hobbs, who, it seems, keeps the White-Hart alehouse at the foot of the College-green: and, gentlemen, you will observe, that from the front windows of that house, one may have a view of Mr. Smith's. And he tells you that on Monday the 18th of January last, the prisoner at the bar came to his house; that Mr. Goodere desired to see an upper room, over the parlour, fronting the street; and having seen it, said, he would come the next morning and drink coffee in that room. Accordingly, the next morning he came (early for that time of the year) before the windows were opened, or fires lighted; his dress so different from what he wore the day before, that the witness did not at first recollect him. But, it seems, he changed his clothes after he came thither. He seemed willing to drink his coffee in the parlour; but being desired to walk up stairs, he went into the room he had pitched upon the day before. Soon afterwards the prisoner Mahony, with three other persons, came in; and after them, five or six more. These people, gentlemen, were not altogether in one room; but they were all entertained at Mr. Goodere's expence. The witness tells you, that Mr. Goodere ordered they should be entertained; and at going away paid the whole reckoning. He says, that while the company was at his house, Mr. Goodere above stairs, and others below, sir John Dineley Goodere rode by from Mr. Smith's attended by his servant; and that as they passed by, Mr. Goodere called out to the people below, Look well at him, but don't touch him. He says further, that on Sunday the 18th of January, Mahony came to his house in the morning, and desired him that if he saw the gentleman in the black cap (by which de-

scription it appears sir John was meant) go towards the Green, he would send a porter to him at a public-house in Marsh-street: that in the afternoon Mahony came again, with a great many other people, all appearing by their dress to be sailors. And that as the deceased walked by the house, they all rushed out and went off. He goes, I think, no farther in his evidence; for he seems to be too much concerned for his reckoning and his tankard, to mind any thing that passed afterwards.

The next evidence is Thomas Williams, who belongs to the Ruby. He says, that on Sunday the 18th he brought up the barge from King-road; and was ordered by Mr. Goodere to leave two hands aboard the barge, and take eight of the crew to the White-Hart alehouse on the College-green, and there wait for him: for, said he, I have a gentleman to go on board me. He accordingly went to the White-Hart with his men, and there found Mahony and four or five people belonging to the Vernon privateer. He says, he had not been long there, before the company rushed out of doors: upon which he followed, and found they had laid violent hands on the deceased, and were carrying him on board the barge; giving out, that he had murdered a person on board the ship, and that they were carrying him thither in order, as they pretended, to bring him to justice. He tells you, that the prisoner Mahony was very active in this outrage; and that the prisoner Goodere was present, seeing and hearing all that passed. He likewise gives you an account of the conversation that passed between sir John and the prisoner Goodere, after they were in the barge; and, among other things tells you, that upon the deceased's saying, You are carrying me on board to murder me, the prisoner Goodere answered, No, I don't intend to do so, but I would have you make your peace with God. This witness speaks little to what passed after they came on board the ship; for, says he, I had been employed all day, and went to bed early. But he tells you, that in the night he heard a very unusual noise on board; and that about two in the morning, he saw the prisoner Goodere go down the ladder leading to the purser's cabbin.—You have heard, gentlemen, from the witnesses, whom I shall mention presently, that the murder was committed in this very cabbin.

The prosecutors then called several witnesses, Samuel Trivet, Thomas Charmbury, Mrs. Darby, and William Dupree; who all speak to the manner of carrying sir John from the College-green to the place where the barge lay.

These witnesses agree in general, that he was treated with great rudeness by the company in whose hands he was. But, as the prisoner Goodere admits, that he did take his brother on board; and, as Mahony endeavours to excuse the part he had in it, by alleging that he was under command; I need not be very particular in repeating the circumstances attending this part of the affair. Only, gentlemen, it may be proper for you to observe, that the pretence given out to blind the people who enquired into the meaning of this outrage, was, that the gentleman had committed a murder on board the Ruby. And that when sir John was on board the barge, and calling out for help to the people on shore, telling them his name, and begging them to let his friend Mr. Jarrit Smith know what had happened to him; the prisoner Goodere at that instant stopt his mouth. This circumstance is proved by three of these witnesses.

The next set of witnesses who have been called, are persons belonging to the Ruby. And from them you have an account of what passed from the time sir John was brought on board to the time of the murder.

The first is Theodore Court, the master of the Ruby; and he tells you, that about seven in the evening sir John was brought on board, and immediately by Mr. Goodere's order carried down into that part of the ship which is called the cockpit, and secured in the purser's cabbin, and a centinel set on him. He tells you further, that Mr. Goodere, as soon as he came on board, said to him and the other company present, I have brought a madman on board. And, gentlemen, you will observe, that the ship's crew were made to entertain an opinion, that sir John was mad; says Mr. Goodere, Don't mind what he says, he is mad. This, all the witnesses agree in. And you may remember too, that when the poor gentleman was dragged and hurried along towards the barge, then he had murdered a man on board the Ruby. Now he is brought aboard, where that pretence cannot serve, he is a madman, and must be confined. This witness was present the next morning when the purser's cabbin was broke open, and sir John was found there murdered: upon which, he says, Mr. Goodere was made a prisoner. But he tells you, that before this, Mr. Goodere expressed a great inclination to sail that very morning; and upon his representing to him the danger of attempting the Bristol channel without a pilot, he answered, If I can but get as low as the Holmes I don't care.

This witness was asked a question by Mr. Goodere, touching the place where the Ruby was moored, at the time the fact in question was committed; and he says, that she then lay in King Road, and has described her several bearings to Port's-head point, the Denny, and the Hole's mouth. But, gentlemen, it will not be material in the present case, in what part of King Road the ship then lay, if you are satisfied from the evidence you have heard, that King Road is in the county of this city, because it is admitted by the prisoner, and indeed it is too plain to be denied, that the ship was then in King Road.

The next witness is Duncan Buchanan, who was one of the company at the White Hart ale-house, on Tuesday the 13th; and he confirms what Hobbs told you, that when sir John and his servant rode by, the prisoner Goodere

called to Mahony and the company at the White Hart, and bid them mind him well, but not to touch him. He says too, that Mr. Goodere at the same time ordered some of the company to follow sir John. He speaks much to the same purpose as the last witness, touching the bringing sir John aboard, and carrying him into the purser's cabbin; and adds, that two bolts were put on the outside of the cabbin door by Mr. Goodere's orders. He tells you, that he was the centinel placed at the cabbin door by Mr. Goodere, who, you are to take notice, had then the command of the ship; and says, that about twelve at night he was sent for into the captain's cabbin, where he found both the prisoners at the bar together. That Mr. Goodere enquired of him, whether his brother made any noise? and said, I believe he is wet in his feet, I'll carry him a pair of clean stockings. That between one and two the prisoner Goodere came down to the cock-pit, and listened some time at the cabbin door, where sir John was; and soon afterwards took the sword from him, and ordered him up to the deck; and stood himself as centinel at the door. He says, that being on deck, he saw the prisoner Mahony go down the ladder towards the purser's cabbin, and is positive he went into the cabbin; the prisoner Goodere standing at the same time centinel at the door. He tells you that a short time after this he heard a great noise and struggling in the cabbin, a person crying Murder, like one going into a fit: that, I think, was his expression. This noise, he judges, continued four or five minutes; and is positive that the prisoner Goodere stood at the door all that time, with the sword in his hand. He says, that after the noise in the cabbin ceased, he saw the prisoner Goodere hand a candle into the cabbin; and that he, seeing Mr. Goodere had no light with him, lighted a candle at the lanthorn upon deck, and was going to carry it down; upon which he says Mr. Goodere waved the sword towards him, saying, Keep back, stay where you are. He says, that soon afterwards the prisoner Goodere called for a light, delivered back the sword to him, locked the cabbin door, and put the key in his pocket; and said, If my brother makes any more noise, let me know of it.

The next witness is Daniel Weller, the carpenter of the Ruby: he agrees in the main with the two former witnesses, touching the bringing sir John aboard, the carrying him into the purser's cabbin, and putting the bolts on the door; and gives an account of the conversation he had with sir John in the cabbin while the bolts were fastening on: from which it seems natural to conjecture, that sir John expected he should have foul play for his life. He did not stay long with him; for it seems nobody was to visit the poor gentleman but Mahony. He says, he broke open the cabbin door next morning, and found sir John dead, and observed some blood about his mouth and nose; which, gentlemen, is what may be expected in case a person is strangled.

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The next witness is Edward Jones, the cooper of the Ruby; and he tells you, that on the Thursday before the fact in question was committed, Mr. Goodere ordered the purser's cabbin to be cleared out; for, said he, I shall bring a gentleman aboard. He says, that soon after sir John was brought aboard, Mr. Goodere came down to the purser's cabbin, and offered him a dram of rum, and also persuaded him to make use of some to chafe his leg, which it seems had received some hurt that day. He says, that Mr. Goodere, speaking of sir John to the people present, said, Don't mind what he says, he'll be well enough again. He tells you, that about eight o'clock he went to bed in the slop-room, which it seems, is parted from the purser's cabbin by a thin deal partition. That before he went to sleep, he heard what passed in the cabbin, particularly the discourse between sir John and the prisoner Mahony, which I need not repeat to you. And says likewise, that he heard sir John praying to God to deliver him out of his present distress, and express himself as a man sensible of his present danger. He tells you, that between two and three in the morning, his wife, who happened then to be aboard and in bed with him, waked him, and that he then heard a great struggle in the cabbin, sir John crying out, as a person in great confusion and distress, Here's twenty guineas, take it, take it, must I die? He says, that in a little time all was quiet, from which he concluded the gentleman was dispatched; and then a light was brought into the cabbin; upon this he says, he got up upon his knees, and peeped through a crevice in the partition, and saw the prisoner Mahony and one Charles White rifling the pockets of sir John, who was laid upon the bed, in the posture he has described to you, and motionless. He says, at this time he saw a hand at sir John's throat, and heard a person say, It is done, and well done; he cannot say who the person was whose hand was at sir John's throat, but believes it was not the hand of White, or Mahony, for it was a white hand, and not like either of theirs. He says that he lay in fear of his own life (as indeed I think he had great reason) till about four in the morning, and then the men belonging to the yawl being called up, he got up too, and acquainted the lieutenant with what passed, and consulted with him and others of the officers about apprehending Mr. Goodere, which was afterwards done in the manner you have heard.

The next witness is Margaret Jones, wife of the last witness. And she gives much the same account of the bringing sir John aboard, and Mr. Goodere's offering him rum, as her husband does. And says farther, that Mr. Goodere talked of ordering sheets for sir John's bed. But, gentlemen, it does not appear to me that any sheets were ordered, or indeed any sort of refreshment provided for him; except a single dram of rum, which he refused, having forbore the use of strong liquors of all sorts for a considerable time. This witness likewise gives an

account of the conversation between Mahony and sir John, and tells you, that when Mahony offered to pull off sir John's stockings, he said to him, Pray don't strip me till I am dead. She says, that about two in the morning she heard Mahony desire sir John to compose himself to sleep; and soon afterwards the light was put out, and she heard Mahony say, You must lie still, and not stir for your life; and immediately she says there was great struggling in the cabbin, two persons whispering, and sir John crying Murder, and kecking in his throat (as she expresses it,) so that she concluded they were strangling him. At this time, she says, somebody on the outside of the door offered to come in; upon which, those in the cabbin said, Damme, you negro, keep out. She says, the noise and strugglings continued for a short time afterwards, and then all was quiet, and a light was brought into the cabbin. She then saw the prisoner Mahony, and Charles White, the person her husband spoke of, rifling sir John's pockets. The particular circumstances she mentions in this part of her evidence I need not repeat. She says, that after this was over, they went out of the cabbin, and the door was locked and bolted; and she heard one of the persons say, Which way shall I go, where shall I run? To which the other answered, Follow me, my boy.

The next witness is James Dudgeon, who, it seems, is the surgeon's mate. And he tells you, that when sir John was brought aboard, he was carried directly to the purser's cabbin, and a centinel placed over him. Says Mr. Goodere to this witness, Doctor, I have brought a madman on board, you must do the best you can with him; pray go and feel his pulse now; or you may let it alone till to-morrow, the first night will be the worst with him. The doctor did go, but was told by the centinel, that he had orders to let nobody in but Mahony; however, he went in and felt sir John's pulse, and found no disorder there but what might be occasioned by the fatigue he had undergone that afternoon. This witness, who, it seems, lodged in a part of the cock-pit near the purser's cabbin, says, that about two in the morning he heard an unusual stir in the cock-pit, and overheard Mahony, who was in the purser's cabbin, say, You must lie still, don't stir; and immediately there was a great bustle in the cabbin, sir John crying, Murder, and saying, Here's twenty guineas, take it, take it. He says, that by the noise he heard, and from other circumstances he has mentioned, he then apprehended that somebody was strangling the gentleman. Before the noise was quite over, he says he heard the lock of the cabbin go; upon which somebody within cried, Damn ye, keep the door fast. The witness hearing this, called out and enquired what was the cause of the noise; and he says that the person who then stood at the door answered, It is nothing at all. He does not say who the person was, but says he is sure that the prisoner Goodere was in the cock-pit while the outcry was in the cabbin. Soon after the noise was over, he says, a light was called for, and carried into the cabbin; and in a little time he heard the tread of people running out of the cabbin, and is sure he heard the prisoner Mahony say, Which way shall I go? To which answer was made, You may go by the ship-side. He says, about this time a person stept up the ladder from the cock-pit, towards the deck, and he then heard the prisoner Goodere say, If my brother makes any more noise, let me hear of it. These words, gentlemen, if you believe Duncan Buchanan, were spoken to him at the top of the ladder. It seems indeed probable, that Mr. Goodere was solicitous to know whether sir John made any noise or no, after this time; for this witness tells you, that Mr. Goodere's servant, some time afterwards, came to him to enquire whether he had lately heard any noise in the cabbin? Yes, says the witness, I heard something at the lock. This noise the witness supposes was occasioned by a cat which had been locked in the room. This witness inspected the body the next morning, and tells you, that he found great impressions about the neck, and the marks of nails and fingers on it; and upon the whole, is of opinion that sir John died by strangling. And, gentlemen, whether a rope was made use of in the business, or whether it was done by thrusting their fingers between the neck and cravat, and so straining the cravat close about the neck, will not be material; for though the indictment charges that it was done with a rope, yet if it appears on the evidence, that the deceased was strangled by any means whatever, such evidence will be sufficient to maintain the indictment.

The next witness, and the last that has been examined, touching what was done on board the ship, is William Macguinis, the centinel at the gun-room. And he tells you, that after two in the morning, the prisoner Goodere went down into the cock-pit; that soon afterwards the prisoner Mahony push'd by him; he says he would have kept him back, but Mahony gave him ill language, and passed on, and called to another person to follow him. He says that Duncan Buchanan was ordered up to deck, and that he saw Mr. Goodere standing at the purser's cabbin-door with a sword drawn in his hand; and remembers, that when he offered to come near the cabbin, Mr. Goodere ordered him to keep back; this was at the time the noise and outcry was in the cabbin. He says further, he saw Mahony go into the cabbin before the noise was heard there; and that, about three in the morning, he saw both the prisoners at the bar go up the ladder from the cock-pit to the deck together.

The prosecutors then examined two witnesses touching the gold watch which has been produced. One of them, Sarah Culliford, says, that the prisoner Mahony, the day he was apprehended, delivered the watch to her, desiring she would put it by for him; that she, upon hearing that Mahony was taken up for the murder, in a surprize, threw it into the vault.

The other witness tells you, that he, by order of the magistrates, opened the vault, and found the watch there. This watch the prosecutors would fix upon the prisoner Goodere, and to that end, it was shewn to Theodore Court, who was examined before to other points. And he says, he cannot be positive, but believes it to be Mr. Goodere's watch, having often seen it, or such a one, hanging up in his cabbin. The prosecutors then produced a handkerchief, which was taken out of Mahony's pocket the night he was apprehended; it appears to be a little bloody, but I don't see what use they make of that circumstance.

The next piece of evidence the prosecutors went to, was Mahony's examination and confession, which has been read to you. This, gentlemen, is very proper evidence, and ought to have its weight with you, as far as it concerns Mahony himself; but with regard to the other prisoner Goodere, you are to lay no manner of stress upon it, it is no evidence against him.

The prosecutors then proceeded to shew, that King-road, where the Ruby lay at the time the fact was committed, is within the county of Bristol. I think indeed that some evidence of that kind was proper to be given for your satisfaction, and to that end they have called Mr. Wint and Mr. Lowden, two ancient officers well known to you all. And they say, in general, that King-road has always been esteemed to be within the county of Bristol. And they go farther and say, that they have constantly, as occasion required, executed process of all kinds in King-road; warrants from the mayor and aldermen, process from the mayor's and sheriffs' court, and warrants grounded on writs from above, directed to the sheriffs of Bristol. And, gentlemen, I must say, that though another sort of evidence might have been given, touching the bounds of this county by water, I know no evidence so proper to prove the bounds of any county, as the constant exercise of jurisdiction in the place in question, where that sort of evidence can be had.

I think, I have repeated to you the material parts of the evidence which has been given against the prisoners at the bar; and you will now consider what they have offered by way of defence to this charge.

As for Mahony, I do not hear him say any thing by way of proper defence, nor has he called a single witness. He hopes, indeed, that it will be taken by way of excuse, that he was a poor pressed servant, and acted by command. But, gentlemen, if you believe the evidence which has been given against him, no command of any superior whatsoever (supposing that to have been an ingredient in his case) will excuse him.

Mr. Goodere says, that his brother was a lunatic, and he being his only brother, thought it his duty to take care of him in that condition; that in order thereto he had endeavoured to get a lodging in this city, where he was to be confined under the care of the prisoner Mahony, who was to have 5*l.* a month for his attendance on him. That not being able to get a lodging for the purpose in the city, he took him on board the Ruby, in order to have him taken proper care of there. He denies that he ever consented to the murder, or had any knowledge of it; and insists on the great improbability there is that he should be concerned in the murder, since, he says, he knew that sir John had cut off the entail of the family-estate, and had actually made his Will, by which he had devised the estate to another branch of the family. So that, says he, sir John dying while this Will stands, I have no chance for the estate: whereas, as long as he lived, my chance as heir at law continued; for he might have changed his mind, and altered or destroyed his Will.

The first witness he called was Mrs. Gethins, who, I suppose, lets lodgings in the city; and she says, that Mr. Goodere never made a secret of his design, of confining his brother as a lunatic; and that about three weeks before this matter happened, he spoke to her for a garret in her house for that purpose; but she remembers no discourse the prisoner had with her about Mahony.

Mr. Goodere then called two witnesses in relation to something which was opened against him, (but not directly proved by any of the witnesses called by the prosecutors) touching his sending Mahony and White away in the yawl the morning the fact was committed.

They were Mr. Marsh and Mr. Dagg.

Mr. Marsh says, that on the Sunday in the afternoon, after sir John was brought aboard, he was ordered by Mr. Goodere to go up in the yawl early the next morning, to fetch letters from the post-office; and he tells you that as he was setting out on Monday morning, he was informed by some of the ship's company, that Mahony and White were to go with him. Upon which he went to the captain to have his orders; for, said he, I never take any body ashore without leave. And he tells you, that Mr. Goodere did order him to take White and Mahony up in the yawl. He says, that he had no orders to land them at any particular place; and that they were put ashore at the Gibb, the usual place of landing, about six in the morning.

Mr. Dagg tells you, that Mahony had charged one Mervin in his custody in an action for wages; that the Wednesday or Thursday before this matter happened, he waited on Mr. Goodere from Mervin, in order to accommodate matters with Mahony: And that Mr. Goodere appointed to meet Mervin on that affair the Monday following. He cannot say, that Mahony was to meet on that day (though indeed he says he did tell a gentleman so), and knows not of any business White had that day in Bristol.

Mr. Goodere next called three witnesses to the point of sir John's lunacy. The two first have lived with him as servants, and they give you divers instances of an extravagant anec-

countable behaviour in him; from which they conclude that he must have been a madman. The other witness says, that he knew sir John for some years; and in general says, that from his actions he took him to be mad.

He then called several witnesses, gentlemen of worth, who have known him many years; and they all agree in giving him a very good character, as to his former life and conversation: and particularly say, that they always took him to be a good-natured, well behaved man, and one that merited the love and esteem of his neighbours. One of these witnesses, Mr. Forcevil, says, that he was constant at church on Sundays twice a day, generally attended the church-service, and seldom missed attending at the sacrament.

Another of these witnesses, Mr Ashfield, having given the prisoner a good character, was asked touching sir John, particularly with regard to his sanity; and he seems surprised to hear sir John represented as a mad-man; and tells you, that he always took him to be a man of good understanding: and goes so far as to say, that he took him to be the man of the best sense in the family. He was asked, touching the prisoner's having been informed of the contents of his brother's will; and he tells you, that the prisoner was informed of the purport of the will; but adds, that the prisoner declared that he did not value the will: And says, that there had been a long misunderstanding between the brothers.

Mr. Goodere called a witness (Mr. Watkins) to prove that he was informed of the contents of sir John's will. And he tells you, that about half a year or three quarters of a year ago, he did inform Mr. Goodere, that sir John had made his will, and had given his estate to the Foots; who, it seems, are nephews to sir John and the prisoner. But he tells you, that the prisoner then said, he thought sir John had no power to make a will. He says, that in discourse about the will, he spoke it to the prisoner as his opinion, that if matters could be reconciled between sir John and him, that will would not stand long: For, gentlemen, he likewise says, that there has been a long misunderstanding between the brothers. This witness was likewise asked, touching sir John's lunacy, and he seems surprised to hear that his sanity is called in question; and gives him an advantageous character in other respects too.

This, gentlemen, is the substance of the evidence that has been given on the one side and the other. And though the evidence has been very long, and, as you observe, chiefly pointed at the prisoner Goodere; yet with regard to your present enquiry, the matter after all will lie in a narrow compass. You observe, gentlemen, the indictment charges that he was present, aiding and abetting the murder; and therefore however instrumental you may suppose him to have been in procuring the death of sir John, by carrying him on board, and treating him there in the manner you have heard; yet, if you have not evidence to induce you to believe that he was present, aiding and abetting at the murder, he will not be guilty on this indictment. But, gentlemen, you must not be deceived by the mere sound of words. It is not necessary, in order to render a person guilty as a principal in murder or other felony, that he should be in the same room, or on the very spot where the fact is committed, or even in sight or hearing of it: If he be engaged in the design, and posts himself at the time of execution in a proper station to give assistance, if need be, or to prevent a surprise, whereby the persons actually committing the fact are encouraged in the perpetration of it, he is in the eye of the law, present, aiding and abetting, and equally a principal in the fact with those who actually commit it. An instance or two may make this rule better understood. If several persons agree to commit a murder on the highway, or in the open fields, and one party of them undertakes to see the fact committed; the others disperse themselves to their several stations, and stand upon the watch to prevent a surprise: they are all equally guilty, and in the eye of the law present at the fact. So, if a number of people agree to commit a murder, and to that end break into a house, and then disperse themselves into several rooms; or, if any of the company stand without, and keep the door while the murder is committed within, they are all equally guilty, and in the eye of the law present. Nay, though the original intention might be barely to commit a robbery, yet, if in prosecution of that design a murder is committed, the whole company, those who stood upon the watch, as well as those who committed the fact, are all equally guilty, and principals in the murder. And therefore, gentlemen, if upon the evidence which has been given, you believe that the prisoner Goodere did stand at the door of the purser's cabbin while the murder was committed, in order to encourage those within in the perpetration of the fact, or to prevent any assistance which might have come, you must find him guilty. And, gentlemen, I must observe to you, that it is proved by four witnesses, that he was in the cock-pit while the cry of murder was heard in the cabbin. Two of these witnesses are positive that he stood at the cabbin-door at that time with a drawn sword in his hand; and that while he was there posted, he ordered them to keep back. And one of the same witnesses is likewise positive, that soon after the cry of murder ceased, Mr. Goodere handed a candle into the cabbin.

Mr. Goodere indeed has called several witnesses, who have given him an advantageous character; but, gentlemen, I think it my duty to tell you, that though character ought to have its weight when matters are in themselves doubtful, or where the charge is supported by witnesses of doubtful credit; yet in clear cases, and when the credit of the witnesses is not impeached, I think character alone ought to weigh very little with you. And upon the whole, if you believe the witnesses for the king,

you must find him guilty; if not, you must acquit him.

As to Mahony, I think you can have no difficulty if you believe the evidence of Jones and his wife; and lay any stress on his own confession; and indeed he now rather endeavours to excuse than denies the fact.

Then the Jury withdrew, to consider of their verdict; and after a short space, returned again.

Cl. of Arr. Gentlemen, answer to your names. Christopher Bromadge.

Christopher Bromadge. Here. [And so of the rest.]

Cl. of Arr. Gentlemen, are you all agreed of your verdict?—*Jury.* Yes.

Cl. of Arr. Who shall say for you?

Jury. The foreman.

Cl. of Arr. Matthew Mahony, hold up thy hand. You of the jury, look upon the prisoner: how say you, is Matthew Mahony Guilty of the felony and murder, whereof he stands indicted, or Not Guilty?—*Jury.* Guilty.

Cl. of Arr. What goods or chattels, lands or tenements had he at the time of the said felony and murder committed, or at any time since, to your knowledge?—*Jury.* None.

Cl. of Arr. Samuel Goodere, hold up thy hand. You of the jury, look upon the prisoner: how say you, is Samuel Goodere Guilty of the felony and murder, whereof he stands indicted, or Not Guilty?—*Jury.* Guilty.

Cl. of Arr. What goods or chattels, &c. (as before.)—*Jury.* None.

Cl. of Arr. Hearken to your verdict, as the Court hath recorded it. You say that Matthew Mahony is Guilty of the felony and murder, whereof he stands indicted: you say that Samuel Goodere is Guilty of the felony and murder, whereof he stands indicted; and that they nor either of them had any goods or chattels, lands or tenements, at the time of the said felony and murder committed, or at any time since, to your knowledge; and so you say all.

Cl. of Arr. Keeper, take Matthew Mahony and Samuel Goodere the prisoners, from the bar, and look to them; they stand convicted of wilful murder.

Then the Court adjourned to the same place the next morning eight o'clock.

With respect to Mr. Recorder's observations (pp. 1055, 1056) upon Mahony's Confession, see vol. 16, p. 70.

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501. The Trial of Charles White, for the Murder of Sir John Dineley Goodere: 14 George II. A.D. 1741.

On Friday, the 27th of March, 1741, Charles White was brought to the bar of the Court, to be arraigned for the murder of sir John Dineley Goodere, upon an indictment found by the grand jury for the city and county of Bristol on the day preceding; and the Court proceeded thus:

Clerk of Arraigns. Charles White, hold up your hand. (Which he did.) You stand indicted by the name of Charles White, late of the parish of St. Stephen, in the city of Bristol and county of the same city, labourer, for that you and one Matthew Mahony, late of the same parish, city and county, labourer, not having the fear of God, &c. on the 19th day of January, in the 14th year, &c. in and upon one sir John Dineley Goodere, in the peace of God, &c. then and there being, feloniously, voluntarily, and of your malice aforethought, did make an assault; and that the said Matthew Mahony, a certain cord of the value, &c. about the neck of the said sir John then and there feloniously, voluntarily, and of his malice aforethought, did put and fasten: and that the said Matthew Mahony with the cord aforesaid, by him so about the neck of the said sir John put and fastened, then and there, him the said sir John feloniously, &c. did choke and strangle; of which said choking and strangling of him the said sir John by the said Matthew Mahony, in manner and form aforesaid done and perpetrated, he the said sir John then and there instantly died. And that you the said Charles White, then and there feloniously, &c. was present, aiding, abetting, comforting and maintaining the said Matthew Mahony in manner and form aforesaid, feloniously, &c. the said sir John to kill and murder; and so that you the said Charles White, in manner and form aforesaid, the said sir John then and there feloniously, &c. did kill and murder, against the peace, &c.

How say'st thou, Charles White, art thou Guilty of the felony and murder, whereof thou standest indicted, or Not Guilty?

White. Not Guilty.

Cl. of Arr. Culprit, how wilt thou be tried?

White. By God and my country.

Cl. of Arr. God send thee a good deliverance.

The Court proceeded in like manner as upon the indictment against Mr. Goodere and Mahony; and the names of the jury sworn, were as follows:

John Nash,	Wm. Williams,
Joseph Wilson,	Wm. Arnold,
Samuel Cave,	John Willis,
Wm. Abraham,	Cornelius Sandford,
Wm. Jones,	John Taylor,
Robert Moody,	Thomas Seed.

Then proclamation for information was made, and the jury charged with the prisoner.

Mr. *Vernon.* May it please you, Mr. Recorder, and you gentlemen of the jury, I am counsel for the king against the prisoner at the bar, who stands indicted for the murder of sir John Dineley Goodere; and the indictment charges that one Matthew Mahony (who has already undergone the justice of his country) strangled the deceased, and that the prisoner at the bar was present, aiding and abetting him in the perpetration of that horrid fact; and which (if true) will be the same in consideration of law, as if the prisoner had with his own hands strangled the deceased, and actually drawn the fatal cord which put a period to his life. Gentlemen, it is with an aching heart I discharge this melancholy task against the prisoner, but criminal justice must be administered as well as civil, and the great safety of the innocent is in the punishment of the guilty: and of this the prisoner may be assured, that as he now stands at the bar for his life and death, and unassisted by counsel in matter of fact, I shall carefully confine myself to the letter of my instructions, without any aggravation of facts or circumstances, and endeavour so to discharge my duty on this melancholy occasion, as that he may have nothing to fear but from guilt, or to hope but from innocence. And, gentlemen, as I am instructed, captain Samuel Goodere, late commander of the Ruby man of war, and brother of the late unfortunate sir John Dineley Goodere, having on Sunday the 18th of January last, with the assistance of Mahony and other ruffians, forcibly seized upon sir John, and hurried him on board the Ruby (which then lay stationed in King-road, within the body of your county,) with a design of murdering sir John; the prisoner (a private mariner belonging to the Ruby) was pitched upon by the captain as a person fit to be concerned with Mahony in the execution of that base and barbarous design. And accordingly, on Monday the 19th about one in the morning, the prisoner was called up by Mahony to attend the captain in his cabbin, which he did; and the captain after plying the prisoner pretty plentifully with rum, proposed to him the murdering of his brother, in conjunction with Mahony; and no sooner said but done, gentlemen: for this infatuated wretch the prisoner, influenced by the strong delusion of wickedness, and temptation of mistaken gain; and not content with his honest wages, nor considering that the wages of sin are death, gave at once into the monstrous proposal for the sake of plunder. In a word, gentlemen, he readily followed Mahony into the purser's cabbin, where sir John lay confined; and as that unhappy gentleman had from the time of first seizing him been treated as a malefactor, so they executed him as such; for Mahony seized him by the throat, and then fastening about his neck a rope, which they had brought with them for the purpose, strangled him in the presence and with the assistance of the prisoner; and indeed without his assistance, sir John being strong and of an undaunted spirit, would probably have been able to have defended himself against the attack of Mahony. Gentlemen, no sooner had they robbed sir John of his life, but they fell to rifling him of his watch and money; they divided the spoil between them, and then betimes in the morning the prisoner with his accomplice Mahony made off from the ship, and took refuge in this city; a very unfit sanctuary for ruffians and murderers, considering the good order and government of the place, and the constant care of its worthy magistrates in the due execution of the laws. But justice pursued, and will, I doubt not, overtake him. He was apprehended, and made an early confession of his guilt, and comes now to answer for his delinquency. Gentlemen, we shall call the ship's cooper and his wife, who heard the groans and outcries of the deceased, and were spectators of what passed in the purser's cabbin immediately after this tragedy, and saw the prisoner in the very act of rifling the deceased, almost at the instant of his death. We shall also lay before you the prisoner's own confession, on his examination before the justices; and then, gentlemen, we doubt not, but you will be of opinion, that by the laws of his country he ought to die for his transgression, as some atonement for his own guilt, and an example of justice to others.

Edward Jones sworn.

Mr. *Vernon.* Edward Jones, tell Mr. Recorder and the jury what you know concerning the death of sir John Dineley Goodere.

Jones. On the 18th of January last, at night, I was in bed with my wife in the slop-room, next the purser's cabbin down in the cockpit in the Ruby man of war, then lying at King-road, and sir John Dineley was then confined in the purser's cabbin. I heard him pray to God to be his comforter under his afflictions; he said, that he knew he was to be murdered there; and he prayed that it might come to light by one means or another. But I took no notice of him, because I thought him a crazy man, as I heard the captain say he was. After that, I fell asleep; and, I believe about two or three of the clock my wife waked me, and said to me, Don't you hear the noise that is made by the gentleman? I believe they are killing him. I then heard sir John kick, and cry out, Here is 20 guineas, take it, take it; don't murder me; must I die! must I die! Oh my life! and gave several kecks with his throat like a dying man, and then he was still. I would have got out of bed, but my wife persuaded me not, for fear I should be killed too. It was dark; but a light was handed in to the purser's cabbin, and then I got up upon my knees, and I could see a light glimmering through the crack of the boards; I saw Mahony with a candle in his hand, sir John was lying on his side. The prisoner Charles White was there, and he pulled sir John to turn him about, and White said he could not get the watch out of his

pocket; and he tumbled him up to come at the money, and unbottoned his breeches. I saw him get hold of the watch-chain; and White gave Mahony the watch; and White put his hand in one of the gentleman's pockets, and cursed that there was nothing but silver; he put his hand in another pocket, and there he found the gold; he offered it to Mahony, but Mahony damned him, and bid him keep it till by-and-by. White pulled out a piece of paper from one of sir John's pockets, and was going to read it; but Mahony said, Damn ye, don't stay to read it now.

Mr. *Vernon.* Was sir John Goodere dead in appearance when you saw them rifling his pockets?

Jones. As they were turning him about, one of his legs was crooked, which made me think he was dead, and that they had killed him in the dark. The next morning I saw sir John dead, lying in the purser's cabbin, and I believe he was strangled.

Mr. *Recorder.* Prisoner, will you ask this witness any questions?

White. Please you, my lord, I desire you will ask Mr. Jones, whether sir John was living or dead when he saw me in the cabbin first?

Mr. *Recorder.* Mr. Jones, the prisoner asks you whether sir John was living or dead when you first saw him in the cabbin?

Jones. Sir John was dead when White turned him about, for they killed him in the dark. I heard two voices.

White. Whether Edward Jones saw any body strangling sir John besides Mahony?

Mr. *Recorder.* The witness does not say that he saw any body strangling sir John, that he says was done in the dark: but, he says, he heard two voices in the cabbin, and as soon as the light was brought in, he saw you rifling sir John's pockets.

Mr. *Vernon.* Call Margaret Jones.

Margaret Jones sworn.

Mr. *Vernon.* Mrs. Jones, will you give Mr. Recorder and the jury an account of what you know in relation to the death of sir John Dineley Goodere?

Mrs. *Jones.* Yes, Sir. On the 18th of January last, at night, I lay on board the Ruby man of war with my husband, and in the purser's cabbin, next to where we were in bed, sir John was under confinement; the captain said he was a madman, and that he brought him there to save him from a gaol. About ten o'clock Mahony was left there with sir John; sir John desired him to go, but Mahony said he had orders to stay there to take care of him. About 12 o'clock in the night I went to sleep; about two o'clock I awaked, and heard the gentleman talk to Mahony, and Mahony persuaded the gentleman to go to sleep; the gentleman said he could not: they talked together a good while. I heard somebody say to the gentleman, You must lie still, and not speak a word for your life; and then I heard a great struggling; who it was, I don't know. The gentleman cried out Murder! Help, for God's sake; and made several kecks in his throat, as though somebody was stifling him. I shook my husband, and waked him. I heard two people in the cabbin whispering; the gentleman cried out Murder again, Help for God's sake! He said, Here's 20 guineas in my pockets, take it, take it; Must I die! Oh my life! And somebody in the out-side offered to go into the cabbin; but one of them within said, Keep out, you negro; and then a great noise was made, as though the cabbin would have been beat down; and then a candle was brought in. I got up and looked through a crevice: I saw a man, I believe it was White, pulled the gentleman upright. Mahony had the candle in his hand. I observed the other put his hand in the gentleman's pockets; one of them said, Damn ye, pull out his watch: I saw the person take hold of the watch string, and pulled it out, and said to the other, Here, thee take it; and then searched another pocket, and said, Here's nothing but silver: but then he searched another pocket, and said, Here it is, and pulled out a purse. And soon after that I heard the door unbolted, and then I heard Mahony say, Where shall I run? And another said, Follow me, boy. And they went upon deck through the hatch-hold.

Mr. *Vernon.* Did you know the voice of either of the two persons whom you heard speaking to one another?

Mrs. *Jones.* Yes, I knew Charles White to be one of the men by his voice. I knew his voice when he said to Mahony, Follow me, boy. I am certain the prisoner at the bar was in the cabbin; I observed his bulk, but could not look earnestly at him, being very much shocked and surprized; but my husband told me it was Charles White.

Mr. *Recorder.* White, will you ask this witness any questions?

White. Please you, my lord, to ask her, whether she can say that she ever heard my voice in the cabbin?

Mr. *Recorder.* Mrs. Jones, the prisoner asks you, if you heard his voice in the cabbin?

Mrs. *Jones.* I could not know his voice in the cabbin, for he spoke low; and when a person whispers, the voice is not so distinguishable: but as soon as he spoke aloud, I knew it to be his voice.

Mr. *Recorder.* Did you see him in the cabbin, Mrs. Jones?

Mrs. *Jones.* My lord, I did not see his face, but by his voice when he went out, I knew him to be the same man.

White. Please you, my lord, to ask her, whether she ever heard me say, Follow me, boy, before?

Mr. *Recorder.* Mrs. Jones, you hear the question, give an answer to it.

Mrs. *Jones.* I never heard him say so before; but I knew his voice perfectly well, having been acquainted with him for two years.

Mr. *Vernon.* We must now desire that the prisoner's Examination may be read. Cryer, swear Mr. James Britten, (second clerk to the town-clerk).

Mr. *Britten* sworn.

Mr. *Vernon.* Mr. Britten, What paper is that?

Britten. The Examination of the prisoner at the bar, taken before Mr. Mayor.

Mr. *Vernon.* Did you see the prisoner sign it in Mr. Mayor's presence?

Britten. Yes, I did.

Mr. *Vernon.* Did you see Mr. Mayor sign it?—*Britten.* Yes.

Mr. *Vernon.* Is that his hand?

Britten. Yes.

Mr. *Frederick*, counsel for the prisoner. It is opened by Mr. Vernon, that this Examination contains the prisoner's confession of the fact. I would ask Mr. Britten, Was the confession voluntarily made or not? For if it was not voluntarily, it ought not to be read.

Mr. *Recorder.* That is an improper question, unless the prisoner had insisted, and made it part of his case, that his confession was extorted by threats, or drawn from him by promises; in that case, indeed, it would have been proper for us to enquire by what means the confession was procured: but as the prisoner alleges nothing of that kind, I will not suffer a question to be asked the clerk, which carries in it a reflection on the magistrate before whom the Examination was taken. Let it be read.

Cl. of Arr. Reads.

January 20, 1741.

City and county of the city of Bristol, } to wit;

The Examination of Charles White, a sailor belonging to the Ruby man of war, now lying in this port, born in Drogheda in Ireland, aged about thirty-six years.

The examinant voluntarily confesseth, and saith, That he hath been a sailor on board the said ship for about seventeen months last past: That about one of the clock in the night of Sunday last, the 18th instant, he was asleep in his hammock on board the said ship, and was called out by one Matthew Mahony, another sailor on board the said ship (and now in custody), who told him, that the captain (meaning captain Samuel Goodere, commander of the said ship) wanted to speak with him in his cabbin; and accordingly he went to him; and when he came to him, the captain asked him to sit down, and then gave him a wine glass of rum, and after that four or five more, and then asked him if he could kill a Spaniard? And this examinant answered him, That he never did. Upon which the captain told him, he had got a job for him to do, if he would undertake it: And this examinant asked him what job it was; And the captain told him, it was to make away with his brother, whose name (as this examinant is informed) was sir John Dineley Goodere, bart. who was in the purser's cabbin on board the said ship: And the said Matthew Mahony told this examinant, that he must go with him to help do it. Whereupon the said captain went out of the cabbin first, Mahony followed him, and this examinant went next; and when he came to the purser's cabbin door, where sir John Dineley was, the captain was standing centinel himself at the door, with a cutlas in his hand, and Mahony had entered the cabbin, and this examinant entered likewise, where Mahony was talking with the said sir John, and had a piece of rope, called three-quarter of an inch rope, in his hand, about six foot in length, and sir John was lying on the bed; and particularly Mahony asked sir John how his head was, and what he had got about it? And at last told him, it did not signify talking about it any longer, and then fell on him on the bed, took hold of his throat with his hand (his stock being on) and so strangled him with his stock, and afterwards put the said rope about his neck, (which was prepared for the purpose, with a noose in it, before it was brought out of the captain's cabbin), and then Mahony hauled the rope tight about his neck; and upon this examinant's asking him what he did that for? He said, For fear he should not be dead enough. And this examinant took a knife out of his pocket, and cut it off his neck, and threw it over-board. During all which time the captain stood centinel at the door as aforesaid; and as soon as this examinant had so cut the rope off, the captain handed a candle to Mahony, who gave it to him, and Mahony took the watch and money out of sir John's pocket; and then the captain asked them, have ye done? Meaning (as this examinant apprehended) murdered the said sir John. And then came in himself, and this examinant went through the hold, and came upon deck, where he walked for about the space of half a quarter of an hour, and the captain and Mahony went into the captain's cabbin together, and then this examinant went into the steeridge, and Mahony called this examinant into the cabbin, where the captain had undressed himself in order to go to bed; and there the captain gave him five guineas, and this examinant had received of the said captain a six-and-thirty shilling piece of gold before the said sir John was murdered. And further this examinant saith, That Mahony shewed the captain the watch he had taken out of sir John's pocket, and the captain gave Mahony his own watch, and kept sir John's himself; and Mahony likewise shewed the captain the money he had taken out of sir John's pocket, who bid him keep it; and Mahony gave it to this examinant, who put it in his pocket, and he and Mahony shared the money on the forecastle, and this examinant had two pieces to one, in consideration that Mahony had the watch; and this examinant believes they shared about thirty pounds between them,

And further this examinant saith, That the said captain told him and Mahony, that they might go any where for three weeks, and he would send them their tickets. And lastly, this examinant saith, That between four and five of the clock the same morning, the man of war's yawl was going to this city, and he and Mahony landed at the Gibb here.

CHARLES WHITE.

Mr. *Recorder*. Well, prisoner, what have you to offer in your defence?

White. Please you, my lord, I was in my hammock between the hours of twelve and one, and this Mahony came to me and said, Charles White, Charles White! I said, What do you want? He said, Turn out. I asked him what he wanted of me now? He said again, Turn out, turn out. And with that I turned out, and went upon deck to make water, and while I was doing it, he told me that he wanted me to go with him. I asked him where he was going to bring me? But he led me into the cabbin where the captain was. When I came in, the captain bid me sit down. I begged him to excuse me from taking so great a freedom as that in his company. But at last I sat down, and I drank a glass of rum. Then the captain asked me, whether I had ever killed a Spaniard? I told him, No, I never was engaged with one to kill him. Drink about, Mahony, said the captain. With that we drank about, and finished a bottle and a half in raw drams. With that he said, Come along with me. I asked him where he was going? I went with him, the captain first, and Mahony after him; and they went below, and to what intent I knew not, being quite in liquor with drinking so much rum. Said the captain to me, when we came down, Tarry here till I call you. Soon after Mahony came to me, and told me the captain wants you. Then I went into the cabbin, and sat down in it, and Mahony and the captain were talking together; but what they did I know not, for I never laid a hand near the gentleman.

Mr. *Recorder*. You say you were in the purser's cabbin, and do you not know what happened there?

White. I cannot tell, Sir, what past.

Mr. *Recorder*. If this defence be true, how came you to be so unjust to yourself to make the confession which has been read?

White. Please you, my lord, I was in liquor, and did not know what passed between them, for I had not my senses about me.

Mr. *Recorder*. Why, it is charged upon you by the cooper, that you examined sir John's pockets, and took out his watch and money, and a piece of paper which Mahony persuaded you to throw away, as of no consequence, or else to put it into your pocket, and read it at another time.

White. Please you, my lord, I know nothing of it; I have several witnesses to my character.

Mr. *Recorder*. Call your witnesses.

Michael Smith sworn.

Mr. *Recorder*. How long have you known the prisoner?

Smith. From a child, Sir; we went to school together for eight years.

Mr. *Recorder*. What do you know of him?

Smith. Sir, I never heard to the contrary but that he was an honest man, and bore a good character.

Theodore Court sworn.

T. Court. I never knew any harm of the prisoner till this unhappy affair; but I have been informed, that since he hath been under confinement, he hath told several people who have gone to see him, that if he can get clear of this, he will kill my mate.

Edward Jones sworn.

Jones. I have known the prisoner for three years, but never knew any harm by him; I was with him in the West Indies, in the Kingsale man of war, but till this misfortune happened, I never knew any harm by him.

Mr. *Recorder*. Are you sure then, that you saw him in the cabbin rifling the deceased's pockets?

Jones. Yes, my lord, I am sure of that.

William Macguinis sworn.

Macguinis. Please you, my lord, I knew the prisoner at the bar ever since he was an infant; I went to school with him, and never knew any harm that he did before; I have often both eat and drank with him, and when he is sober, he is as good and civil a man as need be.

Daniel Wellar, carpenter of the ship, sworn.

Wellar. I have been about sixteen or seventeen months with him, and he always behaved himself well on board, and I never knew any harm of him before; but his voice is known from all the men in the ship.

Mr. *Recorder*. To what purpose, do you say, that his voice is known from all the men in the ship?

Wellar. Because they talk about his voice oftentimes.

Mr. *Vernon*. If I apprehend him right, Sir, he speaks this in confirmation of Mrs. Jones's evidence, who swore she knew the prisoner's voice. Gentlemen, I was in hopes the prisoner would have stood to his former confession, instead of endeavouring to retract it, and have given glory to God by a public penitence and sorrow for the heinousness of his crime, instead of putting on a shew of innocence against proof so apparent of his guilt.—Defence, I apprehend, he has made none; he has called indeed some witnesses to speak to his character; and character, it must be admitted, is of weight, by way of balancing the proofs, where the fact is doubtful and uncertain; but when the evidence is strong and pregnant, and guilt stares the prisoner in the face, character weighs not a single grain in the scale of justice. How far

the prisoner's character and early confession of the fact, with some ingredients in his case, may be of service to him in another place, is not the present consideration; he stands now at the bar for your justice, not your pity; and it fully appears in proof, that he was an accomplice with Mahony in this barbarous murder, as laid in the indictment: so that life ought to go for life by the laws of God and man, and I doubt not in the least, but that you will conscientiously discharge the duty you owe to God and your country, by going according to your evidence, and finding the prisoner guilty.

Mr. *Recorder.* Gentlemen of the jury, the prisoner at the bar stands indicted for the murder of sir John Dineley Goodere. The indictment charges, that the deceased was strangled by one Matthew Mahony, and that the prisoner was present, aiding and abetting him in the fact.

To support this charge, the prosecutors have called two witnesses, Edward Jones, and Margaret his wife. Edward Jones says, that he lodged in the night between the 18th and 19th of January last, in the Ruby man of war, in the slop-room, which adjoins to the purser's cabbin; where, he says, the deceased was confined. He tells you, that about two in the morning he was waked by his wife, and heard sir John crying out, Here's twenty guineas, take it, take it; don't murder me; must I die? He says, sir John gave several kecks with his throat like a man expiring, and quickly after was still. He tells you, that then a light being brought into the cabbin, he got up and looked through a crevice in the partition, and saw the prisoner at the bar engaged in rifling sir John's pockets, Mahony standing by with a candle in his hand. He says, that sir John was dead, as he believes, when the prisoner was rifling his pockets; and from what he observed the next morning, that he was strangled.

Margaret Jones is something fuller in her evidence, as to some circumstances previous to the murder; but in the main, agrees with her husband touching the rifling of sir John's pockets after he was dead. She is sure Mahony held the candle, and that another person, whom she takes to be the prisoner at the bar, was rifling his pockets. She says, she had not a perfect view of him; but by his bulk, and from what her husband then told her, she concluded at the time, that it was the prisoner at the bar. She says further, that when Mahony and that other person went out of the cabbin, she heard Mahony say, Whither shall I run? The other answered, Follow me, my boy. And then she says, she knew it was the prisoner made that answer by his voice. She says, she knows the prisoner's voice perfectly well, having been acquainted with him two years.

The prosecutors then read the prisoner's Examination, which contains a full confession of the fact, as laid in the indictment.

You have heard, gentlemen, what the prisoner has said to this charge; he admits that he went into the purser's cabbin, but says, that being much in liquor, he knows nothing of what passed there; and denies that he had any concern in the murder. He called some witnesses to his character; and I must observe to you, that one of his witnesses, Daniel Wellar, says, that the prisoner's voice is distinguishable from the voices of all the men in the ship. This will give some weight to Margaret Jones's evidence, that she knew him by his voice.

And, gentlemen, upon the whole, if you believe the evidence for the king, and give credit to the prisoner's confession, you must find him guilty.

Then the jury withdrew, to consider of their verdict; and after a short space returned again.

Cl. of Arr. Gentlemen, answer to your names: John Nash.

John Nash. Here. [And so of the rest.]

Cl. of Arr. Gentlemen, are you all agreed of your verdict?—*Jury.* Yes.

Cl. of Arr. Who shall say for you?

Jury. The Foreman.

Cl. of Arr. Charles White, hold up thy hand. You of the jury look upon the prisoner; How say you? Is Charles White Guilty of the felony and murder whereof he stands indicted, or Not Guilty?—*Jury.* Guilty.

Cl. of Arr. What goods or chattels, lands or tenements, had he at the time of the said felony and murder committed, or at any time since, to your knowledge?—*Jury.* None.

Cl. of Arr. Hearken to your verdict, as the Court hath recorded it: You say, that Charles White is Guilty of the felony and murder whereof he stands indicted, and that he had no goods or chattels, lands or tenements at the time of the said felony and murder committed, or at any time since, to your knowledge; and so you say all.

Cl. of Arr. Keeper, take Charles White the prisoner from the bar, and look to him; he stands convicted of wilful murder.

On Saturday the 28th of March the prisoners were brought again to the bar, in order to receive their sentence; and the Court proceeded thus:

Cl. of Arr. Cryer, open the Court.

Cryer. Oyez, Oyez, Oyez: all manner of persons that have any more to do before the king's majesty's justices of Oyer and Terminer, and general gaol-delivery for this city and county, and were adjourned over to this time and place, draw near, and give your attendance.

Cl. of Arr. Mr. Recorder, will you please that the prisoners shall be called up to judgment?

Mr. *Recorder.* Yes.

Cl. of Arr. Keeper, set Matthew Mahony, Samuel Goodere, and Charles White to the bar; which was done.

Mr. *Recorder.* Ask them what they can say to hinder judgment.

Cl. of Arr. Matthew Mahony, hold up thy hand. Thou hast been indicted of felony and

murder, thou hast been thereupon arraigned, thou hast pleaded thereunto not guilty, and for thy trial, thou hast put thyself upon God and thy country, which country hath found thee guilty; what hast thou to say for thyself, why the Court should not proceed to give judgment of death upon thee, and award execution according to the law?

[He offered nothing, but begged for time to prepare himself.]

Cl. of Arr. Samuel Goodere, hold up thy hand. Thou hast been indicted of felony and murder, &c. what hast thou to say? &c.

[He offered nothing, but begged also for time to prepare himself.]

Cl. of Arr. Charles White, hold up thy hand. Thou hast been indicted of felony and murder, &c. what hast thou to say? &c.

[He offered nothing, but declared he was drawn into it, and begged for transportation for life.]

Cl. of Arr. Cryer, make proclamation for silence.

Cryer. Oyez; The king's majesty's justices straitly charge and command all manner of persons to keep silence whilst judgment is giving, upon pain of imprisonment.

Then Mr. *Recorder* spoke to the prisoners thus:

Mr. *Recorder.* Samuel Goodere, Matthew Mahony, Charles White, and Jane Williams,* you have been all convicted, upon very full evidence, of one of the greatest crimes human nature is capable of; deliberate and wilful murder. A crime, which in all ages, and through all nations, hath been had in the highest detestation. For however mankind have differed in other matters, they have been in one sentiment concerning this crime and the demerits of it; as if they had been all witnesses to the promulgation of the precept, "Whoever sheddeth man's blood, by man shall his blood be shed."

But this crime, great as it is, is capable of several aggravations, arising from the circumstances which attend it.

To lay violent hands upon a person who never gave his murderer the least offence, whom perhaps he never saw till the moment he was marked out for execution; and to do this for hire, shews a mind lost, I fear, to all the impressions of humanity.

But what then is the case of one, who can procure all this mischief, and involve others in this guilt; especially if the person to whom the violence is offered, is near to him by the ties of blood or friendship?

It is true, murders of this kind are not very frequent; and less so in this nation than in any other. But in the case in which three of you are concerned, they all concur.

A gentleman of distinction is murdered by persons, who, in a manner, were strangers to his face, and his only brother aiding and abetting the murder. I may say thus much, because your country hath upon full evidence found it so.

I will carry these reflections no farther: I choose to leave that part to your own serious consideration.

I hope I need not persuade you to employ the time you have to live, in making your peace with God: I hope, I say, that a sense of your own condition hath already put you upon that work. And pray don't suffer yourselves to be diverted from it by the hope or expectation of mercy from the crown. His majesty's disposition to mercy is great; but his love of justice, and his love to his people is still greater. And because I would not mislead you, nor have you deceive yourselves, in a case of this importance, I think it my duty to deal freely with you.

I do not see what room any of you have to expect mercy.

You who have been the immediate actors in this affair, what have you pleaded in mitigation of your crime? One says, he is a poor pressed servant; and the other, that he was drunk when the fact was committed. Neither of those excuses can avail you. You both undertook the murder for hire, rifled the gentleman's pockets, and shared the plunder between you.

You had, perhaps, no design upon the gentleman's life, till near the time of execution. This is no excuse. It shews you were ready to shed innocent blood at the first call: That you yielded to the first temptation. And if drunkenness could be admitted as an excuse for crimes of this nature, this would be no world then of virtue and sobriety.

You, Sir, who have been the principal actor in this affair, what have you offered for yourself?

You admit, that you employed a number of people to seize your brother, here in the heart of the city, and in the face of the sun, and to carry him on board the ship of which you had then the command. This is too evident to be denied, and for that reason only, I fear it is admitted.

To give some colour to this unparalleled outrage, you say, that your brother was distracted, and that you took him on board in order to put him under confinement. Admitting that your brother was distracted, was the place you carried him to, or the hands into which you committed him, or the treatment which he met with from them before he was got aboard the barge, at all proper for his case, or fit for a brother to think of?

You called Mrs. Gethins to prove, that Mahony was to have had 5*l.* a month for looking after him at her house. She remembers nothing of Mahony. But, had that been proved, could it at all avail you to say, that for three weeks before the murder was committed, you intended to have confined him under the care of the

* Convicted at the same sessions, for the murder of her bastard child. *Former Edition.*

very man who now appears to have murdered him?

Indeed, you have denied all concern in the murder, or the least knowledge of it. But it hath been proved by three witnesses, that you were in the cock-pit while the murder was committing, and might have heard the noise and struggle in the cabbin, the cry of murder, and your brother's dying groans, as well as they did.

Nay, two of them are positive, that you stood centinel at the door, with a drawn cutlas in your hand, while the fact was committing. One of them says that you delivered a candle into the cabbin, after the cry of murder ceased; and that you, soon after, locked the door, and took the key with you. And it is agreed on all hands, that when the door was opened the next morning, your brother was found there murdered.

Those facts, with other circumstances, are strong and pregnant proofs of your concern in the murder; unless the credit of the witnesses could be impeached, which you have not attempted to do.

It was charged as a circumstance against you, that after the fact was committed, Mahony and White were sent ashore by you. This likewise you denied. But it came out of the mouth of a witness called by yourself, that they went up in the yawl by leave from you.

I have nothing more to do, before I proceed to that which the duty of my place obliges me to, than to exhort you all to make your peace with God by a serious and hearty repentance. His mercy is infinite, and to that we must leave you. For the judgment of this Court is,

'That you, Samuel Goodere, Matthew Ma-'hony, Charles White, and Jane Williams, go 'from hence to the prison from whence you 'came; and from thence you shall be led to 'the place of execution, where you shall se-'verally be hanged by the neck till you shall 'be dead. And the Lord have mercy on your 'souls.'

Then the keeper carried away the prisoners to the gaol, to be reserved till their execution.

On Wednesday the 15th of April following, the prisoners Matthew Mahony, Samuel Goodere, and Charles White, were executed at Bristol, according to the sentence pronounced against them. They all confessed the fact. The body of Mahony is hung in chains near the place where the horrid fact was committed.

At the same Court Charles Bryan, Edward M'Daniel, and William Hammon, were indicted, tried and convicted, for a misdemeanor, in forcibly assisting and seizing sir John in the parish of St. Augustine, in the said city and county, and carrying him on board the barge belonging to the Ruby man of war; and were fined 40*s.* each, to be imprisoned for one year, and then each to give security for his good behaviour for one year more.

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502. The Trial of JAMES ANNESLEY* and JOSEPH REDDING, at the Sessions-House, in the Old-Bailey, before the Right Hon. George Heathcote, esq. Lord Mayor of the City of London, the Hon. Mr. Justice Parker, the Hon. Mr. Justice Wright, Sir John Strange, knt. Recorder, Mr. Serjeant Urlin, and others of his Majesty's Justices of Oyer and Terminer for the City of London, and Justices of Gaol-Delivery of Newgate, holden for the said City, and County of Middlesex, on Thursday, the 15th of July, for the Murder of Thomas Egglestone: 15 GEORGE II. A. D. 1742.

ON Friday, the 4th day of June, 1742, Mr. Annesley (being brought up by the keeper of New Prison), and Joseph Redding (having surrendered himself to take his trial, pursuant to notice given to the prosecutor's solicitor) were, upon application to the Court, in respect of the quality claimed by Mr. Annesley, set within the bar.

Proclamation being made for silence.

Clerk of the Arraigns. James Annesley, hold up your hand. (Which he did.) Joseph Redding, hold up your hand. (Which he did.)

You stand indicted in the county of Middlesex, by the names of James Annesley, late of Staines, in the county of Middlesex, labourer, and Joseph Redding, late of the same, labourer: for that you, not having God before your eyes, but being moved and seduced by the instigation

* This is the person that claimed the title and estate of the earl of Anglesea; and had the Trial in Ireland, relating to part of the latter, in November, 1743, and recovered it. *Former Edition.*

of the devil, on the 1st day of May, in the 15th year of his present majesty's reign, with force and arms at the parish aforesaid, in the county aforesaid, in and upon one Thomas Egglestone, in the peace of God, and our said lord the king, then and there being, feloniously, wilfully, and of your malice aforethought, did make an assault; and that you the said James Annesley, with a certain gun of the value of 5*s.* then and there, being charged with powder and leaden shot, which gun you the said James then and there had, and held in both your hands to and against the said Thomas Egglestone, then and there, feloniously, wilfully, and of your malice aforethought, did discharge and shoot off; you the said James Annesley, then and there, well knowing the said gun to have been charged as aforesaid; and you the said James Annesley, with the leaden shot aforesaid, then and there discharged and shot out of the said gun, by force of the gun-powder as aforesaid, him the said Thomas Egglestone, in and upon the left side of the belly of the said Thomas, then and there, feloniously, wilfully, and of your malice aforethought, did strike and penetrate, giving to him the said Thomas Egglestone then and there, with the said leaden shot so as aforesaid discharged and shot, in and upon the left side of the belly of the said Thomas Egglestone one mortal wound, of the breadth of one inch, and of the depth of four inches, of which said mortal wound the aforesaid Thomas Egglestone then and there instantly died; and that you the said Joseph Redding, at the time of committing of the felony and murder aforesaid, feloniously, wilfully, and of your malice aforethought, was present, aiding, abetting, assisting, comforting, and maintaining the said James Annesley to kill and murder the aforesaid Thomas Egglestone in form aforesaid; and so you the said James Annesley and Joseph Redding, him the aforesaid Thomas Egglestone in manner and form aforesaid, feloniously, wilfully, and of your malice aforethought, did kill and murder, against the peace of our lord the king, his crown and dignity.

How say you, James Annesley, are you Guilty of this felony and murder whereof you stand indicted, or Not Guilty?

Annesley. My lord, I observe that I am indicted by the name of James Annesley, labourer, the lowest addition my enemies could possibly make use of; but though I claim to be earl of Anglesea, and a peer of this realm, I submit to plead Not Guilty to this indictment, and put myself immediately upon my country, conscious of my own innocence, and impatient to be acquitted even of the imputation of a crime so unbecoming the dignity I claim.

Clerk. How say you, Joseph Redding, are you Guilty of this felony and murder whereof you stand indicted, or Not Guilty?

Redding. Not Guilty.

Clerk. Culprit, how will you be tried?

Redding. By God and my country.

Clerk. James Annesley, Hold up your hand. Joseph Redding, hold up your hand; you stand likewise charged, upon the coroner's inquisition, by the names of James Annesley, late of the parish of Staines, in the county of Middlesex, gent. and Joseph Redding, of the parish and county aforesaid, yeoman; for that you on the 1st day of May, in the year aforesaid, God not having before your eyes, but being moved and seduced by the instigation of the devil, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon Thomas Egglestone, in the peace of God, and our said lord the king, then and there being, feloniously, wilfully, and of your malice aforethought, did make an assault; and that you the said James Annesley, a certain gun, of the value of 5*s.* then and there charged with gunpowder and small leaden shot, at and against the aforesaid Thomas Egglestone, feloniously, wilfully, and of your malice aforethought, did discharge and shoot off, and him the said Thomas Egglestone with the said small leaden shot out of the said gun, by force of the said gunpowder discharged as aforesaid, in and upon the left side of the belly of him the said Thomas Egglestone, near the hip-bone, then and there feloniously, wilfully, and of your malice aforethought did strike, giving unto him the said Thomas Egglestone, then and there, with the small shot aforesaid, so as aforesaid discharged, in and upon the said left side of the belly of him the said Thomas Egglestone, near the hip-bone, one mortal wound of the breadth of two inches, and the depth of ten inches, of which said mortal wound he the said Thomas Egglestone then and there instantly died; and for that you the said Joseph Redding, at the time of the felony and murder aforesaid, in form aforesaid done and committed, feloniously, wilfully, and of your malice aforethought, was present, aiding, abetting, assisting, comforting, and maintaining the said James Annesley, him the said Thomas Egglestone, in form aforesaid, to kill and murder; and so you the said James Annesley and Joseph Redding, the said Thomas Egglestone, in manner and form aforesaid, feloniously, wilfully, and of your malice aforethought, did kill and murder, against the peace of our said lord the king, his crown and dignity.

How say you, James Annesley, are you Guilty of this felony and murder, or Not Guilty?—*Annesley.* Not Guilty.

Clerk. Culprit, how will you be tried?

Annesley. By God and my country.

Clerk. How say you, Joseph Redding, are you Guilty of the said felony and murder, or Not Guilty?—*Redding.* Not Guilty.

Clerk. Culprit, how will you be tried?

Redding. By God and my country.

Clerk. James Annesley, hold up your hand. You stand also indicted in the county of Middlesex, by the name of James Annesley, late of the parish of Staines, in the county of Middlesex, labourer; for that you, not regarding the laws and statutes of this realm, nor the pains and penalties therein contained, after the first day of June, 1723, to wit, the first day of May, in the 15th year of the reign of our sovereign

lord George the second, now king of Great Britain, &c. with force and arms at the parish aforesaid, in the county aforesaid, with a certain gun loaded with gunpowder and leaden shot, which you in both your hands, then and there had and held, wilfully, maliciously and feloniously, did shoot at one Thomas Egglestone, against the form of the statute in such case made and provided, and against the peace of our lord the king, his crown and dignity.

How say you, James Annesley, are you Guilty of this felony whereof you stand indicted, or Not Guilty?—*Annesley.* Not Guilty.

Clerk. Culprit, how will you be tried?

Annesley. By God and my country.

Clerk. God send you a good deliverance.

The defendants being thus arraigned, the Court thought the day too far spent to proceed to a trial of so much expectation, and therefore ordered it to come on the next morning; but the counsel for the prosecutor alleging they could not attend the next day, and desiring to put off the trial to this present sessions, the Court were pleased to indulge them, upon their consenting that the defendants should be admitted to bail.

Whereupon Mr. Annesley was ordered to give four sureties in 250*l.* each, and Joseph Redding four in 50*l.* each; and this being done in Court, they were both immediately set at liberty.

On Wednesday, the 14th day of July, 1742, the prosecutor's counsel moved, that the trial might come on the next day, which, by consent of the defendant's solicitor, was ordered accordingly; notwithstanding which, the next day, when the two defendants had surrendered themselves, and were ready with their witnesses, the prosecutor moved to put the trial off for another day; but not alleging any sufficient reason for the delay, the Court were pleased to direct the trial to go on.

Accordingly the defendants were again arraigned, and pleaded as at the last sessions, and there being no challenges to the jury,

The following gentlemen were impannelled and sworn:

JURY.

Walter Lee,	Robert Harrop,
John Deschamps,	Wm. Duck,
John Reynolds,	Wm. Boucher,
Wm. Lewis,	Edmund Stowell,
Francis Rawlins,	Tho. Whitehead,
John Sandwich,	Francis Tredgold.

Crier. If any one can inform my lords the king's justices, &c.

Clerk. James Annesley, hold up your hand.

Joseph Redding, hold up your hand.

You of the jury, look upon the prisoners, and hearken to their charge.

They stand indicted by the names of James Annesley, late of Staines, in the county of Middlesex, labourer, and Joseph Redding of the same, labourer; for that they, &c. (as in the indictments), and upon these indictments they have been arraigned, and thereunto pleaded Not Guilty, and for their trial have put themselves upon their country, which country you are: your charge is to enquire, &c.

Mr. *Brown.* My lord, and you gentlemen of the jury, this is an indictment for murder. The indictment sets forth that James Annesley and Joseph Redding did make an assault with a gun on the body of one Thomas Egglestone; and that the prisoner Annesley did discharge the said gun against the left side of the said Thomas Egglestone, and did make a wound on the left side of the belly of the said Thomas Egglestone, of which he instantly died; and that the said Joseph Redding was aiding and assisting the said James Annesley to murder the said Thomas Egglestone. Gentlemen, if we prove our charge, I hope you will find the prisoners Guilty.

Serj. *Gapper.* Gentlemen, the prisoners stand indicted for the murder of Thomas Egglestone; James Annesley was the person who killed the said Thomas Egglestone, and Joseph Redding he was aiding, abetting and assisting in the murder, and so they are both guilty of felony and murder. And, gentlemen, there is an act of parliament made in the 9th year of his late majesty king George 1, that if any person does wilfully shoot at another, it is felony without benefit of clergy. Gentlemen, the case is thus: On Saturday the first of May, Thomas Egglestone, the deceased, and his son were going to fish, at a place called the Moor, near Staines; they had a casting-net, and there was a string which belongs to the net, and this string was about the deceased's right arm: they were fishing in a meadow belonging to one Sylvester; and as they were fishing towards the north of the enclosure, the deceased, seeing the prisoners, stopped, and went back again; and as they were going back again, instantly came up the prisoner, Joseph Redding, and seized the deceased by the shoulder, and demanded the net; but the deceased cast the net into the river, which was on his right hand; then came up the other prisoner, Annesley, with a gun in his hand, and swore at the deceased, and said, Damn you, surrender, or you are a dead man: he pointed the gun immediately towards his side, before a word of reply, and shot him; the force of the powder drove the shot and some of the deceased's coat into his body; he clapped his hand to his side, and said, You rogue, what have you done? dropped down, and died immediately: then John Egglestone, the son, took a knife out of his pocket to cut the string of the net; upon which the prisoner Annesley turned the butt end of the gun, and said to him, You rogue, I will knock your head off; to avoid which young Egglestone jumped into the water, breast-high, and cut the string of the net, and dragged it to the other side of the water, and cried out his father was murdered. There were three persons, Fisher, Bettesworth and Bowles, who could see what was done;

they were on the other side of the river, about 160 yards from the place where the accident happened; they heard a gun fired, and the young man cry out that his father was killed; and when they came to the river-side, he had dragged the net out of the river; upon this they crossed over, and found the man dead, or so bad that he could not live, and thereupon directed the son to go and fetch Mr. Cole, a surgeon at Staines: he went accordingly to Mr. Cole, and desired him to come along with him, for his father was shot, and he believed he was dead. Why, says Mr. Cole, if he is dead, it does not signify my coming; I can do him no good: so then the young man went to Mr. Russel, a constable at Staines. But I should tell you, gentlemen, that as soon as the prisoners saw these three persons, Fisher, Bettesworth and Bowles, coming towards the river, they ran away. Afterwards Russel, the constable, and some other persons coming up, they thought proper to pursue the murderers: accordingly they went to a farm-house, where Annesley and Redding used sometimes to lodge, and there they found Annesley, and apprehended him, and sent him to the round-house at Staines: Redding could never be found; but he has surrendered himself since, in order to take his trial. The prisoner Annesley was carried before a justice of the peace, I think sir Thomas Reynell; he was carried to Hounslow, and from thence to Laleham; what that examination was, I cannot tell. They made application to this young man to be favourable, and not to carry on the prosecution: says he, Gentlemen, I will not sell my father's blood. This, gentlemen, is the nature of the case; and if we prove our charge, that they have been guilty of murder, gentlemen, you will find them Guilty.

John Egglestone sworn.

Serj. *Gapper*. Give an account of what you know of this matter, and speak the truth.

J. Egglestone. An't please you, my lord, on Saturday the first of May——

Serj. *Gapper*. Speak slow and deliberately, that the Court and the jury may hear you.

J. Egglestone. An't please you, my lord, on Saturday the first of May last, I and my father were going up Staines river, to catch a dish of fish in Staines moor, in the parish of Staines, with a casting-net; we fished all the way up, till we came to this ground.

Serj. *Gapper*. In whose possession was the ground?

J. Egglestone. It was one Mr. Samuel Sylvester's meadow; we were turning back again, an't please you, my lord, in order to go home; my father, he carried the net upon his arm, and the string was fastened to his arm.

Serj. *Gapper*. Well, as you were coming back from fishing, what happened then?

J. Egglestone. By that time we had got half-way in the meadow, we saw Joseph Redding and Mr. Annesley running, and Joseph Redding out-run Mr. Annesley, and came up to my father first.

Serj. *Gapper*. When they came up, what was the first thing they did?

J. Egglestone. Redding took my father by the collar, and demanded the net, and he refused to deliver the net.

Court. Did you see him take him by the collar?—*J. Egglestone*. Yes, my lord.

Serj. *Gapper*. What became of the net afterwards?

J. Egglestone. My father threw it into the river.

Serj. *Gapper*. How far were you from the river then?

J. Egglestone. I was about two yards from the river. After the net was thrown into the river, Annesley came up with his gun, and swore, God damn your blood, deliver your net, or you are a dead man; and he fired off before he received any answer from my father.

Serj. *Gapper*. In what manner did Annesley hold his gun?

J. Egglestone. In this manner. [Pointing the gun straight forward, holding it about breast-high, stooping a little.]

Serj. *Gapper*. How near was the gun to your father when he fired it?

J. Egglestone. It was close to my father's side; he put the gun between Redding and my father, and shot directly into his left side, here, (holding his hand to his hip) he had a plate button there, which was bruised to pieces; then my father said, You rogue, what have you done? I am a dead man; and dropped immediately.

Serj. *Gapper*. What did Annesley say before he fired?

J. Egglestone. He swore, if he did not deliver the net, he was a dead man; and then fired immediately.

Serj. *Gapper*. What did you do after you heard your father say he was a dead man?

J. Egglestone. I took a knife out of my pocket to cut the string of the net: and Annesley said, You rogue, I will knock out your brains too; and held up the butt end of his gun; upon that I jumped into the stream, and cut the string, and drew the net over to the other side of the river: then says Annesley, The rogue has got the net, let us go on the other side after him.

Serj. *Gapper*. Who did you see when you came on the other side of the river?

J. Egglestone. I saw John Bettesworth, John Fisher, and John Bowles; and when Annesley and Redding saw these three men, they ran away directly.

Serj. *Gapper*. How near were Bettesworth, Fisher and Bowles to you, before Annesley and Redding ran away.

J. Egglestone. As soon as I got on the other side of the river, they saw these three men coming, and then they ran away; and Bettesworth, Fisher, and Bowles, came through the river to the side where my father lay dead; they came from one side to the other.

Serj. *Gapper*. What did you do then?

J. Egglestone. They bid me get a surgeon;

so I went to one Charles Cole, a surgeon at Staines.

Serj. *Gapper.* When you came to Staines, did you meet with Cole?

J. Egglestone. Yes; and I told him my father was shot, and I believed he was dead, or dying; but he never came near my father; then I went to Russel the constable, and he took some townsmen with him, and went to old Mr. Redding's house at Yeoveney farm, to search for the man that killed my father; we beset the house all round, and found James Annesley hid up in a corner.

Serj. *Gapper.* How long were you there before he was found?

J. Egglestone. I was there about a quarter of an hour, or a little more.

Serj. *Gapper.* Were you present then?

J. Egglestone. Yes, I was there all the time: then, an't please you, my lord, they pulled him down.

Serj. *Gapper.* Where was he hid?

J. Egglestone. He was hid in a place which is five or six foot from the ground, where they put old iron, and any sort of lumber: it is a boarded place or room over the wash-house; a place where the woman makes medicines for sore eyes.

Court. Was there a chimney in it?

J. Egglestone. I do not know.

Serj. *Gapper.* Was he standing up or lying down; or how was he, when he was found?

J. Egglestone. I do not know; for I did not see him till he was pulled down: he was carried in a chair into the yard, and sat there about a quarter of an hour, and then was put into the cart that brought up my father, and was carried to the round-house at Staines.

Serj. *Gapper.* This is all you know; is it not?

J. Egglestone. An't please you, my lord, I can tell you a great deal more.

Serj. *Gapper.* Who pulled him down?

J. Egglestone. I do not know.

Serj. *Gapper.* Was this wound the occasion of your father's death?

J. Egglestone. Yes, it was.

Serj. *Gapper.* Go on; you say you have other things to say.

J. Egglestone. He lay in the round-house all night; the next day Annesley, the prisoner, and I went in a cart to a justice at Hounslow; and there was one Mac Kercher there, who said to me——

Court. What Mac Kercher said is no evidence against the prisoners.

Serj. *Gapper.* We will let this alone a little.

Court. Can you prove he was any ways employed as an agent by the prisoner?

Serj. *Gapper.* I believe we can.

Foreman of the Jury. My lord, please to ask him, whether there was no quarrel, hustle, or struggling, between Annesley, Redding, and Egglestone, before the gun went off.

J. Egglestone. There was no quarrel or jostling; my father never gave him an ill word.

Court. Did your father make no resistance?

J. Egglestone. No, no resistance at all.

Q. Was there no jostling, nor any thing else passed?

J. Egglestone. Yes: Redding took my father by the collar, and Annesley came up in the mean time.

Court. What happened between your father and Redding before Annesley came up?

J. Egglestone. He demanded his net.

Court. I thought you said there was some jostling?

J. Egglestone. No other jostling than laying his hand upon my father's collar; but my father never laid his hand upon him.

Mr. *Brown.* How near were you when Redding laid his hand upon your father?

J. Egglestone. About a yard and an half off.

Mr. *Brown.* You say he shot off the gun; I ask you what you mean by shooting off the gun?

J. Egglestone. Why he fired the gun to shoot my father.

Mr. *Brown.* What do you mean by shooting off the gun?

J. Egglestone. He came up directly, as if he was going to shoot a dog.

Mr. *Brown.* Did you see him draw the trigger of the gun?

J. Egglestone. No, I did not.

Mr. *Brown.* Was the gun cocked before he came up?—*J. Egglestone.* I do not know.

Q. Did not you say that it was?

J. Egglestone. I do not know that I did.

Mr. *Brown.* Pray, was any body present at the time?

J. Egglestone. There was nobody near but Bettesworth, Fisher, and Bowles; nor nobody came up.

Mr. *Brown.* Did the prisoner offer you any money?

J. Egglestone. Yes, he offered to settle 50*l.* a-year on me.

Mr. *Brown.* Where was this?

J. Egglestone. When I was at Laleham, the next day after my father's death.

Serj. *Gapper.* How came you there?

J. Egglestone. We went to a justice's at Brentford; but he not being at home, we put up at the Red Lion there; and while we were there, sir Thomas Reynell came in, and ordered us to go to Laleham; accordingly we went to one Mr. Lee's, into a little room, and there was Jack Lane, Mrs. Chester, and the prisoner: young John Lane offered me 100*l.* a-year; but the prisoner said he could not settle 100*l.* a-year upon me, for he had more to do for; but he said he would settle 50*l.* a-year on me. This was said in the presence of the prisoner.

Mr. *Brown.* Did he mention what he would give you 50*l.* a-year for?

J. Egglestone. Because I should not come in as an evidence against him.

Serj. *Gapper.* What is the reason you did not comply with this offer?

J. Egglestone. I told them, I would not sell my father's blood at any rate. [The counsel for the prosecutor having done with this witness, he was cross-examined as follows.]

Q. Pray, in what manner did Mr. Annesley, Redding, and your father stand, when this accident happened?

J. Egglestone. Redding stood between Annesley and my father, and had him hold by the collar.

Q. Do you know William Duffel, and had not you some talk with him about the manner of your father's death?

J. Egglestone. No, I never saw him, nor had any talk with him.

Q. Had you any conversation with one John Dalton at Laleham, where you say you were offered that money?

J. Egglestone. I came out of the room to ask him, whether I should take the money or not; for he said I had better take the money, and not hang the man.

Q. Then you said nothing at that time about the manner in which your father was killed?

J. Egglestone. No, Sir.

Q. You say you stood by, and saw Mr. Annesley point the gun to your father: did you see him cock the gun?

J. Egglestone. I did not see him cock it; the gun was cocked when he came up to my father.

Q. Do you know one Giffard?

J. Egglestone. Yes.

Q. When did you come to be first acquainted with him; before or since your father's death?

J. Egglestone. After my father was killed.

Q. Did not you meet with him at Staines?

J. Egglestone. Yes, I believe I did.

Q. Did you ever see him there before?

J. Egglestone. No, never.

Q. Did you give him any orders or authority to prosecute upon the account of your father's death?—*J. Egglestone.* No.

Q. Do you know one Williams?

J. Egglestone. Yes.

Q. Where does he live?

J. Egglestone. He keeps the White Horse in Piccadilly.

Q. How did you come acquainted with him?

J. Egglestone. He came to Staines, and sent for me.

Q. What did he want with you, when he sent for you?

J. Egglestone. I don't know; I went to live with him as a servant.

Q. What business were you of, when your father died?

J. Egglestone. I worked with my father as a carpenter.

Q. If you were brought up a carpenter, how came Williams to find you out for a servant?

J. Egglestone. I can't tell.

Q. How long have you lived with him?

J. Egglestone. Ever since my father's death, and I live with him now.

Q. Have you not seen my lord Anglesea at Williams's?——

[Here the Court interposed, and said the question was improper.]

Q. You say you are Williams's servant; have you not dined with him at his table?

J. Egglestone. Yes.

Q. Do you dine at his table now?

J. Egglestone. No, I am his servant.

Q. Do you know the reason why you were sent from dining at his table to draw beer?

J. Egglestone. No, Sir.

Q. Do you know one Paul Keating?

J. Egglestone. Yes.

Q. Do you know any thing of a note he drew for you at the Oxford arms?

J. Egglestone. He did draw something of a note, but I tore it.

Q. What made you tear the note?

J. Egglestone. Because I did not like his proceedings.

Q. What were the proceedings that you did not like?

J. Egglestone. I do not know; I did not understand them.

Q. Why, did not you read the note before you tore it?—*J. Egglestone.* No, I did not.

Q. How came the note to be wrote? Did he say nothing to you about writing of a note before he wrote it?

J. Egglestone. Nothing at all; but he desired me to copy it.

Q. What did he say to you when he desired you to copy the note?

J. Egglestone. Nothing; it lay upon the table, and I tore it.

Q. What did you tear it for, if you had not read it?

J. Egglestone. Because it was about things that I did not know what they were.

Q. Did not he desire you to copy the note?

J. Egglestone. Yes.

Q. What did he say then?

J. Egglestone. I cannot tell what he said.

Q. Were you ever at New-prison to see Mr. Annesley?—*J. Egglestone.* Yes.

Q. What did you go for?

J. Egglestone. I cannot tell.

Q. I ask you what you went for?

J. Egglestone. I went for my own fancy.

Q. Did you not send up word to him, you were sure he would be glad to see you?

J. Egglestone. I believe I might.

Q. What was the reason for which you thought Mr. Annesley would be glad to see you?

J. Egglestone. I cannot tell; I was willing to see him.

Q. Did you never, in speaking of your father's death, say that it was done accidentally?

J. Egglestone. I do not know that I did.

Q. Did you never say to Keating, that you were to have 200*l.* or had a promise, or that you were to have security, and from whom?

J. Egglestone. No, Sir, I never did.

Q. Did you give the same account, with respect to the holding of the gun, as you do now, before the coroner's inquest, and before the justice?—*J. Egglestone.* Yes, I am sure I did.

Q. Did not you give two accounts before the coroner's inquest; part at one time, and went out, and the remainder when you came in again?—*J. Egglestone.* No.

Q. Did you never say that the butt end of the gun was up to his shoulder, and the muzzle pointed downward?

J. Egglestone. No, I did not.

Q. Did you never say any thing to any body of the manner of Mr. Annesley's drawing one of his feet back?—*J. Egglestone.* No, never.

Q. Can you tell which of his legs he drew back?

J. Egglestone. No, I cannot tell which he drew back.

Q. Did you never say which?

J. Egglestone. No.

Q. To nobody?

J. Egglestone. No, never.

Serj. *Gapper.* You said you went to the Oxford Arms with Keating, and there was something talked of relating to a note; was there any offer made to you there?

J. Egglestone. No, Sir.

Serj. *Gapper.* You talked of a paper that was tore; do you know the contents of it?

J. Egglestone. No, Sir, I do not.

John Betteworth sworn.

Serj. *Gapper.* Tell us what you know of this matter, and where you were when you heard a gun fired on the 1st of May?

Betteworth. Thomas Egglestone and his son were a-fishing; I was 169 yards some odd inches from the river, as near as I could measure.

Q. What ground was it in?

Betteworth. They were in the ground called Mr. Sylvester's rents.

Serj. *Gapper.* Are there many hedges on the side of the river where the deceased was?

Betteworth. There were a pretty many willows, but any body might see through them.

Serj. *Gapper.* What did you see?

Betteworth. I saw Joseph Redding and Mr. Annesley come over the hedge.

Serj. *Gapper.* What hedge?

Betteworth. The hedge that parted Mr. Sylvester's ground from Mr. Redding's ground; I do not know whether one of them did not come over the stile; then they both ran after Egglestone and his son; young Redding came up first.

Serj. *Gapper.* Did he lay hold of Egglestone?

Betteworth. Whether he laid his hand upon his collar, or what, I cannot tell; but the boy ran away.

Q. Who was it laid hold of the shoulder or collar of the deceased?

Betteworth. Redding; I saw his hand upon the shoulder or collar of the deceased, but I cannot say positively whether he had him by the shoulder or collar.

Serj. *Gapper.* How long was it after that, that Annesley came up?

Betteworth. The boy was gone but a little way from his father, and when Mr. Annesley came up to his father, he came back again.

Serj. *Gapper.* How near was he to his father when this accident happened?

Betteworth. I cannot say how near he was to his father, I believe two or three yards off. Annesley and Redding came up almost together, but Annesley came up after him, the gun went off after he came up: I saw the smoke and heard the fire.

Serj. *Gapper.* As you were 169 yards off, how came you to come up?

Betteworth. The boy called to us, and said his father was killed.

Serj. *Gapper.* Who came along with you?

Betteworth. John Bowles, and John Fisher. We came to the river just against the place where Mr. Egglestone lay, and we could not get over there without being up thus high; (putting his hand to his middle) but we went over in a shallower place a little farther.

Serj. *Gapper.* Were Annesley and Redding there when you came over?

Betteworth. No, they ran away before that.

Serj. *Gapper.* Was Egglestone dead or alive when you came up?

Betteworth. He was not dead, but he could not speak. I desired the boy to go for a surgeon, and he went away directly.

Serj. *Gapper.* Who came first to the river?

Betteworth. I do not know.

Serj. *Gapper.* Did you all three come away together?

Betteworth. Yes, I was coming rather before the boy cried out, for I saw the man drop, I could not see the boy for a good while, for he was in the river, and he cut the net from his father's arm, as he says, I did not see that; but I saw the boy come cross the river, and when I came up, I saw that the net was brought cross the river.

Serj. *Gapper.* How did Egglestone lie?

Betteworth. He lay upon his face; I lifted up his head, he groaned pretty much, but he could not speak: I sent the boy for a surgeon, but no surgeon came.

Serj. *Gapper.* Were you at the apprehending of the prisoner?—*Betteworth.* Yes, I was.

Serj. *Gapper.* What place was it that the prisoner was in when he was taken?

Betteworth. It was a sort of a wash-house, a back-house: he was in a place where they throw up hoops and iron, and any sort of old lumber; I saw him lie upon his face.

Serj. *Gapper.* Who took him down?

Betteworth. I do not know.

Serj. *Gapper.* What did they do with him then?

Betteworth. They carried him to the Roundhouse at Staines.

Court. When you came to the place where you say he had hid himself, did he come down of his own accord?

Betteworth. Yes, my lord.

Mr. *Brown.* When you heard the gun go off, whose hand was it in?

Betteworth. Mr. Annesley's.

Mr. *Brown.* Do you know the position of the gun when it went off?

Betteworth. No, I do not.

Mr. *Brown.* Did you observe any struggle

between Annesley, Redding, and the deceased?

Bettesworth. No other than their striving to take the net away.

Q. Do you remember any thing that passed in the Round-house? Did the prisoner say any thing there?

Bettesworth. Yes, the prisoner said he desired to be killed out of the way, for being accessary to such an innocent man's death.

Mr. *Brown.* What did he tell you besides?

Bettesworth. He said he would have gone home for more men, but Joseph Redding would not let him.

Mr. *Brown.* What did he want more men for?—*Bettesworth.* To take away the net.

Q. What answer did he say Redding made him to that?

Bettesworth. I believe it was, that he said we can do it well enough.

The prosecutor's counsel having done with this witness, he was cross-examined as follows.

Q. Did you see Mr. Annesley and Redding before they came up to the deceased?

Bettesworth. Yes, I did.

Q. Did you observe Mr. Annesley making any use of his gun before he came up?

Bettesworth. I saw him offer to shoot at a crow.

Court. How long was that before this accident happened?

Bettesworth. I believe about half an hour.

Q. Was the crow flying or sitting?

Bettesworth. Flying.

Q. Did you observe whether he did shoot at the crow?—*Bettesworth.* Not then, he did not.

Q. How far were you off then?

Bettesworth. About as far, I think, as when I saw the man killed.

Q. What was the position of the gun when you saw him come up running?

Bettesworth. It was in this manner, [holds it as if the gun was with the muzzle hanging a little slanting towards the ground.]

Mr. *Brown.* You say you saw Annesley and Redding in the other ground before they came into that ground which belongs to Sylvester—what were they doing there; were they standing, sitting, or what?

Bettesworth. They were sitting or lying under the hedge, I cannot tell which.

Q. For what purpose do you imagine they were sitting or lying there?

Bettesworth. I cannot say that, I may imagine they came to take the net away, I cannot imagine any thing else.

Q. Did you see the boy go into the river?

Bettesworth. Yes, and it was just after his father was shot.

John Fisher sworn.

Mr. *Brown.* Do you know the prisoners at the bar?—*Fisher.* I know Mr. Redding.

Q. Do you believe this to be the person who was along with Mr. Redding at the time that Mr. Egglestone was killed?—Look at Mr. Annesley's face, and see whether that is the man.

Fisher. I see Mr. Annesley, but I cannot say that he is the man; I saw two men lie under the hedge a considerable time, and saw a piece in one of their hands.

Mr. *Brown.* In which ground were they?

Fisher. I believe in Mr. Redding's ground.

Mr. *Brown.* In what ground was Egglestone?

Fisher. He was in Sylvester's ground. Bettesworth called to me, and said, There is Redding running after Egglestone, and Redding laid hold of Egglestone, the deceased, and then came up the other with a piece; I cannot say whether he touched him or no.

Court. In what manner did Redding lay hold of him?

Fisher. I cannot say, I was at such a distance; but I thought he laid hold of his shoulder.

Mr. *Brown.* Did Egglestone make away from him?

Fisher. Yes; for he knew he was out of the bounds that he ought to have been fishing in; and there was a sort of a struggle to take away the net; and I thought that Redding and the other person did both snatch at the net, and then the gun went off.

Mr. *Brown.* In whose hand was the gun?

Fisher. Not in Redding's hand, but in the hand of the other person.

Mr. *Brown.* Were not you attentive at that time, to see in what manner he carried the gun?

Fisher. It may be this way, or this way, I cannot say whether he had the gun against his shoulder or no.

Mr. *Brown.* How near was he to the deceased?

Fisher. Very nigh, I believe not above the length of a gun.

Serj. *Gapper.* Did you see John Egglestone by, when you first came up?

Fisher. He was near the river.

Mr. *Brown.* Did you hear the boy cry out?

Fisher. Yes, he said his father was killed; he saw me, and called me by my name, and said, My father is killed, and I came directly cross the river.

Mr. *Brown.* What then became of Annesley and the other?

Fisher. They ran away: we hallooed after them, but I did not think the man was shot, though I saw the smoke and fire of the gun.

Q. Who went over the river first?

Fisher. We were all three together almost. I cannot tell who was over first, but I believe I was.

Q. What was said to the boy then?

Fisher. Nothing; only to go and get a surgeon.

Q. Who bid him go?

Fisher. Somebody did, I did not. I believe it was Bettesworth, and the boy run away directly.

Q. Was there any surgeon brought there?

Fisher. No.

Q. Who came there afterwards?

Fisher. Mr. Sylvester; he saw the deceased lying upon the ground, but he was not there when the murder was committed.

Q. Were you in the house when he was taken?—*Fisher.* No.

Q. Were you with him before the justice of peace?

Fisher. I was examined, but I was not present when the other witnesses were examined.

Mr. *Brown.* What distance was there between you and the deceased when the gun went off?

Fisher. One hundred and sixty-nine yards.

Q. Do you include the breadth of the river?

Fisher. Yes, I do.

Cross-examined.

Q. You say you think that both Redding and Annesley snatched at the net?

Fisher. I think they did.

Q. Do you think it was possible for you to hear what passed between them?

Fisher. I could not hear one word.

Q. I would ask you, whether young Egglestone, before he was examined by sir Thomas Reynell, did not say to you he believed the gun did go off by accident?

Fisher. He said he believed it was not done wilfully. I was called into a room with Chester and Lane: he had money offered him, in my hearing, by John Lane; he offered him 100*l.* a year.—Mr. Annesley said, He could not give him 100*l.* but he would give him 50*l.* for he had others to do for: then, said the boy, I do not care to sell my father's blood; but I will do as my friends direct me; I believe he was in liquor.

Q. What did you say to him?

Fisher. I said your father is dead; the money will do you good; do not swear any thing against him, if you think it was done accidentally; he said, The money will do me good if I had it; and then said, I believe the gentleman did not do it wilfully.

Q. Had you not some conversation together after his examination before the justice?

Fisher. I asked him, after he was examined, what he had done; and how he could swear against him, when he had said so and so to me; said he, I did not know what I said.

Q. That he did not know what he said, to whom?

Fisher. I asked him, how he could swear against him when he knew what he said to me; said he, I do not know any thing of the matter; he did not remember what he had said to me.

Q. Do you know Mr. Williams the clergyman?—*Fisher.* Yes.

Q. Did not you make a declaration of this to him?

Fisher. Yes; and I told him what I now say, I mean what passed between us at the time he went before the justice: I said to Mr. Williams, that Egglestone told me he really believed that the gentleman did not do it wilfully.

Q. Repeat all that you said to Mr. Williams.

Fisher. That the boy said to me, Mr. Annesley had offered him 50*l.* a-year, that the money would do him good if he had it, and that he believed the gentleman did not do it wilfully.

Mr. *Brown.* Did not he say it was wilfully done, as you were going along to the justice's?

Fisher. All the way he went, he said he believed he did it wilfully, but after the prisoner had been talking with him, he said he believed it was not done wilfully.

Samuel Sylvester sworn.

Serj. *Gapper.* Did you see the deceased after he was dead?

Sylvester. He lay dead on the ground that I rent near the river side, I think about the middle of the ground.

Serj. *Gapper.* Do you know how he came by his death?

Sylvester. I was going up to look after my ground, to see if there was any cattle in it, or any thing amiss.—I called at the Cock, and drank two pints of beer, and when I came within two hundred yards, or thereabouts, of my ground, I met three men, who told me old Egglestone was killed; I did not believe it; they then pointed to my ground, and said, There he lies; I saw several people there, upon which I thought there was something more than common, and so I went up, and saw Tom Egglestone lie dead in my ground.

Serj. *Gapper.* Do you know where the prisoner Annesley was taken?

Sylvester. He was taken in a back building belonging to Mr. Redding's house; I was searching the rooms myself, and heard the people say, Here he is; and I saw Mr. Annesley, who is the gentleman there, come down out of the place.

Mr. *Brown.* What sort of a place was it he was found in?

Sylvester. It was a place to put odd things in: it was not boarded up to the top.

Q. Did he come down voluntarily, or was he pulled down?

Sylvester. I do not know whether they pulled him down, or helped him down.

Mr. *Brown.* Did you hear him say any thing at that time?

Sylvester. I did not hear him say any thing; I believe he was in a fit, for he trembled and fell down behind the door.

Mr. *Brown.* Did you see him at the Roundhouse?

Sylvester. No, I did not, for I was gone to search after the other prisoner, Redding.

Serj. *Gapper.* Were you at Lalcham before the justice?—*Sylvester.* Yes, I was.

Serj. *Gapper.* Had not the boy been drinking, and did he not sleep before he went in to the justice?

Sylvester. I believe he did, for about three

quarters of an hour; I do believe he had been in liquor, but he was refreshed afterwards.

Upon the cross-examination.

Q. Have you not received money to pay the witnesses for attending here on this cause the last sessions, and from whom?

Sylvester. Yes, I paid some of them, I think it was by Mr. Giffard's direction, who subpœnaed me up; I asked him who was to pay me; he said, I should be paid half a crown a day for my time, which was as much as he thought I could earn at my business.

Q. What business is this Giffard* of?

Sylvester. He is a stranger to me.

Q. Do you know whom he said he was employed by?

Sylvester. He said he was concerned for the king.

Q. Did you send notice of this accident to any body as soon as the man was killed?

Sylvester. No.

Q. Do you know Mr. Williams?

Sylvester. Yes, I know him, but I never was in his company upon this occasion.

Q. What business does young Egglestone follow?

Sylvester. I cannot say what business he follows, I believe he draws beer now.

Q. How long have you known him?

Sylvester. I have known him five or six years.

Q. What business was he bred to?

Sylvester. Sometimes he would be out at service, and sometimes he would be with his father in the business of a carpenter.

Q. Where does he draw beer now?

Sylvester. I think it is at Mr. Williams's, at the White-Horse, in Piccadilly. But this is not the Williams I was speaking of before.

Q. Have you never been in company with this gentleman, and had some conversation with him about this affair?

Sylvester. I have been at the gentleman's house in Piccadilly since this business has been in hand, but never before; and I have been in company with the gentleman there, but never had any talk with him about this trial.

Q. Was not this Williams down before the justice?—*Sylvester.* I do not know.

Q. Did you ever see him at Staines?

Sylvester. I saw him in the town of Staines, I believe, about a week after the accident happened.

Q. Have you seen the boy, Egglestone, there since?

Sylvester. I never saw him at Staines afterwards.

Q. What, he has lived with Williams ever since?—*Sylvester.* I cannot tell.

Q. I ask you whether you have not seen him at Williams's house every time you have been there?—*Sylvester.* Yes, I believe I did.

Serj. *Gapper* then said, they would rest it here; and having observed upon the evidence, concluded with saying, he hoped it had fully made out the charge against the prisoners; that the ground where the man was killed being the property of Sylvester, the prisoners were trespassers by coming into it, and therefore answerable for the consequences. That as to Mr. Annesley, there was not only implied, but express malice proved upon him, for that after he had killed the father, he was for beating out the son's brains, only because they would not let him and the other prisoner run away with their net.

Court. Mr. Annesley, you are indicted in a very unhappy case, what have you to say for yourself?

Annesley. My lord, I am very unable to make a proper defence, having by the cruelty of those, whose duty it was to protect me, been deprived of the advantages of an education I was entitled to by my birth.

All I know of the melancholy accident in question is, that on the unfortunate day mentioned in the indictment, I went out with my gun, in company with my innocent fellow-prisoner, to shoot sparrows, as I usually did. As we were going along, Mr. Redding, who is game-keeper to the lord of the manor, saw some people a-poaching within the royalty, upon which he proposed to go and seize their nets. I followed him, the deceased threw the net into the river, and the boy jumped in to pull it across, to prevent which I stooped to lay hold of one of the ropes that trailed upon the ground, and at the same instant, the fatal instrument I had in my other hand, hanging by my side, went off without my knowledge, and to my great grief as well as surprize. My behaviour, immediately after the accident, was, I hope, inconsistent with a temper that could murder a man I had never seen before, without one word of provocation.

Whatever may be the determination of your lordship and the jury, great as the misfortunes of my life have been, I shall always consider this unfortunate accident as the greatest of them all.

Court. Mr. Redding, what have you to say for yourself?

Redding. My lord, I am game-keeper to sir John Dolben, lord of the manor of Yeoveney. On the first of May last, in the afternoon, Mr. Annesley and I went out a-walking; we saw a crow, and Mr. Annesley made an offer to shoot at her, but I called to him not to fire, for that she was too far off: Soon after I saw Egglestone and his son fishing with a casting-net, upon which I said to Mr. Annesley, I would go and endeavour to take their net away, as it was my duty to do; accordingly I went up to the deceased, and demanded the net, which he refused to deliver to me, and threw it into the river, one end of the string being about his arm; I then laid hold of the string, and pulled, whilst the boy endeavoured to draw it cross the river, and presently I heard the gun go off (my back being towards Mr. Annesley), and saw the man fall down.—I said to Mr. Annesley, I hoped he

* He makes a considerable figure in the next trial but one. *Former Edit.*

had not shot the man; he said No, but turning up the flap of his coat, we saw he was shot; upon which Mr. Annesley cried out, What shall I do! and expressed so much concern, that I am sure it was quite an accidental thing.

Mr. *Hume Campbell*, of counsel for the prisoners, said, that although he knew by the course of the court at the Old-Bailey, he was not at liberty to observe upon the prosecutor's evidence, yet he apprehended, that for the ease of the Court, he might just open the nature of the defence, without making any observations upon it.

That the defence which the prisoners insisted upon was, that the gun went off merely by accident; that Redding was game-keeper to sir John Dolben, lord of the manor of Yeoveney, and had a proper and legal deputation for seizing of nets and other engines, for destroying of game. That the deceased and his son were poaching with a casting-net within the manour; that Mr. Annesley went in aid of the game-keeper; and therefore the prisoners being about a lawful act, were not so much as trespassers, and the death that was the accidental consequence of that act, would, in point of law, make Mr. Annesley guilty only of chance-medley.

Mr. *Thomas Staples* sworn.

Q. Do you know the manor of Yeoveney?

Staples. Yes: I am deputy to my father, who is steward to sir John Dolben, as lord of the manor under the dean and chapter of Westminster.

Serj. *Gapper.* How do you know this to be a manor.

Staples. I have the grant of the manor from the dean and chapter in my pocket.

Serj. *Gapper.* Are there any copy-holders?

Staples. Yes, I have admitted some copy-holders; I know it to be a manor, because I have held one court there for my father, and have seen him hold several.

Serj. *Gapper.* Is there any mansion-house belonging to this manor?

Staples. There is a mansion-house belonging to it, which I think is the house that Mr. Redding lives in.

Serj. *Gapper.* What court was it you held there?—*Staples.* A court baron.

Mr. *Thomas Burlingson* sworn.

Q. Mr. Burlingson, look upon this deputation. Are you a subscribing witness to it? If you are, did you see this executed, and by whom?

Burlingson. Yes, Sir, that is my name; I saw sir John Dolben execute it; this is his hand and seal.

Court. Was it executed at the time it bears date?

Burlingson. Yes; I believe on the very day.

Mr. *James Edmonds* sworn.

Q. Mr. Edmonds, look upon that endorsement, do you know whose hand that is?

Edmonds. My lord, I went to the clerk of the peace for the county of Middlesex, and heard him acknowledge this to be his hand, and that it was entered according to the act of parliament.

Serj. *Gapper.* Did you see any entry of it?

Edmonds. He said it was entered, and acknowledged this to be his hand, and told me that was sufficient.

Q. My lord, we pray the deputation may be read; we will send for the clerk of the peace to bring the book itself where it is entered.

Clerk reads.]

"Know all men by these presents, that I sir John Dolben, of Thingdon al. Findon in the county of Northampton, baronet and doctor of divinity, lord of the manor of Yeoveney, in the parish of Staines, in the county of Middlesex, by virtue of the several acts of parliament lately made, for the preservation of the game, have made, nominated, authorized, constituted, and appointed, and by these presents do make, nominate, authorize, constitute, and appoint, Joseph Redding, the younger, of Yeoveney aforesaid, in the said parish of Staines and county of Middlesex, husbandman, to be my game-keeper of and within my manor of Yeoveney aforesaid, of all and all manner of game, of what kind or nature soever, which now is, or hereafter shall be, upon or within the bounds, limits, or precincts of the same, with full power and authority, according to the directions of the statute in that case made and provided, to kill any hares, partridges, pheasants, fish, or other game whatsoever, upon or within my said manor, and the bounds, limits, and precincts of the same: And also to take and seize all such guns, grey-hounds, setting-dogs, and other dogs, hare-pipes, snares, low-bells, ferrets, tramels, hays, tunnels, or other nets or engines, for the taking, killing, or destroying of hares, partridges, pheasants, fish, or other game, within my said manor, and the precincts thereof, that shall be kept or used by any person or persons, not legally qualified to do the same: And further to act and do all and every thing and things which belongs to the office of a game-keeper, pursuant to the directions of the said act of parliament. And lastly, I do direct that the name of the said Joseph Redding be entered as such game-keeper of my said manor, with the clerk of the peace for the said county of Middlesex, pursuant or according to the act or acts of parliament in that case made and provided. In witness whereof, I have hereunto set my hand and seal, the second day of July, in the year of our Lord 1741. J. Dolben."

"Sealed and delivered, being first duly stamped, in the presence of James Affleck, Thomas Burlingson."

"Middlesex. These are to certify, that the name of the within mentioned Joseph Redding is this day entered in my office, pursuant to the statute in such case made and provided. Dated this 29th day of January, 1741. P. Walter, Clerk of the Peace, Middlesex."

Joseph Redding, the elder, sworn.

Q. Do you know the place where this unhappy case happened?—*Redding.* Yes.

Q. Give an account of what you know.

Redding. I was in the next field, called Chantry Mead. This, where the accident happened, is called the Hare Mead.

Q. What manor is it in?

Redding. It is in Yeoveney manor, which belongs to sir John Dolben.

Q. Where were you when this happened?

Redding. I was in Chantry Mead.

Q. How far were you off then?

Redding. As near as I can guess, it is about forty pole.

Q. What did you observe there?

Redding. I saw my son and Mr. Annesley coming up.—I did not know who they were till they came up.

Q. Did you see them immediately after the accident happened?—*Redding.* Yes, presently.

Q. How did they behave upon this occasion?

Redding. They were so troubled they could hardly wag or speak: My son said he was afraid the man was killed; and he said to Mr. Annesley, How did you do it? Mr. Annesley said, I did not think of the gun's going off.

Q. You say you saw them coming up; did you observe them when the accident happened?

Redding. Yes, I looked at them all the while.

Q. How was the gun carried when it went off?

Redding. Just as I may hold this sword. (Holding it in his right hand, hanging down near the pocket a few inches from his body, almost upon a level.) He had it in one hand, as I have the sword now.

Q. Did he express himself concerned?

Redding. He was so concerned, that he did not run ten pole before he fell down, and beat himself thus upon the belly, and said, What have I done?

Q. Did you ever hear of any quarrel between him and this man?—*Redding.* Never.

Serj. *Gapper.* (On the cross-examination.) Where did you stand when the accident happened?—*Redding.* In Chantry Mead.

Q. Is there not a hedge between Chantry Mead and Hare Mead?

Redding. Yes, I believe there is.

Q. How could you see through the hedge?

Redding. It is a new hedge not above a yard high, and I could see any thing that was doing there as clear as I can see you.

Q. Was Annesley with his face or his back towards you?

Redding. He was side-ways to me.

Serj. *Gapper.* Why Chantry Mead is north of Hare Mead; then his face could not be towards you?

Redding. No, I say his side was towards me.

Serj. *Gapper.* You were speaking as to this being a manor; how do you know it to be a manor?

Redding. Because there have been courts kept there.

Serj. *Gapper.* By whom?

Redding. By sir John Dolben.

Q. What is Sylvester?

Redding. He occupies this ground: I lett the farm to Sanders, and Sanders letts it to him.

Q. On which side of Hare Mead does the river lie? Is it east, west, north, or south?

Redding. It is about south.

Q. Does not this river belong to another person.—*Redding.* No.

Q. Has not sir John granted the fishery to any body?

Redding. I rent the fishery; the fishery belongs to me.

Q. Do you depute your son to look after this?

Redding. No, sir John Dolben deputes him.

Q. How came sir John Dolben to appoint your son to be game-keeper?

Redding. Because they robbed me daily.

Q. Have you assigned that fishery to any body?—*Redding.* No, I have not.

Q. Who owns the land on the other side?

Redding. I believe my lord Dunmore is the landlord.

Q. Were you standing up when the gun went off, or sitting?

Redding. I was standing up.

William Duffell sworn.

Q. Do you know John Egglestone, the son of Thomas Egglestone?—*Duffell.* Yes.

Q. Have you ever had any conversation with him about this matter?

Duffell. Yes; on this occasion he was at my house; I desired him to tell the truth: He said he would; and then told me, that as he and his father were fishing, they saw the prisoner, Redding, coming up; that he desired his father to give him the net, and he would run away with it, but his father would not let him; that then Redding came up and demanded the net; that Thomas Egglestone said he should not have it, and then threw the net into the river; and in the mean time the other gentleman came up, and shot him; that John Egglestone jumped into the river, and cut the line of the net, to pull it out on the other side: and that when the gun went off, and his father dropped down, Mr. Redding said to the other gentleman, Lord, sir, what have you done! and then they both run home. Mr. Abraham Egglestone, who was present, asked him, if he saw Mr. Annesley pull the trigger of the gun; and John Egglestone answered, that he could not tell. I asked him, if there was any quarrel or words that had passed between them, and he said, No. I said it was very surprising to me, that this gentleman should come and shoot his father, and nothing more pass between them: I then asked him, in what manner he held the gun; he had a stick in his hand, and shewed in what manner the gun was held in his hand, thus (in his right-hand, the arm hanging down near the pocket, some inches from his body, and near upon a level; which was the same manner that old

Redding said the gun was held.) I asked, if he thought he did it wilfully; he said he could not tell.

Q. How long was this discourse after this accident happened?

Duffell. About four hours.

Q. Did you ever see this John Egglestone before, for he says he knows nothing of you?

Duffell. I have known him these eight years, and he has been frequently at my house.

Q. What character has he?

Duffell. I cannot say much in his behalf; his father could not manage him at all.

Q. What business did he follow?

Duffell. His father was a carpenter, and he worked with him.

Q. When did he leave Staines?

Duffell. Soon after this accident happened.

Q Where has he been ever since?

Duffell. I have seen him at the White Horse in Piccadilly; and I heard at Staines that he was sent for to London.

Q. Did the man at the White Horse come down for him to Staines?

Duffell. I did not see him him there.

Serj. *Gapper.* You say he was at your house; who gave you directions about advising him to speak the truth?

Duffell. Nobody: Mr. Abraham Egglestone advised him the same thing.

Q. Who was there?

Duffell. Nobody but Mr. Abraham Egglestone and myself; I was desired to go and see how the man came to be killed, and John Egglestone came to me about eight o'clock.

Serj. *Gapper.* You say he could not say it was wilfully done; so he did not say it was accidentally done.

Duffell. No, he did not say it was.

Mr. *Brown.* Do you apprehend he had hold of the gun by the barrel, near the lock?

Duffell. I understood by Egglestone's manner of holding the stick, that he meant that Mr. Annesley had hold of the gun about the middle of the barrel.

John Dalton sworn.

Q. What discourse had you with young Egglestone?

Dalton. On the Sunday, when the prisoner at the bar was carried to Laleham to be examined, I went there; the company dined at the Grey Hound at Laleham; I staid and drank half a pint of wine there, and immediately afterwards John Egglestone came to the door, and called me out of the room, and said he wanted to speak with me. When I came out, he said he wanted to ask my advice concerning this accident: I said, I wonder you should ask my advice, when you have relations to advise with; he said, I thought fit to ask you, as you are my master. While we were talking, Samuel Sylvester came out, and said I was persuading the boy to sell his father's blood: the boy said, What do you mean, you fool you? My master is persuading me to no such thing. I then asked him, whether he thought it was accidentally done or not; he said, he believed, it was accidental, rather than any other thing. I said to him, Well, if you think so, you will be examined when you come before sir Thomas Reynel; I desire you would not forswear yourself, but be very careful what you say.

Q. What character has the boy?

Dalton. He was very irregular, and used to lie out.

Q. How do you know that?

Dalton. He was my servant.

Q. What trade are you?

Dalton. I am a butcher.

Serj. *Gapper.* You say he has a bad character; do you think he would forswear himself?

Dalton. I can say nothing to that.

Serj. *Gapper.* When was it you had this discourse with him?

Dalton. On the Sunday, at the Grey Hound at Laleham.

Serj. *Gapper.* Was there any talk of money then?

Dalton. Yes, the boy said he had been offered money.

Q. But you say, he said he would not sell his father's blood?

Dalton. No; I said Samuel Sylvester came and said I was persuading him to sell his father's blood; and the boy said, My master did not persuade me to any such thing.

Serj. *Gapper.* Are you sure, that this is true?

Dalton. Yes, I am; I think I am in my senses.

Serj. *Gapper.* What did you say to him afterwards?

Dalton. I told him he had lost his father, and had no friend to take care of him, and he knew best what he had to do.

Q. Did not you say it was better to take money, than hang the man?

Dalton. No; I said, I thought, by what he told me, that the man was in no danger of being hanged; and therefore he had better take money than endeavour to hang a man, that he thought did not do it designedly.

[Mr. Higgs, belonging to the Clerk of the Peace, being sworn, produced the book wherein all the game-keepers of all the manors in the county of Middlesex are entered; (Reads) Sir John Dolben of Northamptonshire, baronet, to Joseph Redding the younger, dated July 2, 1741. Entered January 29, 1741.]

Mr. *Richard Chester* sworn.

Q. Give us an account of what you know of this matter.

Chester. I drove the chaise from my own house to the Red Lion at Brentford, and then to the Grey Hound at Laleham; I went up to young Egglestone, and asked him, how this unfortunate thing happened; whether it was done designedly, or happened by accident?

Q. Where was this?

Chester. This was at Laleham: he said he

believed it was accidental; for he did not believe any gentleman in cool blood would do any such thing wilfully.

Q. Do you know any thing with respect to the net?

Chester. I think he said Mr. Annesley was stooping to the net, in order to take it, and the gun went off.

Q. Did he say any thing how Mr. Annesley held the gun?

Chester. I had the chaise-whip in my hand, and desired him to shew me how Mr. Annesley held the gun; he took the whip in his hand, and held it so, (which was much the same position as Redding and Duffell said he held it in) I think it was rather nearer the handle than the middle of the whip that he held it.

Mr. *Brown.* Did you see the wound? Where was the wound?

Chester. I understood it was somewhere, about the hip.

Mr. *Brown.* I ask you, whether you think he could have shot him in the hip, if he had held the gun that way?

Chester. I think he could not have shot him there, if he had held it any other way?

Mr. *Brown.* Pray do you know of any money being offered by any person in your presence to young Egglestone?—*Chester.* No.

Mr. *Brown.* Nor any reward of any sort?

Chester. No.—My lord, I had forgot to mention one thing. After this, Egglestone spoke to Mr. Annesley the prisoner, and shook hands with him; and Egglestone said, he was very sorry for what had happened; but said, he did not think he did it designedly; and then drank a glass of wine to him.

Court. Did they shake hands, or drink the wine first?

Chester. Both at the same time, as near as could be.

Serj. *Gapper.* Did you see this?

Chester. I did see it.

Mr. *Brown.* I ask you, Whether the prisoner at the bar is not married to your daughter-in-law?

Chester. My lord, if your lordship thinks I ought to answer this question, I will.

Court. The relation is very small; but if they insist on their question, you must answer it.

Chester. The prisoner is married to my daughter-in-law.

Q. They ask this question in hopes of its being of service to them in another affair, for it cannot be of any in this; though I hope he has got a very good wife.

John Paterson sworn.

Q. Mr. Paterson, I think you did attend the coroner's inquest upon this occasion; please to give an account how Egglestone behaved then, and what he said.

Paterson. My lord, I will; but first beg leave to make an apology for appearing as a witness on behalf of the unhappy gentleman, for whom I am concerned as an attorney; I do it because in an affair of so great consequence to him, I think he has a right to my evidence; and I do it with less scruple, as I am his attorney without fee or reward. My lord, on the 4th of May I went to Staines, to attend the coroner's jury; though, as I had not time to enquire into the fact, and prepare for Mr. Annesley's defence, I could do him but little service more than by cross-examining the witnesses for the crown, and making observations on their evidence; one of the witnesses was John Egglestone, who has been examined here.

Court. As to any thing in his behaviour, you may give evidence; but not of any thing that was reduced into writing.

Paterson. I can only speak as to what he said before the coroner; and I admit the depositions, taken at that time, were reduced into writing by the coroner or his clerk.

Mr. *King*, the coroner, sworn, who produced his Minutes of the Depositions made before him.

Serj. *Gapper.* Were these drawn up when Egglestone was examined, or afterwards?

King. They were not drawn up afterwards; they were drawn up at the same time.

Q. Read them as far as they relate to John Egglestone.

Serj. *Gapper.* Did Egglestone sign his deposition?—*King.* He did not.

Serj. *Gapper.* As this gentleman is coroner, what he has taken down ought to be signed by the deponent; and if it is not, I humbly apprehend it cannot be read.

Counsel for the Prisoner. The gentlemen may chuse whether they will have the Minutes read, or whether we shall give parole evidence, to prove what Egglestone said at that time.

[The Counsel for the prosecutor preferring the Minutes, they were read, and are as follows:]

May 4, 1742.

DEPOSITIONS relating to the death of THOMAS EGGLESTONE, who was shot in the parish of Staines, in the county of Middlesex.

John Egglestone, son of the deceased, living at Staines, saith, That on Saturday, the 1st of May, he and his father went a-fishing in one Sylvester's grounds; and says, that one Joseph Redding came up, and laid hold of his father, and demanded his net; upon which his father said he should not have it; then the prisoner, James Annesley, came up, and said, Damn your blood, surrender your net, or you are a dead man; and, upon his refusal, the prisoner held up his piece to his shoulder, and presented his piece to the said Egglestone, near to the middle part of his body, on his left side, and shot the said Egglestone, who died presently after. Says, the gun was cocked before he came, and that the piece went off before his father's refusal to deliver the net. He says, the deceased clapped his hand to his side, and

said, You rogue, you have shot me, I am a dead man. That after the discharge of the piece, his father dropped instantly.' Says, that when he saw his father shot, he took his knife and cut the string of the net, and jumped into the river; upon which the prisoner said, He has got the net, and went to strike at him with the butt end of the gun; and said, Let us go on the other side of the river, and fetch it. Says, that Redding had hold of the deceased by the collar, when the piece went off. Says, he was not offered any money by any body.

Counsel for the Prisoner. This is the 4th of May, and he now says, that on the 2nd of May he was offered money at Laleham.

Serj. *Gapper.* Are these all the minutes that you took?

Mr. *King.* My clerk was there; these were all that he mentioned that he took: if I may say any thing more from my memory, I will do it.

Q. Then we will go upon the parole evidence.

Serj. *Gapper.* When an officer has taken things down in writing, it is of dangerous consequence to admit parole evidence to be given of the same things.

Q. We do not insist upon it.

The Rev. Mr. *Eusebius Williams* sworn.

Q. Sir, do you know John Fisher?

Williams. Yes.

Q. Had you any talk with him about Egglestone's being killed?

Williams. I happened to be at Laleham, and heard the depositions that were made before sir Thomas Reynell: Fisher said, if he was examined before the justice, he would declare what Egglestone had said to him.

Q. What was that?

Williams. Fisher told me, that Egglestone said he did not believe the gentleman killed his father designedly; but that it was an accident.

Q. Do you know how this young man Egglestone came from Staines to London, and who has had the keeping of him since?

Williams. I know nothing but by hear-say.

Q. Were you never at the White Horse in Piccadilly?

Williams. I never was there since this accident.

Mr. *Bethune* called.

Serj. *Gapper.* My lord, this is another person that is brought to contradict the evidence of Egglestone, in what he said with respect to the position of the gun.

Prisoners' Counsel. Egglestone said the gun was pointed downward. Now we shall shew you, from the nature of the wound, that it was morally impossible it should be so; for the wound is slanting upwards.

James Bethune sworn.

Q. Sir, you are, I think, a surgeon at Brentford: did you see the body of this Egglestone that was killed at Staines?

Bethune. On Sunday, after the accident, my lord, I happened to be at Laleham, and sir Thomas Reynell gave me leave to come in and hear the depositions: I was afterwards sent for by Mr. Perkins, a surgeon at Staines, to attend at the opening of the body before the coroner; there were several of the coroner's jury in the room. I found the wound on the left side, about an inch and a half below the ridge of the hip-bone: The wound I apprehend to be about an inch and a half wide; I found it went into the cavity of the belly.

Q. Did the wound go upwards or downwards into the belly?

Bethune. When I found it went into the cavity of the belly, I remembered in what manner Egglestone held the gun when he was before sir Thomas Reynell, to shew how Mr. Annesley held it when he fired: I remember very well he held it to his shoulder, slanting downwards: I attempted to put my probe into the wound, in the same direction as he described the gun; but there was no passage for it in that position; it would not go in downwards: then I put it in, in this manner, cross the belly, and it went in without obstruction, and then upwards, and it went in with the same ease, in this manner. I observed several large blisters, full of black serum on the right side, opposite to the place where the shot went in; the blisters, which were on the opposite side, were three or four inches higher than where the wound was: the wound was on the left side, and the blisters on the right: when I found this was so plain to me, I desired it might be as plain to the jury, and every one there, as it was to myself, because this was a matter of fact, and not of judgment; and I desired the foreman to come and put the probe in, and try; he did so, and found the wound as I have described it: I was the more careful in this, because I had observed the evidence that the boy gave on the Sunday, and there was some variation between that and the nature of the wound; therefore I desired them to take the more notice of it; and said, Gentlemen, I shall have occasion to speak to this by and bye, and therefore I desire you would mind what I say to you.

Q. What do you think those blisters on the other side were occasioned by?

Bethune. I apprehend they were occasioned by the force of the powder; and that if the shot had gone through, it must have come out three or four inches higher on the other side than it went in.

Serj. *Gapper.* According to your account, could he, holding the muzzle of the gun upwards, have made this wound?

Bethune. He could not have made it with the muzzle downward.

Q. Did you observe how the wound was upon the bone, and whether there were any shot remaining in the wound?

Bethune. No, Sir; but I found some shot in the cavity of the belly.

Mr. *Brown.* Now the question is, Whether

the shot, coming upon this bone, might not be thrown upwards?

Bethune. No; for the shot went through the bone, so that the gun must have been held obliquely, pointing upwards: the shot could not have gone through in that direction, if the muzzle of the gun had pointed downwards. This is not matter of judgment, but I have given you demonstration of it.

Serj. *Gapper.* You say the wound went from the left side to the right, and that if the muzzle of the gun was downwards, the wound would be in the same manner?

Bethune. Certainly, Sir; if the muzzle of the gun is held downward, the shot cannot go upward.

Foreman of the Jury. He makes it appear, that the prisoner could not hold the gun to his shoulder, but that it was held horizontally; and that it was impossible for him to wound him in the manner the boy has described, if the muzzle of the gun had been pointed downward.

Bethune. I beg leave to speak a few words more to your lordship. While I was giving in this evidence before the coroner and his jury, if your lordship remembers, I said I had shewed them how the wound was; therefore I desired them to consider, how consistent it was with the evidence that Mr. Egglestone had given: I believe I proved it to the coroner's jury, and others that were there, that it was impossible it could be done in that manner, if the gun was held, as he said, to his shoulder; upon that he comes up again, and, says he, The gentleman stooped when he did it.

Counsel for the Prisoner. This shews how he departed from what he had said; for he said first, that Mr. Annesley stood upright when he fired; and then that he stooped, in order to make his evidence correspond with the wound.

John Perkins, Surgeon, sworn.

Q. Did you see the body of Thomas Egglestone?

Perkins. I opened the body on the 4th of May, and, on inspection, I found one wound about an inch and an half diameter; on the lower part of the left side, it passed through the spine of the *os ilium*, about an inch and a half below the ridge of the hip-bone: I put in my probe seven or eight inches, by which, and likewise upon inspection, I found it run horizontal, a little upon the ascending. I put my two fingers into the cavity of the bone, and shewed the jury how it was; and observed on the contrary side four or five blisters, which I think to be occasioned by the force of the powder from the other side; but the shot did not go through the skin.

Court. I ask you, whether these blisters were higher or lower than the wound?

Perkins. Four or five inches higher, my lord.

Mr. *Brown.* Do you think these blisters were occasioned by the shot?

Perkins. I apprehend they were, because there were no other blisters on any other part of the body.

Mr. *King*, the Coroner, called again.

Q. Was any application made to you, at any time, to send Mr. Annesley, a prisoner to Newgate?

King. Yes, I think it was Mr. Giffard; he came along with another gentleman, whose name, I think, is Carrington.

Q. What, captain Carrington?

King. I believe it was: I said, I think the gentleman is secure enough (there was a lord mentioned, but I cannot remember that he was named: Mr. Giffard wisely kept him from saying who it was;) I thought it was too severe to send him to Newgate; and said, that sir Thomas Reynell was the justice of peace who committed him, and he had taken sufficient care about it.

Paul Keating sworn.

Q. Do you know any thing of Egglestone?

Keating. Yes.

Q. Where did you come acquainted with him?

Keating. At the White Horse in Piccadilly.

Q. What countryman are you?

Keating. I came from Ireland on board a merchantman from Waterford: I was recommended to the earl of Anglesea, to say what I know as a witness about the estate.

Q. How came you to the White Horse?

Keating. There was one Lawler, that came over in the same ship. When I came to town, I went and enquired for him at the earl of Anglesea's, and he sent me to the White Horse in Piccadilly to live, and there I came acquainted with Egglestone.

Q. After your acquaintance, do you remember any conversation with him, about what he was to have for swearing in this cause?

Keating. I do, my lord, remember mighty well; a little time after he came to the inn, he and I got acquainted together, and went out a walking to see the town, and particularly on a Sunday morning; the Sunday after he came to Piccadilly.

Q. What month was that in?

Keating. In the month of May: I believe it was the second Sunday in May. As we were walking abroad, I asked him how he came to live there; says he, I am here at the expence of the earl of Anglesea.

Court. This is not proper: if you can call any body to contradict Egglestone you may; but this is reflecting upon a noble person's character.

Q. Did he tell you how he came to be at that inn?

Keating. He told me, that Mr. Williams, who keeps the White Horse, brought him from Staines; and that he should be very well provided for, if he would prosecute the gentleman who is now in custody for this murder; and he desired I might contrive some way that he

might get the money secured, and I wrote two or three drafts of notes for 200*l.* and he took copies of them.

Q. How came he to take copies of them?

Keating. Because I did not care my hand should be known. I have a copy of one of them in my pocket. [Reads.]

'I promise to pay to Mr. Thomas Egglestone' (that is his elder brother) 'or his order, 'at or upon the 10th day of June next, the 'sum of 200*l.* sterling, for value received from 'his deceased father and him in carpenter's 'work, &c. Witness my hand this 10th day 'of May, 1742.'

This was to be signed either by Williams, or my lord Anglesea.

Q. Do you know of any discourse with Patrick Lawler?

Keating. Yes; he is my lord Anglesea's servant.

Court. What Lawler said is not evidence, unless to contradict him, and he has not been examined.

Q. Have you ever seen the earl of Anglesea at the White Horse?

Keating. He is there often.

Q. What, has the earl of Anglesea any thing to do there?

Keating. His coach and horses are kept there.

Q. How long have they stood there?

Keating. They stand there constantly.

Serj. *Gapper.* What was that note for?

Keating. It is only a copy of what I wrote for Egglestone; for, as I told the Court before, I did not care that my hand should be seen in any such thing as bribery and corruption.

Serj. *Gapper.* Where was this note signed?

Keating. I cannot say whether it was signed or not; he told me it was to be signed.

Q. Did not you put this into Egglestone's head?

Keating. No, upon my oath, I did not.

Mr. *Brown.* Did not you receive money to go somewhere, and you and he went and spent the money?

Keating. I received a crown to go to Woolwich.

Q. How came you not to go to Woolwich?

Keating. I had not a mind to go.

Serj. *Gapper.* So you had a mind to make Egglestone drunk with this crown?

Keating. That is a different case.

Q. Did not you treat him?

Keating. Yes, I did.

Q. What reason had you to treat him?

Keating. Because he had no money of his own.

Serj. *Gapper.* So you had a crown to go to Woolwich, and did not go.

Keating. I did not go, indeed.

The evidence for the prisoners being gone through,

Court. If the jury should be of opinion that the gun went off by accident, the homicide must, in point of law, be either manslaughter, or chance-medley: I should be glad, in that case, to make it chance-medley; but, in order to that, it must appear, that what Mr. Annesley was doing was perfectly lawful, otherwise he will be guilty of manslaughter.

The other prisoner, Redding, had certainly, by virtue of his deputation, and by force of the acts of parliament made for the preservation of the game, authority to seize the deceased, who was clearly acting in violation of those laws. But it is doubtful whether the authority of a game-keeper, being personal, the other prisoner acted lawfully in assisting him.

The Substance of the Arguments by the Counsel for the Prisoners, viz. Mr. Hume Campbell, Mr. Serj. Hayward, Mr. Clarke, Mr. Wyrley, and Mr. Smith, was as follows:

My lord, although a game-keeper's authority be personal, we submit to your lordship, that, as the deceased was confessedly doing an unlawful act, Mr. Annesley's catching at the string of the net, which the deceased had thrown away, and which might be only to prevent its falling into the water, was not such a trespass in him, as will alter the nature of the consequence, and make that manslaughter, which appears to have been, in fact, a most unfortunate accident.

We humbly apprehend, my lord, that it is not necessary, that the act Mr. Annesley was about, when the accident happened, should be strictly legal; if it was an act of an indifferent nature, not an unlawful one, we hope it will be sufficient to excuse him from the guilt of manslaughter.

If a man throws a stone into a place of public resort, and kills another, that will be manslaughter, because the act itself was unlawful, supposing that dismal consequence had not followed it.

But if a man is playing at bowls, and undesignedly kills another, there, as the first act was of an indifferent nature, the law will not impute the accident consequential to it as a crime.

As to Mr. Annesley's entering the close that belonged to Sylvester, whatever it might be with regard to him, it was an act of an indifferent nature with respect to the deceased, who claimed no property in the ground, and consequently had no more right to be there than Mr. Annesley, unless you will suppose him to have had the owner's consent, which, as it was not proved, may and ought, with equal justice, to be supposed in favour of the prisoner.

The young man's evidence being put out of the case (and considering the manner in which he contradicted himself, and has been contradicted by others, what he says, we apprehend, ought to stand for nothing), Mr. Annesley's act appears to be no more than stooping to prevent the string of the net from falling into the river; in doing of which, suppose a pistol had gone off in his pocket, would it not be the

hardest case in the world, to say that this accident should make him guilty of manslaughter?

But allowing it necessary that the act Mr. Annesley was doing must be lawful, we hope to shew your lordship, that Mr. Annesley's interposition in this case was so.

There are two acts of parliament relating to the game applicable to this case; the one made in the 22d and 23d years of Charles 2, chap. 25, and the other in the 4th and 5th years of William and Mary, chap. 23.

The first recites, that divers disorderly persons, laying aside their lawful trades, betake themselves to the stealing of conies, hares, pheasants, partridges, and other game, with nets and other engines.

For remedy whereof it enacts, That all lords of manors may, by writing under their hands and seals, authorize one or more game-keeper or game-keepers, within their manors; who, being so authorized, may seize such nets, or other engines, as shall be used by any person or persons prohibited to keep or use the same.

Then it recites, that divers idle, disorderly, and mean people do betake themselves to the stealing of fish out of ponds, and other several waters and rivers, to the great damage of the owners thereof.

Therefore it enacts, That if any person or persons shall use a casting-net in any river, &c. without the consent of the lord or owner of the said water; and being thereof convicted before any justice of the peace, shall give the owner such satisfaction (not exceeding treble damages) as the justice shall appoint, or be committed to the House of Correction. And that it shall be lawful for the justice to destroy all such nets, or other engines, wherewith such offenders shall be taken or apprehended.

The other act of parliament recites, That divers good and necessary laws had been made for preservation of the game; notwithstanding which, or for want of the due execution thereof, the game had been very much destroyed by many idle persons, who afterwards betake themselves to robberies, burglaries, or other like offences, and neglect their lawful employments.

For remedy whereof it enacts, That no person or persons shall have or keep any net or engine for taking of fish, except the owner or occupier of a river or fishery. And that it shall be lawful for such owner or occupier, and all and every other person or persons, by him or them for that purpose appointed, to seize, detain, and keep, to his and their own use and uses, every net or engine which they shall find used, or in the custody or possession of any person or persons whatsoever, fishing in any river without the consent of the owner or occupier.

Now the question which your lordship puts upon us to argue, is, Whether a person duly authorized under these acts of parliament, being resisted in the execution of his office, can legally call any other person to his assistance?

Your lordship will consider we are arguing in favour of life, and therefore will construe these laws in the most beneficial manner for the prisoner, and the rather, because such construction will tend to put the laws themselves in force, which were intended for securing men in their property from the violation of idle and disorderly persons.

These acts suppose the offenders to be desperate people; for it describes them to be such as afterwards betake themselves to robberies and burglaries; and likewise supposes (what is also true in fact) that they go in numbers to destroy the game.

That circumstance seems to imply, that a game-keeper, or other person duly appointed, may, in such cases, call in other persons to his assistance.

To construe the law otherwise, would render it ineffectual; for it is absurd to suppose, that every lord of a manor, or owner of a fishery, should appoint as many game-keepers as there may be persons inclined to invade his property. This would entirely tend to defeat the security intended by the law, and therefore can never be agreeable to the meaning of the legislators.

As these are late acts of parliament, it cannot be expected that we should produce cases directly in point, and resolutions of the judges, on the construction of those acts in this question.

But suppose, upon some of the acts of parliament made against smugglers, an officer of the revenue, or at the common-law a constable, being resisted in the execution of his office, calls in other persons in the neighbourhood to his assistance, and mischief or death ensues; might not those persons avail themselves of the authority vested in the officer or constable, so as to be justified in what they do, for the manifest support and execution of the law?

A man has undoubtedly a right to drive away cattle, which he finds damage faisant in his ground. Suppose then he should desire a stranger to assist him, could the owner of the cattle maintain an action against the stranger for the trespass in driving his cattle?

Suppose, in the present case, the deceased had not unfortunately been killed, and had brought an action against the prisoners for an assault, might not the defendants (one of which was game-keeper) have pleaded specially, and justified under the act of parliament? And surely, whatever in pleading would have been a justification in such a case as this, will be a sufficient excuse.

But we apprehend, that in all cases where the law makes offences punishable by justices of the peace, whoever sees a person committing such an offence, has a right, without any special authority, to take him up, and carry him, together with the instrument of his offence, before a justice, in order to his conviction; and that whatever is necessary for this purpose is lawful.

If this was not law, offenders would, in most cases, escape with impunity; for, observing

themselves to be discovered, they would hardly stay till the observer could resort to a proper authority; and, being mean and unknown persons, might never afterwards be found.

Even the young man who was so very forward in giving his evidence, admits that his father and he were actually fishing, that is, committing an offence against these acts of parliament; that Redding, who had a legal authority, came up first to the deceased, and demanded the net; that the deceased refused to deliver it; and that, whilst they were struggling for the net, Mr. Annesley came up and snatched at it.

Upon the whole, we hope Mr. Annesley was well warranted to go to Redding's assistance; and that the unhappy accident that fell out at that time, shall not be imputed to him as a crime, but construed to be no more than chance-medley.*

The SUBSTANCE of the ARGUMENTS by the Counsel for the Prosecutor, viz. Mr. Serj. Gapper, Mr. Serj. Wynne, Mr. Brown, and Mr. Johnson, was as follows:

My lord, the counsel for the prisoners have undertaken to justify under two acts of parliament.

As to the 22d and 23d of Charles 2, we beg leave to observe, that the clause empowering lords of manors to appoint game-keepers, with authority to seize nets, does not extend to fisheries. The clause which relates to fishing, only directs that the offenders shall be punished, upon conviction, before a justice of peace; but does not empower any one to seize either them or their nets. The regular way, undoubtedly, is to lay a complaint before a justice of the peace, who is to grant his warrant for apprehending the offender, and then, upon conviction, he may destroy the net. Besides, it was sworn by old Redding, that this was his fishery; if so, sir John Dolben had no authority at all to appoint a game-keeper to take care of it, and consequently, even the deputation itself is void.

But if it was not void, yet still the power is personal, and cannot be delegated to another, and therefore cannot serve to excuse Mr. Annesley, who appears to have acted officiously, without being called upon by any body.

As to the other act of parliament, the 4th and 5th of William and Mary, that no ways relates to game-keepers; but only empowers the owners or occupiers of fisheries, or persons by them for that purpose appointed, to seize the nets; so that this power is confined to old Redding himself, and it does not appear he has appointed either of the prisoners; and therefore, as they had no authority at all, they were trespassers, and must answer for the consequences.

As to the liberal construction of the acts of parliament, which the gentlemen contend for, we say, that, at the common law, every man had a right to fish in rivers; and consequently those statutes are an abridgment of the common law, and therefore to be strictly construed. By the same rule of construction, which they insist upon, any man may claim a right to come every day, and search another's house for nets and engines for destroying of game. But what murders, besides other inconveniences, must be the consequence of such an unlimited power, we leave all the world to judge.

We admit, that this is a new case, and therefore the cases put of a constable, whose office is as ancient as any in the kingdom, are by no means parallel. We insist, therefore, that the prisoners, at least, Mr. Annesley, having been wrong-doers, must answer for the consequence, which being the death of one of his majesty's subjects, make them guilty of manslaughter, supposing the gun went off by accident.

Then Mr. *Hume Campbell* said in reply:

My lord, I beg leave to trouble you with a few words, on behalf of the unhappy gentleman who stands charged before you with a crime which affects his life.

If that consequence was the motive for the charge, he may rely upon the justice of this court as his security; to your justice he has surrendered himself, and equally trusts in that and his innocence.

In arguing the point now before the Court, I may take it for granted, that the gun went off by accident, without Mr. Annesley's knowing it; and only consider, whether his interposing to assist Redding was or was not lawful.

My lord, I take it for a general rule, that all persons, on request, not only may, but are bound by their duty and allegiance, to assist legal officers in the execution of their duty.

I shall not repeat any of the evidence; the Court will remember, that a request of the game-keeper's, or what amounts to such, has been proved.

I mentioned the case of a constable, which the gentlemen of the other side endeavour to distinguish from that of a game-keeper, by saying, that his power is great, and that his office is very ancient. I admit both these positions; but insist, that his power does not arise from the antiquity, but from the legality of his office.

A game-keeper is a legal officer, particularly appointed under the acts of parliament for the preservation of the game: He is for that purpose fully empowered to put the laws, relating to the game, in execution: nobody can legally resist him, and consequently the deceased and his son were doubly criminal; first, in breaking the law, and then in resisting the legal officer, who came to put that law in force.

What did Mr. Annesley do in this case? He stooped to take up the net, which the deceased had unlawfully thrown into the water, to prevent the game-keeper from seizing it.

* See Leach's Hawkins's Pleas of the Crown, book 1, c. 29, s. 8. See also, as to the question here made, the observations in East's Pl. Cr. ch. 5, s. 31.

Egglestone had abandoned it; and will any one maintain, that when a trespasser throws away the instrument of his crime, it is unlawful in another person to take it up? Nay, the assistant of him to whom the statute gives it?

They say a man may as well go every day into people's houses, under pretence of searching for nets, &c. No, they cannot do that by law: every man's house is his castle; and the law has provided, that he shall not be molested there without a special authority. Nor is there the same reason for that, as there is for seizing offenders in the actual commission of the offence. The very case they put, implies the offender may be found and come at by the ordinary forms; but in the other, he may not be known, and will hardly stay till you apply for a warrant to apprehend him.

So that the necessity of the thing makes that reasonable and lawful in the one case, which, for want of that necessity, is not so in the other.

That a special authority, my lord, is not necessary in all cases, will hardly be disputed; a constable, if the law is broke in his presence, may, by virtue of his general power, take cognizance of the offence, and arrest the offender.

In the present case, the game-keeper, who is a legal officer, and in nature of a constable for this particular purpose, saw the deceased a-fishing, and consequently had a right, without any special warrant, to seize him, and when resisted, to call Mr. Annesley to his assistance.

It is said, the acts of parliament are an abridgment of the common law, and therefore should be construed strictly. My lord, no man, by the common law, had a right to fish in another's property. It was an offence at the common law; it is 'malum in se;' and the statutes, that have been mentioned, only make that offence punishable by a justice of peace; as they tend therefore to secure the property which a man had at the common law, they are an addition to the common law, fixing a punishment for the breach of law; and therefore to be so construed, as will best answer so salutary an end.

If it is a new case, as the gentlemen seem to lay a stress upon it, let us consider what will be the consequence of your lordship's determination, if it should be against us.

The law, my lord, I apprehend, will become vain and idle; for if offenders get together in any number, it will be impossible for a game-keeper to restrain them.

Nay, my lord, the law itself will become a snare to all who have not the act of parliament in their pocket, to tell them they must not interfere; for suppose a person, legally appointed under an act of parliament, going to do his duty, is resisted, can it be imagined that his fellow-servant, his neighbour, or his friend, would not think himself justified, nay bound to assist him, when he sees his authority thus trampled upon?

At most, my lord, it could be only an imprudent act in Mr. Annesley to interpose; but we hope your lordship will not construe it to be such an unlawful act as will make him a trespasser, and so guilty of manslaughter.

Your lordship will please to observe, that it depends entirely on the credit of Egglestone, whether this gentleman did any thing or not. Before your lordship directs the jury as to this, it is my duty to acquaint your lordship, that there is an indictment on the coroner's inquest, and likewise an indictment on the black act, against the prisoner Mr. Annesley.

Court. That is for shooting maliciously: But there is no evidence tending that way.

Serj. *Gapper.* My lord, we desire to call some evidence to support the character of John Egglestone.

Q. For what? We have called no witness to impeach it.

Court. Have you not examined every witness that has appeared to the boy's character? If you could have called more, it is to be supposed you would have done it.

John Gardner sworn.

Serj. *Wynne.* Do you know this young Egglestone?—*Gardner.* Yes.

Serj. *Wynne.* How long have you known him?—*Gardner.* Seven or eight years.

Serj. *Wynne.* What is he, as to his honesty and veracity?

Gardner. He is like other boys, sometimes good, sometimes indifferent.

Serj. *Wynne.* I do not mean as to a little unluckiness: But do you think, from his general behaviour, that he would forswear himself?

Gardner. No, I do not think that he would.

Thomas Sylvester sworn.

Serj. *Wynne.* Do you know this Egglestone?

T. Sylvester. Yes, I have known him about three years; he lived by me at a butcher's.

Serj. *Wynne.* What was he as to his character and behaviour?

T. Sylvester. He was sometimes idle and given to play.

Serj. *Wynne.* Do you think he would forswear himself?

T. Sylvester. No, I do not think he would.

Samuel Sylvester called.

Serj. *Wynne.* How long have you known this boy?

S. Sylvester. I have known this boy a good while.

Serj. *Wynne.* What is his general character; do you think he would forswear himself?

S. Sylvester. I have had no conversation with him, so I do not know what he is.

William Palmer sworn.

Serj. *Wynne.* Do you know young Egglestone?—*Palmer.* Yes.

Serj. *Wynne.* How long have you known him?

Palmer. I have known him as long as I have known any person of his age: He came of very honest parents.

Serj. *Wynne.* Do you think he would forswear himself.

Palmer. I do not think he would forswear himself.

Q. Upon your oath, do you not think he is much addicted to lying?

Palmer. Why, that is not taking a false oath.

Patrick Lawler sworn.

Serj. *Wynne.* Do you know Paul Keating?

Lawler. I have known him ever since the 18th of March last.

Q. What is his general character?

Lawler. I do not know his general character; but I know he has behaved very bad of late.

Q. Did you never offer him any money to keep out of the way, and not appear at this trial?

Lawler. No, not I; but he said he would give them a Rowland for their Oliver.

Q. Do you know what he meant by that?

Lawler. No; only that he said if my lord Anglesea did not give him money, he would turn evidence on the other side.

Q. What did you think he meant, when he said, if my lord Anglesea did not give him money, he would turn evidence on the other side? Why surely my lord is not concerned in this prosecution? But pray, Sir, you have given a bad account of Mr. Keating, how came you and he acquainted?

Lawler. This Keating and I came over together from Ireland in the same ship; he told me, there were some evidences on board that were coming over to swear away my lord Anglesea's estate: said he, there are three women and two men, and I have discovered the whole thing, how they are bribed to come here; and if I come to London, said he, I will give my lord Anglesea an account of it.

Q. Pray, Sir, tell us what became of Keating when he came to town?

Lawler. Soon after he arrived he found me out, and so I told Mr. Jans I thought he might depend upon this man, because I had seen him in Bristol; said I, I speak to you about this man out of charity; for he is very poor: then says Mr. Jans, Let him go to the White-Horse in Piccadilly; and then he wanted clothes and money; and, says he, If they do not give me clothes and money, I will swear that the earl of Anglesea was to give a note to young Egglestone to swear upon this trial.

Q. What do you think he meant by his giving a Rowland for an Oliver? Whether it respected this cause, or related to my lord Anglesea's estate?

Lawler. I cannot tell what he meant.

Then the Court proceeded to sum up the evidence as follows:

Gentlemen of the jury, the prisoners at the bar, James Annesley and Joseph Redding, stand indicted for the wilful murder of Thomas Egglestone, by giving him one wound on the left-side of the belly, in the parish of Staines, of which he instantly died: the indictment sets forth, that Annesley fired the gun, and gave the wound, and that Redding was assisting and abetting him in the doing of it: and they stand a second time indicted on the coroner's inquest for the same murder; and there is another indictment against the prisoner Annesley, for feloniously, wilfully, and maliciously shooting this man, against the statute of the ninth of king George the first. The first evidence that is called by the prosecutor is John Egglestone; he says his father and he went a-fishing up the river, till they came to Samuel Sylvester's ground; that they had a net, and the string of the net was about his father's arm; that when they got about the middle of the field, they saw the prisoners coming up; that Redding came up first, and went to lay hold of the net, and his father threw the net into the river, about two yards from him; and that Annesley then came up and said, Damn your blood, deliver your net, or you are a dead man, and fired directly: and that he shot him near the bottom of the belly on the left-side; that his father said, You rogue, what have you done? I am a dead man; that he, the witness, took a knife out of his pocket, to cut the string of the net from his father's arm, and leaped into the river, and dragged the net to the other side of the river; and that Annesley said, The rogue has got his net, let us go on the other side; that he saw Bettesworth, Fisher, and Bowles, on the other side of the river, and told them he believed his father was dead; that they came over the river, and advised him to get a surgeon; upon which he went to one Charles Cole, but he did not come: that then he went for Russel the constable, to search for the prisoners, and says they found the prisoner Annesley in a place about five or six foot above the floor, in an out-house, upon some rubbish; that they carried him to the Round-house; that he staid there all night, and the next day they carried him to Hounslow: he says the gun was cocked, but he cannot tell when he cocked it: he says sir Thomas Reynell came into Hounslow while they were there; and that by his order they went to the Greyhound at Laleham; and that one Lane, Chester's son-in-law, offered him 100*l.* a year; that Mr. Annesley said he had not 100*l.* a year to give him, for he had more to provide for; but he might have 50*l.* a year, if he would not come against him: he said he had no conversation with one Duffell, but that he had with Dalton; he says, he has sometimes dined at Williams's table; and that he did not tell Paul Keating he was to have 200*l.*

The next witness that is produced is John Bettesworth: he says, that Egglestone and his son were in Sylvester's ground, on the other side of the river, and he saw the prisoners come out of Redding's ground into Sylvester's, and when they were in the middle of the ground they ran after them: he says, Joseph Redding was too nimble for Egglestone's father; but whether he had him by the collar, he cannot say: he says, that the gun went

off soon after Mr. Annesley came up to old Egglestone: he says, he saw the smoke and fire of the gun; and came up soon after Egglestone's father was shot. He says, he and Fisher, and Bowles, crossed the water; and that Annesley and Redding ran away; that Egglestone was not quite dead when he came over, but was not able to speak; and says, he saw the net on the other side of the river: he says, there was a place in a wash-house, about six foot from the ground, and there they found Mr. Annesley; that it is a place where they put hoops, and other rubbish: he says, that when Mr. Annesley was taken, he said, he wished to be killed, for being instrumental in the taking away an innocent man's life. That about half an hour before this accident happened, he saw Mr. Annesley offer to shoot at a crow.

John Fisher is called next; he says, he saw young Redding in the ground with another man; but cannot say that Annesley is the man; and that he saw there, two men running after Egglestone and his son; that Redding laid his hand, he thinks, on Egglestone's shoulder; and there was a sort of a scuffle between them; and he that carried the gun carried it in a form to shoot; and he that carried the gun was very near Egglestone when the gun went off: and he says, he saw Joseph Redding, and the other man, go away; and he says, he was at this time 169 yards off. It seems the ground has been measured, and that is the reason they are so particular in it: he says, Egglestone had money offered him in his hearing; he would have had a hundred a year; but Mr. Annesley said, he could not give him an hundred a year, for he had other people to do for: but he would give him fifty; and that Egglestone afterwards said, he would not sell his father's blood; and he said, that Egglestone afterwards told him, he believed the gentleman did not do it wilfully; but that the boy, being afterwards asked how he could swear against the gentleman, when he had said he believed he did not do it wilfully; he said, he did not remember any thing of what he had said to him; and he says he has been in the same story ever since the accident happened, excepting that one time.

The next witness, gentlemen, is Samuel Sylvester; and he says, when Mr. Annesley came out of that place where he was found, he trembled very much: he says, he rents this land of one Sanders, who took it of Redding's father: he says, Egglestone used to work sometimes with his father in the business of a carpenter, but that he has lived some time at the White Horse, in Piccadilly.

This is the substance of the evidence for the prosecutor.

The prisoner Mr. Annesley, in his own defence, says, that he is very sorry for the accident that has happened; that these persons were poaching in the manor that belongs to sir John Dolben; that they did go up to them, but that you cannot suppose he had any spite against a man he never saw in his life; he says that he had a gun in his hand, and that the gun went off by accident. The other prisoner Redding says, he is game-keeper to sir John Dolben; that he saw these men fishing, and went to take the net; that he heard the gun go off, and saw the man fall down, and then he said to Mr. Annesley, Lord bless me, I hope you have not killed the man! and that it was done accidentally.

To prove their case, they called the following witnesses. The first is,

Mr. Staples; he says, this is sir John Dolben's manor, and that he has held courts there.

The next witness, gentlemen, was Thomas Burlingson, and he proves a deputation of the second of July 1741, from sir John Dolben to Joseph Redding the younger, and thereby he is appointed his game-keeper, to seize the nets, &c. of any person who shall destroy any game, or fish, in his manor; and in the book which is kept for the entry of these things for the county of Middlesex, it appears that the entry was made the 29th of January, 1741, which was before the committing of this fact.

Then Redding, the father of Joseph Redding, is called, and he says, the fishery belongs to sir John Dolben, who is lord of the manor; that he lett the ground called Hare Mead to Sanders; and that the same is now in the possession of Sylvester. That he himself was in Chantry Mead (which is next to the Hare Mead) when this accident happened: that when he came up to them, his son said, he was afraid the man was killed, and asked Annesley how he came to do it? To which Annesley answered, He did not think of the gun's going off; he says, they seemed very much troubled and concerned: being asked the position of the gun when it went off, he says, Mr. Annesley held the gun in one hand, and that it hung down by his side.

The next witness, gentlemen, is William Duffell; and he says, that some hours after the accident happened, John Egglestone came into his house; and the man that brought him to his house, desired him to speak the truth; and the account the boy gave at that time was, that Redding came up to his father, and demanded the net, and that his father said he should not have it, and threw it into the river; that then Mr. Annesley came up, and the gun went off, and his father was shot. He says, that Abraham Egglestone particularly asked the boy whether he saw Mr. Annesley pull the trigger of the gun? And that he said he could not tell; that then he asked him if there were any words between them? And he said, No; that then this witness said, it was a strange thing that Mr. Annesley should shoot his father, and have no words with him: that being asked in what manner the gun was held, Egglestone, with a stick which he had in his hand, shewed them in what manner Mr. Annesley held the gun: he says the stick was in his hand, hanging down by his side. He says,

that Egglestone then was asked, if he thought Annesley did it wilfully, and that he said he could not tell. Being asked as to the boy's character; he says he has but an indifferent character, that he cannot speak in the praise of him, and has heard his father often complain of him.

The next evidence is John Dalton; and he says, that the next day after the accident, he went to Laleham, and there Egglestone told him, he believed it was an accident, and not done designedly. He says the boy has but an indifferent character, but believes he would not forswear himself.

The next witness is Richard Chester, and he says, that he asked the boy at Laleham, whether it was accidental or wilful; and that he said he believed it was an accident; for he did not believe any gentleman, in cool blood, would designedly shoot another; he says he had a whip in his hand, and desired Egglestone to shew him how Mr. Annesley held the gun; that he took the whip in his hand, and shewed him; that he held it in his hand, hanging down by his side; and he says he saw Egglestone speak to Mr. Annesley; that he shook hands with him, and drank a glass of wine, and said he did not think he did it designedly.

Mr. Paterson was then called to prove what the boy said before the coroner; but his examination being taken down in writing, I did not think proper to allow of parole evidence.

Then Mr. King the coroner was called; and he produced the minutes of the depositions, taken the 4th of May at Laleham, before the inquest. The minutes have been read, by which it appears that Egglestone deposed, that as his father and he were fishing in Sylvester's ground, Redding came up, and laid hold of his father, and demanded his net, which his father refused; that then Annesley came up and said, "Damn your blood, surrender your net, or you are a dead man;" that he held up his piece against his shoulder, and shot him directly: and his father said, "You rogue, you have shot me, I am a dead man." And, gentlemen, his deposition before the coroner likewise says, that when he saw his father was shot, he took his knife, and cut the string of the net; and that then Mr. Annesley went to strike him on the head, with the butt end of the gun. And he swears in his deposition, that he was not offered any money by any body. Then they produced Mr. Eusebius Williams, and he says, John Fisher told him, that John Egglestone had said he did not believe Mr. Annesley killed his father wilfully, but that it was done by accident.

Then James Bethune, a surgeon, is produced, and he says, he saw the body; that he examined and probed the wound; and he says it was an inch and an half below the ridge of the hip-bone, and an inch and an half wide; and that when he put his instrument downwards it would not go in; but it would go in when the probe was put upwards, or cross the belly.

The next witness is John Perkins, a surgeon: he says he opened the body the 4th of May, to be inspected by the coroner's inquest; and there was a wound an inch and a half diameter. He put in his probe seven or eight inches, and found the wound a little horizontal, about an inch and a half below the hip-bone; he says there were blisters on the other side of the body, and they were four or five inches higher than the wound. Mr. King says, that Mr. Giffard, who is the solicitor in this prosecution, made application to him to commit Mr. Annesley to Newgate; but he thought that was too severe, as sir Thomas Reynell was a justice of the peace, and had taken sufficient care of him.

Paul Keating says, he became acquainted with Egglestone at the White Horse in Piccadilly, which is kept by one Williams; and that he, at Egglestone's desire, drew a note of 200*l.* for him, and that the boy, Egglestone, took a copy of it.

Gentlemen, this is the evidence given in behalf of the prisoners; and there has been evidence given to support the character of John Egglestone.

John Gardener, he says he has known him seven or eight years,—that he is like other boys, sometimes good, and sometimes indifferent, but he does not think he would forswear himself.

Sylvester was called again, to Egglestone's character; he says, he has known him about three years, that he was sometimes given to play, but believes he would not forswear himself.

William Palmer says he has known him from a child, and does not think he would forswear himself.

Patrick Lawler says, he has known Paul Keating since the 18th of March; that because he could not be supplied with clothes, as he expected, he was to swear, that the earl of Anglesea was to give a note to young Egglestone.

This is the state of the evidence on both sides.

Now, gentlemen, you are to consider, whether the fact is murder, manslaughter, or chance-medley: murder, gentlemen, in point of law, is when a person kills another with express malice and design, or with implied malice, as when it is without any offence or provocation; but if there is a sudden fray, and in that fray and heat of blood, a person is killed, that is manslaughter; now there are several things in the course of the evidence proper to come under your consideration; you will observe that Egglestone swears Mr. Annesley said, "Damn your blood, deliver your net, or you are a dead man," and that immediately the gun went off, and the man was shot; if he let the gun off designedly, if this was the case, though on a sudden, he can be guilty of no less than manslaughter; but then you will consider what different things the boy has said; he has declared several times, he did not believe he did it designedly; and according to what the surgeons say, it is not probable to me, that

this wound could be given in the situation he says Mr. Annesley was in; for the wound goes upwards; and if he held his gun as the boy has said, the wound could not have been as it is: besides that, he is expressly contradicted in the fact itself by old Redding, who swears he saw the gun go off, and that it was hanging by Mr. Annesley's side. Gentlemen, as I said before, the question you are to consider of, is, whether this is manslaughter, or chance-medley in Mr. Annesley; for as to Redding, he must certainly be acquitted; and as to murder I cannot think there is any evidence to make Mr. Annesley guilty of that; but as there was some hot blood, there may be reason to consider, whether it is not manslaughter: on the other hand, if Mr. Annesley was carrying his gun by his side, and it went off accidentally, then it will be chance-medley.

Then the Jury having considered of their Verdicts, without going out of Court.

Clerk of the Arraigns. Gentlemen of the jury, are you agreed in your verdicts?

Jury. Yes.

Clerk. Who shall say for you?

Jury. Our foreman.

Clerk. James Annesley, hold up your hand.—Joseph Redding, hold up your hand.—Gentlemen of the jury, look upon the prisoners. How say you, is James Annesley Guilty of the felony and murder, whereof he stands indicted, or Not Guilty?

Foreman of the Jury. Not Guilty of murder, but Guilty of chance-medley.

Clerk. How say you, is Joseph Redding Guilty of the same felony and murder, whereof he stands indicted, or Not Guilty?

Foreman of the Jury. Not Guilty of the murder, but Guilty of chance-medley.

Clerk. How say you, is the said James Annesley Guilty of the felony and murder, wherewith he stands charged upon the coroner's inquisition, or Not Guilty?

Foreman of the Jury. Not Guilty of the murder, but Guilty of chance medley.

Clerk. How say you, is the said Joseph Redding Guilty of the same felony and murder wherewith he stands charged upon the coroner's inquisition, or Not Guilty?

Foreman of the Jury. Not Guilty of the murder, but Guilty of chance-medley.

Clerk. How say you, is the said James Annesley Guilty of wilfully shooting at Thomas Egglestone, against the form of the statute, or Not Guilty?

Foreman of the Jury. Not Guilty.

Clerk. Gentlemen of the jury, hearken to your verdicts, as the Court has recorded them. You say that James Annesley is Not Guilty of the felony and murder whereof he stands indicted, but is Guilty of chance-medley.

You say that Joseph Redding is Not Guilty of the same felony and murder whereof he stands indicted, but is Guilty of chance-medley.

You say the same upon the coroner's inquisition.

You also say that the said James Annesley is Not Guilty of maliciously shooting at Thomas Egglestone, against the form of the statute. And so you say all.

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503. The Trial in Ejectment between CAMPBELL CRAIG, Lessee of JAMES ANNESLEY, esq. and others, Plaintiff; and the Right Hon. RICHARD Earl of ANGLESEA, Defendant; before the Lord Chief Baron Bowes, the Hon. Mr. Baron Mountney, and the Hon. Mr. Baron Dawson, Barons of his Majesty's Court of Exchequer in Ireland. Begun on Friday, Nov. 11; and continued by several Adjournments to Friday the 25th of the said Month.* 17 GEORGE II. A. D. 1743.

THE Court being sat, the Jury were called over, and answered to their names; of whom the following twelve were sworn to try the issue joined between the parties:

* This was the longest trial ever known, lasting 15 days, and the jury (most of them) gentlemen of the greatest property in Ireland, and almost all members of parliament.—They were only to try a mere matter of fact, whether lord Altham had a son? *Former Edition*: In which the Report of this Case is incomplete, and in other respects faulty: I have corrected it by reference to "The Trial "at Bar, between Campbell Craig, Lessee "of James Annesley, esq. Plaintiff, and the "Right Honourable Richard earl of Angle-"sey, Defendant. Before the Honourable the "Barons of the Exchequer, at the King's "Courts, Dublin, in Trinity Term, in the 16th "and 17th years of the reign of our Sovereign "lord George the Second, King of Great "Britain, &c. and in the year of our Lord "1743. London: Printed for M. Cooper, at "the Globe in Pater-Noster-row, and sold by

Sir Tho. Taylor, bart.	Nat. Preston, esq.
Rt. hon. W. Graham,	C. Hamilton, esq.
Rich. Wesley, esq.	Clotworthy Wade, esq.
Her. L. Rowley, esq.	Tho. Shaw, esq.
Rich. Gorges, esq.	Gorges Lowther, esq.
John Preston, esq.	Joseph Ashe, esq.

PLAINTIFF.

Campbell Craig, lessee of James Annesley, esq.

DEFENDANT.

The right hon. Richard earl of Anglesea.

The Issue was as follows:

PLEAS before the Barons of the Exchequer, at the King's Courts, Dublin, of the Term of the Holy Trinity, in the 16th and 17th years of the reign of our sovereign lord George the 2nd, now king of Great Britain, and so forth; and in the year of our Lord, 1743.

County of Meath to wit;

Be it remembered, that in this same term, Campbell Craig, gent. a debtor of our lord the king that now is, came before the Barons of this Exchequer, by Charles Caldwell his attorney, and brought here into this Court his Bill against the right hon. Richard earl of Anglesey, of a plea of trespass and ejectment of a farm, the tenor of which Bill follows in these words; that is to say, County of Meath; Campbell Craig, gent. a debtor of our lord the king that now is, comes before the Barons of this Exchequer, on the 3rd day of June, in this term, by Charles Caldwell his attorney; and by his Bill complains against the right hon. Richard earl of Anglesea, present here in Court on the same day by Thomas Burroughs his attorney, of a plea of trespass and ejectment of a farm: For that whereas James Annesley, esq. on the 1st day of May, 1743, at Trim, in the county of Meath, demised to the said Campbell 80 messuages, 30 tofts, 50 cottages, 2 mills, 50 gardens, 800 acres of arable land, 300 acres of meadow, 600 acres of pasture, 50 acres of furze and heathy ground, 50 acres of moory ground, with the appurtenances, in Great Stamine, otherwise Stameen, Little Stamine, otherwise Stameen, Little Donacarney, Shallon, Killcarvan, otherwise Killsharvan, Cruffey, Annagor, otherwise Annager, and Little Gaffney, situate, lying and being in the county of Meath aforesaid: All which said premisses were formerly the estate of the right hon. James earl of Anglesea, deceased, and lately the estate of the right hon. Arthur baron of Altham, also deceased: To have and to hold the said demised premisses, with the appurtenances, to him the said Campbell, his executors, administrators, and assigns, from the 1st day of May aforesaid, in the year of our Lord aforesaid, for the term, time and space of 21 years from thence next ensuing, and fully to be complete and ended. And whereas also the right hon. James earl of Anglesea, on the same 1st day of May aforesaid, in the year of our Lord aforesaid, at Trim aforesaid, in the county of Meath aforesaid, demised to the said Campbell 30 messuages, 30 tofts, 50 cottages, 2 mills, 50 gardens, 300 acres of arable land, 300 acres of meadow, 600 acres of pasture, 50 acres of furze and heathy ground, 50 acres of moory ground, with the appurtenances, in Great Stamine, otherwise Stameen, Stamine, otherwise Stameen, Little Donacarney, Shallon, Killcarvan, otherwise Killsharvan, Cruffey, Annagor, otherwise Annager, and Little Gaffney, situate, lying, and being in the county of Meath aforesaid; all which said premisses were formerly the estate of the right hon. James earl of Anglesea deceased, and lately the estate of the right hon. Arthur baron of Altham, also deceased: To have and to hold the said demised premisses, with the appurtenances, to him the said Campbell, his executors, administrators and assigns, from the 1st day of May aforesaid, in the year of our Lord aforesaid, for the term, time, and space of 21 years from thence next ensuing, and fully to be complete and ended. And whereas also the hon. James Annesley, only son and heir of Arthur late baron Altham, of Altham deceased, otherwise the right hon. James baron Altham of Altham, on the same 1st day of May aforesaid, in the year of our Lord aforesaid, at Trim aforesaid, demised to the said Campbell 30 messuages, 30 tofts, 50 cottages, 2 mills, 50 gardens, 300 acres of arable land, 300 acres of meadow, 600 acres of pasture, 50 acres of furze and heathy ground, 50 acres of moory ground, with the appurtenances, in Great Stamine, otherwise Stameen, Little Stamine, otherwise Stameen, Little Donacarney, Shallon, Killcarvan, otherwise Killsharvan, Cruffey, Annagor, otherwise Annager, and Little Gaffney; situate, lying and being in the county of Meath aforesaid: All which said premisses were formerly the estate of the right hon. James earl of Anglesea deceased, and lately the estate of the right hon. Arthur baron of Altham, also deceased: to have and to hold the said demised premisses, with the appurtenances, to him the said Campbell, his executors, administrators, and assigns, from the 1st day of May aforesaid, in the year of our Lord aforesaid, for the term, time, and space of 21 years from thence next insuing, and fully to be complete and ended: By virtue of which said several demises he, the said Campbell, afterwards, to wit, on the 2nd day of May aforesaid, in the year of our Lord aforesaid, entered into the said demised premisses, with the appurtenances, and was thereof possessed until the aforesaid Richard earl of Anglesey afterwards, to wit, on the 3d day of May aforesaid, in the year of our Lord aforesaid, with force and arms, to wit, with swords, clubs, and so forth, entered into the said demised premisses, with the appurtenances, in and upon the possession of the said Campbell,

"the booksellers and printers in all the cities "and noted towns in Great Britain and Ire- "land, 1743."

and ejected, expelled, and removed him, the said Campbell, from his said farm (his term in the premisses not being then or since determined) and the said Campbell being so ejected from his said farm, he, the said Richard earl of Anglesea, hath ever since, and still doth with-hold the possession thereof from him; and then and there did other wrongs and injuries to him, against the peace of our said lord the king that now is, and so forth, and to the damage of the said Campbell 100*l.* sterling; by means whereof the said Campbell is less able to pay the debts he now owes to our said lord the king, at the receipt of his said Exchequer; and thereupon he brings his suit, and so forth pledges to prosecute John Doe and Richard Roe. To which the aforesaid Richard earl of Anglesey, by his said attorney, comes and defends the force and injury when, and so forth: And saith, That he is not guilty of the trespass and ejectment aforesaid, in manner and form as the said Campbell Craig above against him hath declared, and of this he puts himself upon the country. And the said Campbell Craig doth likewise the same. Therefore let a jury thereof be made, and the sheriff of the county of Meath aforesaid is commanded, that he cause to come here, and so forth.

The counsel for the defendant having confessed lease, entry, and ouster; Mr. Lill, of counsel for the lessor of the plaintiff, opened the declaration, in substance as follows:

That the plaintiff had brought his ejectment for thirty messuages, fifty cottages, two mills, fifty gardens, eight hundred acres of arable land, three hundred acres of meadow, six hundred acres of pasture, fifty acres of furze and heath ground, fifty acres of moory ground, with the appurtenances, in Great Stamine, otherwise Stameen, Little Stamine, otherwise Stameen, Little Donacarney, Shallon, Killearvan, otherwise Killsharvan, Cruffey, Annagor, otherwise Annager, and Little Gaffney, situate in the county of Meath, demised to him by James Annesley, esq.; that if they proved the lessor of the plaintiff, James Annesley, esq. to be the only son and heir of Arthur late lord Altham deceased, (who enjoyed the said premisses) he hoped the jury would find a verdict for the plaintiff.

Serj. *Marshall.* I am in this case of counsel with the lessor of the plaintiff, whose title stands thus: The lands in question were the estate of Arthur, late lord Altham, of which he died, seised, and the lessor of the plaintiff is his only son and heir. My lord, if this were a common case, I should have rested here; but as the course of descent has been interrupted on a supposition that lord Altham died without issue; and as this is a matter of great expectation, very extraordinary in its nature and circumstances, and may be much more so in its consequences; so it will be incumbent on me particularly to point out to your lordship, and to the jury, the time and place when and where the lessor of the plaintiff was born; for on that important birth this cause must depend.

My lord, in the year 1706, Arthur late lord Altham was married to Mary Sheffield, natural daughter of John duke of Buckingham. After the marriage, lord Altham's affairs required his attendance in this kingdom, and in the year 1709 he came over; but his lady remained in England till the year 1713, when she came into Ireland; and in the year 1714, lady Altham resided in the city of Dublin with lord Altham her husband, and proved with child. When she had been some months advanced in her pregnancy, and at the latter end of the year 1714, lady Altham went to his lordship's house at Dunmaine, in the county of Wexford, where it was publicly known in the neighbourhood that lady Altham was with child, and the then dowager lady Altham (who was married to Mr. Ogle, one of the commissioners of the revenue in this kingdom) made lady Altham a present of a very rich quilt against her lying-in: and it will appear to your lordship, and to the jury, that lady Altham's pregnancy was so well known in the country, that interest was made by several women to nurse this child when it should be born; and that great care was taken in examining the milk of the several women who did apply to be nurses, and that one Joan Landy was approved of to be the nurse. My lord, in the beginning of the year 1715, lady Altham fell in labour, and was delivered of the lessor of the plaintiff by Mrs. Shiel, a midwife of skill and reputation, who then lived at Ross, about three miles from Dunmaine; and it will appear to your lordship and to the jury, that lord Altham expressed great satisfaction and joy upon the birth of this son; that a bonfire was made upon this happy event, and drink publicly given to the neighbours and people who came in to testify their joy upon such an occasion. It will likewise appear to your lordship, and to the jury, that great preparations were made for the christening of this son; and that about a month after the birth, the lessor of the plaintiff was christened at the late lord Altham's house at Dunmaine, in the parish of Tynterne, by one Mr. Lloyd, who was his lordship's chaplain, and at that time curate of Ross, by the christian name of James, after his grandfather the third earl of Anglesea, from whom lord Altham had received great favours, and the sponsors on that occasion were Mr. Colclough, Mr. Cliff, and Mrs. Pigot. I mentioned to your lordship before, that Joan Landy was appointed the nurse; her father's house was about a quarter of a mile from Dunmaine, where the child continued for about a month; and then the nurse's father's house being first made fit for the reception of such a child, he was carried to that place with his nurse: and it will appear to your lordship, and to the jury, that for the conveniency of lady Altham, and that she might visit this child as often as she pleased, a coach-road was made from the house of Dunmaine to the nurse's father's house. When the child was about

sixteen months old he was weaned, and brought back to lord Altham's house at Dunmaine, where one Joan Laffan was appointed his dry nurse: and it will appear to your lordship, and to the jury, that while lord and lady Altham were united, the greatest fondness was shewn to this infant by both. My lord, in February 1716, there were some very unhappy differences between the late lord Altham and his lady, upon which they, by agreement, separated; but lady Altham, as was extremely natural, desired to have the company of her child, which lord Altham, but with great expressions of regard and tenderness for the child, refused; and it will appear to your lordship, and to the jury, that lady Altham left her son with the utmost concern and regret. After this unhappy separation, lord Altham forbade lady Altham's access to this child, and directed that she should by no means see him, and that the child should not be carried to visit her. The lessor of the plaintiff, thus deprived of his mother, continued at Dunmaine in the care of servants, until the year 1718, and in that year lord Altham removed his family to Kenna, in the county of Kildare, where he continued about two years; and it will appear to your lordship, and to the jury, that the lessor of the plaintiff was educated there with the greatest affection, and was constantly reputed and deemed to be lord Altham's son and heir. My lord, in the latter end of the year 1719, or beginning of the year 1720, lord Altham removed to Dublin, and had a house in this town for some time, to which the lessor of the plaintiff was also brought; and it will appear to your lordship and to the jury, that he was then clothed in a very extraordinary manner, and was treated and esteemed as the son and heir of the lord Altham. My lord, some time in the year 1720, lord Altham removed to a place called Carrickduffe, in the county of Carlow; and it will appear to your lordship, and to the jury, that as the lessor of the plaintiff was then of years capable of instruction, so lord Altham provided a tutor for him in the house; and when afterwards lord Altham sent the lessor of the plaintiff to a public school at Bunclody in the county of Carlow, that he was there attended as the son of a nobleman, and treated as such. My lord, in the year 1722, (it was a year extremely fatal to my client) lord Altham began a criminal correspondence with one Miss Gregory, and in the winter of that year, lord Altham settled in Dublin with her, in a house in Cross-lane; and it will appear to your lordship, and to the jury, that this Miss Gregory, before she had made her interest in lord Altham quite secure, behaved tolerably well to the lessor of the plaintiff; and the lessor of the plaintiff was brought to the house where lord Altham resided with her, and was sent to a public school in this city, and was used with great care and tenderness by his father, and at school was deemed and taken to be the son of lord Altham. It will be necessary to mention to your lordship and the jury what became of lady Altham after this separation. She resided in the town of Ross for about three years, and her affection for the lessor of the plaintiff was so strong, that, notwithstanding lord Altham's prohibition, she found means privately to see the child, and always expressed the greatest regard and fondness for him, and complained much more severely of being deprived of the comfort in her child, than the loss of her husband. In the year 1720, or thereabouts, lady Altham came to reside in Dublin; but, unhappily for this lady, she had in her lying-in contracted disorders, which at last ended in a dead palsy, and not only took from her the use of her limbs, but also, in some measure, deprived her of her memory and senses; but, notwithstanding, it will appear to your lordship and to the jury, that during the time she continued in this kingdom, she kept a secret correspondence with this family, relative only to this child. In the year 1723, lady Altham was carried from this kingdom to London in a very languishing condition, and there, during the remainder of her life, lived upon the bounty of some persons who had charity enough to support her. My lord, from this languishing condition of lady Altham, Miss Gregory, who had gained a prodigious influence over lord Altham (who will appear to your lordship to have been a very weak man), had hopes from him of every thing in his power, expected to be lady Altham, and had assumed the title even in the life-time of lady Altham; and therefore considered the lessor of the plaintiff as the greatest bar to her hopes, in case she should have issue by this lord, and thereupon grew very harsh and severe to the lessor of the plaintiff; she raised doubts in the lord Altham, that, though this was the son of the lady Altham, it might not be the son of his lordship, that so she might take off that paternal affection from the lessor of the plaintiff, which he had always shewn to him before; and, my lord, she gained such an influence at last upon this unhappy lord, that she prevailed on him to remove the lessor of the plaintiff out of his house; and in the year 1724, the lessor of the plaintiff was sent by lord Altham to one Cooper's in Ship-street, in this town. But the heart of lord Altham was not at this time quite estranged from his son, for he gave directions there that the lessor of the plaintiff should be taken great care of, that he should be put to school; and it will appear to your lordship and to the jury, that he was put to school at one Dunn's, in Warburgh-street, in this town, and that lord Altham came privately sometimes to see him there. My lord, it will appear to your lordship, and to the jury, that about this time the necessities of the late lord Altham were so extremely great, that he looked out to raise money by all manner of ways and means; and lord Altham being advised, that if the lessor of the plaintiff were out of the way, large sums might be raised by the sale of reversions, in conjunction with the remainder-man in tail; and this scheme being agreeable to the inclinations of Miss Gregory, who was willing to get

rid of the lessor of the plaintiff at any rate, it was determined that this great obstacle to lord Altham's desire of raising money should be removed; and to that end the lessor of the plaintiff was sent to the house of one Cavenagh, with directions to be kept quite private, so as it should not be known where he was. What farther was designed against him I cannot say; but it will appear to your lordship, and to the jury, that though the lessor of the plaintiff was at this time a very young lad, yet he was a little too sprightly to be confined in that manner; he found means to make his escape from thence, and being denied admittance into his father's house, he roved about from place to place (as will be more particularly given an account of to your lordship and to the jury, by the witnesses) for the space of two years before the death of the late lord Altham, his father, which happened on the 16th of November, 1727. But during all that time, he was taken care of by several persons of extreme good credit, and considered as the lord Altham's son and heir. Upon the death of the late lord Altham, in the year 1727, the lessor of the plaintiff was extremely young; he was by the mother's side destitute of all friends whatsoever in this kingdom; and the now defendant, the earl of Anglesea (I must take the liberty now of mentioning him), he, my lord, upon the death of the lord Altham, claimed the title of lord Altham, as brother and heir to the deceased lord, upon a supposition that the late lord died without issue male. My lord, it will appear to your lordship, and to the jury, that many people who had known the lessor of the plaintiff for several years before his father's death, appeared to be greatly surprised that the defendant assumed the title of lord Altham, in regard that they believed the lessor of the plaintiff to be the son and heir of the lord Altham; and there were murmurings among the servants, and a great many people who were acquainted with the lessor of the plaintiff, on that account. It will appear to your lordship, and to the jury, that, in order to remove every obstacle out of the way of the defendant, and to take from the lessor of the plaintiff all possibility of asserting his right, and claiming the title, an attempt was made very early after the death of the late lord Altham; an attempt was made, I say, to kidnap the lessor of the plaintiff; and it will appear that the first attempt was in vain; a second attempt of this kind was made, and likewise defeated; but the third attempt was more successful; and in about four months after the death of the late lord Altham, the lessor of the plaintiff was sent into America, and there sold for a common slave. I, my lord, have not taken upon me to mention by whom those several attempts were made, it will much more properly come out of the mouths of the witnesses; and when they shall speak it here upon the table, every body will judge with what view and design such a wicked attempt could be made. My lord, the lessor of the plaintiff, while he was in slavery, suffered many and various hardships, as every body in those unhappy circumstances does, and did make an attempt to regain his liberty; but being retaken, he suffered according to the law of that country, and continued about 13 years in slavery: But it will appear to your lordship, and to the jury, that even in that miserable condition, when he had an opportunity of relating his misfortunes to any body that had compassion of them, he did mention the unhappiness of his case, and by what means he was reduced to such circumstances. It will appear to your lordship, and to the jury, in what manner the plaintiff was brought by the care and bounty of Admiral Vernon, into the kingdom of Great Britain. There an unhappy misfortune detained him for some time; he happened by an accidental shot, to kill a man near London, for which he was indicted, stood his trial, and was honourably acquitted. How that prosecution was carried on, or for what purpose, I shall not take upon me to say, though it will have its weight in the case; but it was necessary to mention this circumstance, to shew that, when we were at liberty of coming into this kingdom, and prosecuting our right, we did it as recently as was in our power. When these facts are laid before your lordship and the jury, we of counsel for the lessor of the plaintiff, do apprehend there is such a connection in every one of them, that the force of truth will prevail, and that your lordship will direct the jury to find a verdict for the lessor of the plaintiff.

Serj. *Tisdall.* My lord, Mr. Serjeant Marshall has so fully stated the case of the lessor of the plaintiff, that I have no further facts to mention, unless the gentlemen on the other side should require of us to prove the title of the late lord Altham to the lands in question; if they do, we are ready to enter into it, and to shew that by the will of James earl of Anglesea, a remainder of the lands in the declaration was limited to the lessor of the plaintiff, after the death of his father.

Mr. *Lehunte*, of counsel for the defendant. My lord, I hope they will read the remainders in the will of James earl of Anglesea, and the codicils; whereby it will appear that the next remainder of the lands in question, after failure of issue of Arthur late lord Altham, was limited to Arthur earl of Anglesea, and not to the present defendant, who was brother to the late lord Altham.

Serj. *Marshal.* We admit that the late lord Altham was tenant for life of the lands in the county of Meath, and that Arthur late earl of Anglesea had a remainder before the present defendant, and did enjoy it accordingly.

Serj. *Tisdall.* My lord, the legitimacy of the lessor of the plaintiff is the material point.

Mr. *Recorder*, for the defendant. My lord, the lessor of the plaintiff insists that he is the legitimate son of the late lord Altham; if this be proved, there will be no necessity to read the wills and codicils: for we admit, that if

Arthur lord Altham left a son, the present earl of Anglesea has no right to the lands in question.

Serj. *Marshal.* My lord, there is one point further to be admitted, which is, that the late lord Altham intermarried in the year 1706 with Mary Sheffield, natural daughter of the duke of Buckingham (which was admitted). My lord, we have been so happy as to be able not only to trace the lessor of the plaintiff from his birth, but to shew some preceding circumstances, rendering it highly probable; with which we shall begin, by laying before your lordship and the jury, that immediately after lady Altham's coming into this country she proved with child, that she miscarried at Dunmaine of that child, that she proved pregnant a second time, and was delivered of the lessor of the plaintiff.

L. C. B. Bowes. Gentlemen, from the evidence as opened, I see this is like to prove a trial of length, as well as expectation; and I think it is to the honour of your country, as well as for the advantage of the parties concerned, that men of your rank and known probity attend the trial of this issue: But I fear it will not be in the power of the Court to take the evidence with such exactness as to give you the usual assistance, by summing of it up at the end of the trial. I must therefore request you, gentlemen, to take notes as we proceed.

Mrs. *Dorothy Brisco* sworn.

Says, she knew lord and lady Altham at the deponent's father's house in Bride-street, Dublin. That her father's name was Temple Brisco, and was called captain Brisco. That lord and lady Altham came to her father's house in 1713, about the latter end of October or November, and went from thence to lodge to one Mrs. Vice's at Temple-bar, near the Slip. That she afterwards was at that house, and supped with them there. Says, that she, with the rest of the family, were desired to see lord and lady Altham to bed at her father's house, that it might be known they were reconciled.

That from Mrs. Vice's house lord and lady Altham went to Dunmaine, in the county of Wexford, about Christmas, 1713. That she afterwards saw lord and lady Altham at Mrs. Vice's, the latter end of summer 1714.

Henrietta Coles, sworn to the Voire Dire.

Says, she never was promised any thing for giving her testimony in this cause.

Being sworn in chief, deposeth, that she knew the late lord Altham and his lady, in 1713, by a reconciliation being made between them at her father's house. That it was some time about Christmas that they lodged at her father's house four or five days, and went from thence to Temple-bar to lodge; observed them to live comfortably—did see lady Altham at Temple-bar. That my lord and lady went to Dunmaine about Christmas. That the deponent and her mother, being invited, went to Dunmaine about the spring, 1714. That lady Altham was with child while deponent was there, but received a fright and miscarried. That the fright was occasioned by my lord's being in a great rage at their bringing some saucers to table contrary to his express orders; upon which he threw the saucers into the chimney just by my lady, who was seated at the upper end of the table. That the deponent lay with her mother; and that in the night of that day her mother was called up by Mary Heath, her ladyship's woman, who told her, that lady Altham was ill, and desired her to come. Says, that my lady miscarried that night, and deponent saw the abortion in a bason next morning. That deponent's mother said, if lady Altham was so easily frightened, she never would have a child. Says her mother is dead.

[Cross-examined.]

Says, she is about 45 years old—can't remember who were the servants when she was at Dunmaine. She was asked, being so young, how she knew it to be an abortion? Says she heard it from her mother. She was asked, what kind of saucers were thrown? Says, they were china saucers with odd kinds of figures on them, and that lord Altham had them before he was married, and ordered them not to be brought to table to his lady. Says, she and her mother were at table, and that she sat at the lady's right hand. She was asked what the butler's name was then? She said, he was called Rolph. She was asked, was he present? Says, to the best of her knowledge, he was, and brought in the second course. Says, lord Altham used these words, when he threw the saucers, These saucers, you know, I ordered never to come to table; and that thereupon the lady Altham fell into a fit of tears. Says, she never was promised any lease. Was asked, if any physicians were called. Says, she does not remember any. Says, that lord Altham said afterwards, it was the lady's own fault that she had miscarried.

Alice Bates sworn.

Says, she knew lady Altham at captain Brisco's in Bride-street, in 1713, and at her lodgings in Essex-street, in November 1714, at Mrs. Vice's, and that lady Altham was then with child. Says, that lord Altham mentioned these words to deponent, By God, Ally, Moll's with child; says, she wished lady Altham joy of her being with child, and that lady Altham thanked her in presence of my lord. Says, she saw lady Altham twice or three times after, before her ladyship went out of town, and spoke to her of it; and says, the lady Altham always owned it. And deponent saw her growng bigger, and had an opportunity of dressing her.

[Cross-examined.]

Says, she can't tell what became of that pregnancy. Says, she waited on Mrs. Brisco, and attended there sometimes on lady Altham.

Being asked of what size lady Altham was; and of what colour her hair? Says, she was a middle-sized woman, and her hair a dark brown. She was asked, if Mrs. Brisco went to Dunmaine? She says, she went in the spring 1714, and one of her daughters along with her. She was asked, how old that daughter was; and if she was marriageable? She says she was, and as big as she is now. Says, the first time she saw lady Altham with child, the days were short, and the weather dirty; says, she got a chair to go home from Mr. Vice's; says, she was told in the family, that lady Altham was with child; saw her about three times at her master's, and at her lodgings. She was asked, How many daughters captain Brisco had? She said five; but could not tell which of them were at home when Mrs. Brisco went to Dunmaine. Said, Miss Harriot was in the country with lady Altham; and says, she heard her master and mistress say, that the lady Altham miscarried in Dunmaine, and has heard Mrs. Cole say so.

Catharine M'Cormick sworn.

Says, she knew lord and lady Altham, when they lodged at Mr. Vice's near Temple-bar, where deponent was servant in the year before queen Anne died, in or about the latter end of summer; says, that the first time of their lodging there, a running-footman came with my lord's slippers; and there was a rumour at first that my lord was married to one of captain Brisco's daughters, but it was soon afterwards known that lady Altham was come to town. That lady Altham went to Dunmaine from her master's house, and about the latter end of May, or beginning of June following, came from the country to Mr. Vice's the second time. That there was some talk in the family at Mr. Vice's of the miscarriage at Dunmaine. Says that my lord one evening having words with my lady's woman, Mrs. Heath, made a great noise, upon which my lady was frightened and screamed out. That Heath then told my lord that my lady had miscarried or was going to miscarry; whereupon he sent for one Mrs. Lucas a midwife in the neighbourhood; that one Mrs. Lawler another midwife was also sent for; says, that lady Altham miscarried about six weeks after her coming to Mr. Vice's: heard it from Mrs. Heath her woman, and Heath said the lady would be a fruitful woman, only for my lord's usage. That about two months after, she heard lady Altham was again with child, and was told so by Mrs. Heath her woman, who mentioned to her she had good news, for that my lady was again with child. Says, there were great changes in my lord for the better, upon my lady's being with child again; that he used to come home earlier than usual, and that a pair of low-heeled slippers was bought for my lady, for fear of her stumbling and thereby occasioning a miscarriage; says, that at a certain time the deponent observing my lady pretty big, she wished her ladyship much joy of her little big belly; that my lord said that was an Irish bull, and mentioned to deponent that he believed she might make a good nurse; says, this was in December, about ten days before Christmas, the year queen Anne died; says, lady Altham did not lace herself as usual. Thought and believed lady Altham to be big, and had the walk of a woman big with child. That jellies and broths were made for her; says, her husband remained a servant to my lord, and she parted from Mr. Vice's family; says, the lady not seeing company, made her first believe she was with child; says, she gave herself full ease and liberty in a night-gown. Said, the occasion of my lady's miscarriage at Mr. Vice's was by my lord's coming in one night in liquor; and some disputes happening between his lordship and Mrs. Heath, my lady's woman, a stool was thrown, which made a noise, and frightened my lady; says, Mrs. Heath said to my lord, You have done a fine thing, my lady has miscarried; says, she was servant at Mr. Vice's, when lady Altham kept her bed a fortnight; don't remember the names of captain Brisco's children, or when they visited lady Altham. But says, Mrs. Brisco was an intimate acquaintance of lady Altham's.

[Cross-examined.]

Being asked in what manner she got her livelihood? Says, by her honest industry, and that her employment is stamping or printing papers for rooms. Being asked whether she had any discourse with one Mrs. Shaw? Says she had; and that having mentioned her living at Mr. Vice's house, she was asked if she knew that Mr. Annesley was a son of lady Altham? or if she could swear that my lady was with child of that very boy?

Dorothy Brisco called up again by the Defendant's Counsel.

Says, she heard lady Altham was with child, and miscarried at Dunmaine: can't charge her memory if lady Altham was a second time with child: says, her mother and sister came in about three months home from Dunmaine. Says, that lord and lady Altham came to Dublin after queen Anne died. Don't remember her ladyship's being with child; for deponent was in the small-pox when queen Anne died, and her mother came to town on her having the small-pox: says, lord Altham came from Dunmaine about August. She was asked whether she knew the witness Alice Bates: says she does, and that she is an honest worthy woman.

Mrs. *Coles* called up again by the Defendant's Counsel.

Says, she remembers Alice Bates to be a servant at Mr. Vice's: can't recollect if she told her that lady Altham was with child. Says, that lady Altham came to town after her mother, towards the winter: believes she visited at her house: can't remember its being talked of that lady Altham was with child. Says, she was at Dublin when she heard of the queen's

death, and that my lady came from the country about the winter: says, she remained at Burton-hall for six weeks, and in Dunmaine the whole month of May, and that she left lady Altham at Dunmaine.

Charles M'Carty sworn.

Says, he knew lord Altham, and knew his lady when they lived at Vice's, in the year 1715 or 1716. Deponent kept an inn at College-green, and lord Altham had a coach-house and stables from deponent. That after the death of queen Anne, about a year or a year and half, it was reported lady Altham had a child. (Deponent was mentioning a discourse he had with lord Altham, at the Three-Tun tavern, but was prevented therefrom, it being matter of hearsay.) Says, that the parliament was sitting when lord Altham lodged at Mr. Vice's, and that it was in summer time.

Major *Richard Fitzgerald* sworn.

Says, he knew lord Altham, and was acquainted with his lordship in 1714, at a place called Prospect-Hall in the county of Waterford, and at Dunmaine, and knew lady Altham; that deponent was at Dunmaine some time in 1715. Being asked if he was sure it was in the year 1715? says, he is certain; but says, he could not then see lady Altham, because she was lying in at that time, and that she sent word down to the deponent, that if she could see any body, she would see him. Being asked the occasion of his coming to Dunmaine, says, he met lord Altham at Ross, who invited deponent to dine with him the next day; that deponent desired to be excused, because he was to dine with some officers; but lord Altham said, deponent must dine with him, and come to drink some groaning-drink, for that his wife was in labour: deponent told him that was a reason he ought not to go; but lord Altham would not take an excuse, and sent the deponent word the next day to Ross, that his wife was brought to bed of a son; and the deponent went to Dunmaine and dined there, and had some discourse about the child, and lord Altham swore that the deponent should see his son; and accordingly the nurse brought the child to deponent, and deponent kissed the child, and gave half a guinea to the nurse: and some of the company toasted the heir-apparent to lord Angleseа at dinner. That this was the day after the child was born; and deponent says, he left the country the next day, and went to the county of Waterford, to his own house at Prospect-Hall. Says, deponent saw the woman to whom he gave the half-guinea, this day of his examination; that he remembers her well, because he took notice of her when he gave her the half-guinea, that she was very handsome; that he did not stay at Dunmaine that night, but came to Ross at night-fall, and was attacked in the road by robbers: that he crossed the ferry on his return home—remembers that the lord Altham was in high spirits with the thoughts of having a son and heir.

[Cross-examined.]

Deponent was asked, did he ever return to the county of Wexford? Says, he never did: he was asked, how far Prospect-Hall is from Dunmaine? Says, about 28 miles. He was asked on what occasion he was at Ross? Says, that deponent's uncle, Mr. Pigott, lived in the county of Wexford, and at his death left deponent a legacy, which occasioned deponent's going there: and says, he was a good while dead before deponent got an account thereof.

John Turner sworn.

Says, he lived at Dunmaine ten years, and knew lord and lady Altham: deponent was seneschal to the lord Angleseа, and visited lord Altham; that he married in December 1714, and he and his wife went to Dunmaine and staid there about three weeks about Lent time, and lady Altham was big-bellied at the time he went there. Says, lady Altham told deponent the next time he saw her, that she had a son: afterwards saw the boy at Dunmaine a year and a half old: staid a night at Dunmaine, and had the child in his arms: saw the lady leading the child across the parlour: saw the lord Altham kiss the child, and he called him Jemmy: saw the child afterwards at Ross, and at Kinnay in the county of Kildare; saw the child once at Ross when lady Altham lodged there at one Butler's. Deponent being asked how the child was treated at Kinnay, says, he was dressed as the son of a nobleman, and the servants called him master; saw him at Kinnay, as he believes, three or four times: the child could walk at Kinnay, and used to be wheeled about in a little carriage: saw the child afterwards at Carrickduff in 1720, and lord Altham was fond of the child. That my lord and deponent being at a tavern in Dublin in 1722, lord Altham said he would send for his son that deponent might see him, and the child accordingly was sent for: that he was then about eight years old, and lord Altham said to deponent, you were seneschal to earl Arthur and earl John, and you may be seneschal to the child: and deponent says, he believes he saw the child once after in Dublin, but did not know him, only was told it was he: and that was about two or three years after the meeting at the tavern; that the child had no clothes, and was so much altered, that although the people of the town told him he was the lord Altham's son, he did not know how to believe it.

[Cross-examined.]

Deponent was asked where my lord lived at the time he saw the child in that poor condition? says, he does not know, but believes at Inchicore; admits he did not enquire where he was, nor about the child, having heard that the child born at Dunmaine was dead many years ago, that deponent was settled near Camolin Deer-park: says, it was visible the lady was with child: deponent was asked what size woman my lady was? he says, a lusty and swarthy

woman, and her hair brown: knows not what neighbours visited at my lord's, but has seen colonel Palliser there. He was asked if he knew the servants? Says, he did not know one servant by name: believes he might then know them, but does not now recollect them: has seen my lady's woman, but does not know her name was Heath: knows Owen Cavenagh now, but did not know he was lord Altham's servant. He was asked if he knew Rolph the butler? says, he has heard the name of Rolph, but could not tell whether or no he was butler. He was asked if he knew the name of the servant who made his bed? says, he does not remember her name. He was asked if he knew the name of the cook? he said, No—or the nurse? he said, No: saw the child at Mrs. Butler's house at Ross, and afterwards at Dublin when he was 10 or 11 years old, and in a miserable bad dress: never saw lady Altham but at Dunmaine, at Ross, and in Dublin: said, he never heard till within these two years that lord Altham had a bastard. He was asked when lord Altham died, says, about 1728—says, he saw the boy in a ragged condition before lord Altham died, at the upper end of Arran Quay in Dublin, and heard some little boy call him my lord: says, lord Altham applied to him in 1723, to speak to lord Anglesea to help to maintain his son, which deponent did; and earl Arthur gave deponent 50*l.* for that purpose. That this was about six years before his death: says, that being recommended by Mr. Cæsar Colclough to the present earl of Anglesea, deponent went frequently to see him, and defendant used to entertain deponent with telling him how much he was perplexed by lawsuits; that deponent asked him one day what was become of Jemmy? to which the defendant answered, that he was dead.

Dennis Redmonds sworn.

Says, he knew lord and lady Altham, and deponent was servant to lord Altham after he came to Dunmaine, about thirty years ago, and was three years in his service, and knew that lady Altham was with child, because he saw her when she was big-bellied, and it was the talk of all the servants; says, my lady was brought to bed at Dunmaine; and deponent was sent for the midwife the day before her delivery. Being asked how he was employed in the service? says, he looked after the hunters; says, it was Mrs. Heath who sent him for the midwife (whose name was Shiels) and that deponent brought her from opposite the barracks in Ross, and that the child was christened when he was about three weeks old, by one Mr. Loyd (lord Altham's chaplain) by the name of James; that the godfathers were counsellor Cliff and Mr. Colclough, and the godmother madam Pigott, and that the nurse (who nursed the child) was Joan Landy, who was preferred, as he was told, because she had the best milk; that there was a bonfire made and other rejoicings for the birth of the child. That the child was nursed about a quarter of a mile from the house upon my lord's land, and nobody lived in the house, but the nurse's father and mother and a servant maid of the house; and lord Altham and his lady went often there to see the child, and to bring him to Dunmaine, and that lady Altham had a coach-road made on purpose to go to see the child; that the child was at nurse about a year, and then removed to Dunmaine. That in the beginning of 1717, my lady went away from Dunmaine, on occasion of Mr. Thomas Palliser. That lady Altham had the child in her arms as she was in the chariot going away, and was kissing it, but the lord Altham came out in a passion and took the child from my lady, and gave it to Joan Laffan; and the lady begged to have the child along with her, and cried because my lord refused her; that she sent for the child to Ross, but could not have it as he knows of. That the child had gold-lace on his hat, and was dressed like a nobleman's child. Says, he saw the child (as he believes six years after) at Carrickduff, and the lord behaved to it as to his own child; and deponent knew him by his face to be the same child he saw at Dunmaine. Deponent did not stay at Carrickduff; came to my lord only in order to break some horses (deponent being a horse-rider). That he saw the lord walking about with the child at Carrickduff. Says, he has heard that Mr. Loyd who christened the child is dead, and that the godfathers and godmother are dead.

[Cross-examined.]

Says, he was servant to lord Altham about two years, before his lady came to Dunmaine. That she was brought to bed about May. Says, deponent was not present at the christening; believes the midwife (for whom deponent was sent to Ross) is dead. Says, that Joan Landy was the nurse, and that she afterwards married to Daniel M'Cormick; that she had a child before her marriage; and some said, a sailor, and some that lord Altham was the father of it.

[Hereupon the Lord Chief Baron said, that it looked odd, that lady Altham should send her child to be nursed to a person suspected to have a child by her ladyship's husband.]

Says, that Joan Landy was brought to bed many months before my lady Altham; says, he saw Landy's child, and that one father Michael Downes christened it. That her mother and sister took care of her child, when she nursed my lady's. That Landy's child died at the age of three or four years, of the small-pox, after my lord had left Dunmaine, and deponent was at his burial. He was asked by what name Landy's child was called? he said, sometimes it was called Landy, and sometimes M'Cormick. That he never heard Landy's son called Annesley. That James Landy, the nurse's father, lived in Dunmaine; that the old house was put in repair for the reception of my lady's child. That deponent was never examined before his present deposition. Says, that col. Palliser in some discourse

with deponent, desired deponent not have any thing to say to this affair.

Margaret Shircliff sworn.

Says, she knew lord and lady Altham, and that Mrs. Shiels the midwife told deponent she delivered lady Altham of a child about April or May, about twenty-nine years ago. [This being hearsay-evidence, was objected to by defendant's counsel, and the Court allowed the objection.]

Mary Doyle sworn.

Says, she knew lord and lady Altham; that she was hired by the steward to be a servant in lord Altham's service. That she lived with lady Altham three months before she was brought to bed, and was in the room when lady Altham was delivered at Dunmaine. That Mrs. Shiels who lived at Ross was the midwife; and Denis Redmonds was sent for her. That there were three or four present when lady Altham was brought to bed, and the christening of the child was public. That Mr. Anthony Colclough and counsellor Cliff were the godfathers, and Mrs. Piggot the godmother, and Mr. Loyd (who was my lord's chaplain) christened the child, and there were great rejoicings for the birth, and plenty of wine and other liquors drank on that occasion. That several nurses came recommended, but Joan Landy was appointed nurse, who was afterwards married to one M'Cormick, as deponent has heard; that she was a clean tight girl; that she was reputed to be married to a sailor, and have the child by her husband.

[Cross-examined.]

Says, she lived three months at Dunmaine before the child was born. That she remembers to have seen major Fitzgerald there in a few days after lady Altham was delivered. That deponent was present at the christening. Never knew of any person's being brought to bed there but lady Altham. That the child was christened in the parlour about three weeks after its birth, and Mrs. Heath was present at the christening. Believes Landy was then married to one M'Cormick who lived at Dunmaine. Believes, that major Fitzgerald did lie at Dunmaine, and staid there for some time. Says, that Joan Landy nursed the child; never was at her house; but heard from the servants that were there, that Joan Landy's house was about two fields from the house of Dunmaine, and that the nurse's house was finely white-washed. Says, that Charles Meagher was the butler then. That one madam Butler, Nelly Murphy, and Mrs. Heath were there at that time. Says, lady Altham was almost three hours in labour; that it was duskish when she was brought to bed, and that she was taken ill the day before.

Mrs. *Deborah Annesley* sworn.

Says, she knew lord Altham, at a place called Kinna in the county of Kildare. That lord Altham lived there, and deponent lived within three miles of that place, at Ballyshannon. That lord Altham was her husband's relation, and visited deponent. That lord Altham's son at this time and deponent's brother, Mr. Paul, used often to drink his health. Being asked if she visited lord Altham at Kinna? says, she did not care to go to the house, because lord Altham had brought down a house-keeper there. Says, that this was in 1717 or 1718. Says, her brother visited my lord. Being asked if she believed the child was my lord's lawful son? says, she believed he was his lawful son, and never heard the contrary. Says, the child was called James. That her brother was a sober grave man, and she is sure would not have toasted the health of the child if he had been a bastard. Says, that the child went with lord Altham to Carrickduff in the county of Catherlough, and deponent never heard of him afterwards. Says, her brother frequently after the death of lord Altham, enquired what was become of that boy, but never could learn, which made them all conclude he was dead.

[Cross-examined.]

Says, she never doubted, but always believed the child was lord Altham's son, but admits she did not hear of the child until he came to Kinna. Says, that after lady Altham came over a second time from England, she was supposed to be with child. Says, deponent once visited lady Altham when she came to the country, but her husband soon after dying, and deponent being in affliction, never had any correspondence with the family afterwards. Says, that she herself drank lord Altham's son's health often when my lord lived at Kinna.

Thomas Barns of Killkenny, alderman, called.

Mr. Barns being called to give his evidence, was asked by defendant's counsel, if he had not a lease of some lands, part of the defendant's estate? Mr. Barns admitted he had a lease of 31 years, which was expired, or near expiring. Whereupon he was objected to by defendant's counsel, for that he was interested, and therefore could not give his testimony. In answer to which, the counsel for the lessor of the plaintiff said, that the lease was not of any of the lands in the declaration, and therefore his evidence could not be objected to.

To which the defendant's counsel replied, that though Mr. Barns's lease was not of the lands in question, yet all the estate might be affected by the verdict, and therefore as he was interested, he was an incompetent witness.

To this it was answered, that since Mr. Barns had not any lease of the lands now in dispute, he could only be supposed to be consequentially, and not immediately interested, and therefore might properly give his testimony; and the following case was cited to shew, that a person consequentially interested in a suit at law may be admitted to give evidence: Two persons coming from Parkgate to Dublin in one ship, both had their portman-

teams stolen from on board the said ship; one of the persons sued the master of the ship for the value of the goods he had lost, and produced the other person, (who had likewise lost his portmanteau) as his evidence. It was objected by the counsel for the master of the ship, that the witness was a party interested, and should not be admitted to give testimony; because, if the plaintiff succeeded, the witness would have the same title to recover against the defendant, in which case he would bring his action against the defendant, and the plaintiff *vice versa* might be a witness for him. Yet notwithstanding the objection the Court admitted the other person to be a witness, because he was not a party in the suit, and not immediately, though consequentially interested. Therefore the counsel for the lessor of the plaintiff insisted, that Mr. Barns should be admitted to give his testimony in the present cause.

Which the Court agreeing to, Mr. Barns was sworn.

Says, he very well knew lord and lady Altham. Being asked, if he knew that lord Altham had a son? Says, he knew nothing of my lord's having a son, but what he was told by my lord. That he went to Ross in spring, 1715, and lord Altham came to the inn where he was, and meeting him in the kitchen, said, he was glad to see deponent, and asked him where he had been? That he told my lord he had been in Dublin about affairs of the duke of Ormond; my lord said to deponent, I hope we shall dine together: deponent said, with all my heart; and after that they went up stairs and dined together; that after drinking some wine, my lord said to deponent, Tom, I'll tell you good news, I have a son by Moll Sheffield; deponent thereupon shook his head, (not remembering she was my lord's wife) and said, Who is Moll Sheffield? My lord taking notice of deponent's meaning, said, Zounds, man, she is my wife: upon which deponent said, My lord, I humbly beg your pardon, I am sorry for what I said. Says, that until my lord had mentioned she was his wife, he took her to be a naughty pack; but afterwards deponent recollected that my lord's wife was the duke of Buckingham's daughter; and deponent then advised my lord, that since he had a son, to take care of his wife, and discharge all other women. Says, he knows the year he went into the country, because he went upon hearing of his father's death. Says, that my lord lived at Dunmaine after the disgrace of the duke of Ormond; deponent's reason of remembrance is, that he was receiver to the duke for 45 years, and came to Dublin from the country, by order of Mr. Nutley, who was concerned for the duke. Says, that deponent was at Dunmaine the day after my lord, and he had the discourse at Ross. Being asked if he saw a son there? Says, he does not know but he might, but is not certain; does not remember any conversation he had with lord Altham about his son at Dunmaine. Says, that deponent dined and supped there, and remembers lady Altham at dinner, but not at supper. Says, he thinks one Mr. Sutton was at dinner. He was asked, if he knew my lord's agent, or any of his servants? Says, he did; that he saw them at that time, but cannot recollect they said any thing to him, or he to them. Says, he does not remember seeing the nurse there.

[Cross-examined.]

Deponent being asked, what month he went to Ross? Answered, either in April or May, but cannot fix which. Says, he might have seen Rolph the butler, but did not know him. Did not know the servants Dwyer or Cavenagh; but knew Mr. Taylor, but had no discourse with him about the son. Says, my lord did not tell him whether or no the child was christened, nor what his name was. Says, nobody was present at Ross when my lord spoke to deponent, and the discourse was after dinner, and as common discourse. He was asked, how he came not to understand my lord's expression of his having a son by Moll Sheffield? Says, he did not recollect who she was. Says, he is 65 years old. He was then asked, how long he served the duke of Ormond? He said, since ninety-five. He was then asked, if he did not say he served him 45 years? He said, he meant to this day. Says, he has heard five hundred at Ross say, lord Altham had a son.

Southwell Piggot, esq. sworn.

Says, He knew lord and lady Altham; and that it was generally reported, without any contradiction, that he had a child about 30 years ago. Deponent came over from England about the year 1712. Says, there was a great intimacy between his step-mother (Mrs. Piggot) and lady Altham. That Mrs. Piggot died about 1720 or 1721. Says, he never heard that the child (which he heard lady Altham had) was a daughter.

The counsel for the lessor of the plaintiff were going to ask Mr. Piggot, what he heard his stepmother say about her being godmother to the child; but this was objected to by defendant's counsel, who insisted that hearsay was not evidence, and that the witness, Mr. Piggot, ought not to be suffered to give any account thereof.

In answer to this the counsel for the lessor of the plaintiff insisted, that matter of hearsay, which could not be supposed originally intended to be made use of in the cause (such as what the deponent heard several years ago) ought to be admitted, and the rather as it was produced to corroborate positive proofs. That if Mrs. Piggot said, she was sponsor to the child, it must have some weight; for Mrs. Piggot could not foresee that what she said on that occasion was ever to be given in evidence, and therefore her declaration could not be supposed calculated for any particular purpose.

That where a lease is lost, an old rent-roll may be given in proof; because it cannot be supposed to have been designed for that particular purpose. The declaration of a wife has been admitted to be given in evidence against a husband; because at the time it was made it could not be supposed to be intended to be made use of as evidence, and a case in Skinner's Reports was cited to this purpose.

It was farther urged by plaintiff's counsel, that there was no stated rule of evidence; but that the rules of evidence vary according to circumstances of the case. And though it must be allowed that hearsay is the lowest degree of evidence, yet it was evidence to be submitted to the jury.

It was answered by the council for the defendant, that any declaration of Mrs. Piggot, which was not made in the presence of the earl of Anglesea, ought not to be given in evidence. That Mrs. Piggot is dead, and where persons are dead, the law hath not provided for their testimony, nor will it substitute a mere declaration in the place of an oath.

As to a rent-roll (if it appears that it was found among the deeds and papers of the family, and not designedly left there) it may be evidence in case of a lease lost or mislaid, to shew the value of lands; but not to prove that there was a lease in being. The nature of the case may require such a proof, and it may be necessary to produce the rent-roll: but that is very different from the hearsay-evidence of Mrs. Piggot's declaration in the present case.

That the admitting hearsay-evidence in the present affair, would introduce a dangerous precedent, in regard the other side could not have the benefit of cross examining.

In some cases, it is true, hearsay-evidence is admitted from the necessity of the thing; as if a man receives a mortal wound, his declaration at the point of death would be evidence; but that is in case of the crown, in a criminal affair, and in a case of absolute necessity; which is distinguished from a civil case.

That in civil cases there is not the same necessity, because a bill in equity may be filed to perpetuate the testimony of ancient witnesses, and then the evidence may be cross-examined. But Mrs. Piggot being dead, no declaration of her's can be evidence, because the defendant has no opportunity to cross-examine her.

An affidavit of Mrs. Piggot's could not be read in the present question; therefore much less a declaration of her's made several years ago, and which was not upon oath. If hearsay-evidence of this nature were to be admitted, such precedent would be attended with evil consequences.

The Court would not admit the hearsay of Mrs. Piggot's declaration to deponent to be made use of as evidence, on the principal reason, that hearsay evidence ought not to be admitted, because of the adverse party's having no opportunity of cross-examining. And that if declarations of persons dead were to be admitted, they would in effect have the force of original testimony.

Philip Breen sworn.

Says, Deponent knew lord and lady Altham about thirty years ago, at Dunmaine, where deponent's father and mother lived. Says, that deponent saw lady Altham with child at Dunmaine, and heard by the people of the place that she was with child; and that about 28 or 29 years ago (a little before or after May) there were great rejoicings at Dunmaine for the birth of a child. Says, that Joan Landy nursed the child at her own father's house: that it was a thatched house, and repaired on that occasion. Says, he has seen the child with lord and lady Altham in the coach. Says, he remembers the child Joan Landy had, and that it died of the small pox after lord Altham left Dunmaine; believes about a year; and deponent was at the wake and burial. Says, that the child which Landy nursed, was removed to Dunmaine, and delivered to Joan Laffan, one of the maids at Dunmaine; says, that there was a coach-road made between Landy's house and Dunmaine-house; and deponent has seen the coach go that road. He was asked, whether he remembered Mrs. Heath at Dunmaine at the time he saw the child? Says he did.

[Cross-examined.]

Being asked, who he heard was father of Joan Landy's child; he answered that some said lord Altham was, and others said a sailor was the father of it. Says, Joan Landy was married to Daniel M'Cormick after lord Altham left Dunmaine; and that lord Altham was supposed to have got the child in the house of Dunmaine, when Landy was dairy-maid; says, Joan Landy's child was a year older than lady Altham's; says, he was often in every room of the house. Says, lady Altham was a tall woman; and that Mrs. Heath was a tall thin woman. That Joan Landy's child was called James Landy. Does not remember his being ever called James M'Cormick. Says, he does not know who christened the child.

Eleanor Murphy sworn.

Says, that she knew lord and lady Altham at Dunmaine, about 26 or 29 years ago; says, that she was a servant there when my lady was brought to bed, that deponent was called to bring up some water to my lady's room, and that she went into the room with a bason of water, immediately after lady Altham was delivered; that Mrs. Shiels was the midwife, and Dennis Redmonds was sent for her to Ross. Being asked, who was in the room when she went in? Says, madam Butler, Mrs. Heath, and Mary Doyle. Says, deponent came to live at Dunmaine about the beginning of summer, and remained at Dunmaine about two or three months after my lady's delivery of the son. That Joan Landy was the nurse; and there were several other women applied for the

nurse's place. Remembers there were bonfires and rejoicings at Dunmaine for the birth of a son; that the child was about three weeks at Dunmaine after its birth, and then the nurse took it to her own house; that a little road was made from Dunmaine house to the nurse's, for the chariot. That one Mr. Anthony Colclough, and Mr. Cliff, were the godfathers, and Mrs. Pigott the godmother, as she heard from several of the servants, Knows that Mr. Cliff of Ross, and madam Pigott used to come there, and has seen them there often. Says, deponent was in the house at the christening, and was servant under the laundry-maid. Remembers Mrs. Heath was in the room when the lady was brought to bed: the christening was about three or four weeks after. Says, Joan Landy had a house of her own, and believes her mother and sister lived with her; but does not know if her father was alive when she took lady Altham's child to nurse. She was asked how long Joan Landy had her own child before lord Altham's child was born? Says, about three quarters of a year; and that Landy's child continued with her in the house after she took my lady's child to nurse. She was asked, if the house was the same it was before? Says, she believes it was, except that it had another room; but says she did not know the house well before Landy had the nursing of the child. She was asked, what sort of a house it was? Says, a little house hard by.

[Cross-examined.]

Being asked if she did not go into the house; Says, No, no farther than the door. She was then asked, how she could know that there was another room; says, that the room was built as an addition to the old house. Being asked, if she ever saw Joan Landy's child; says, Yes. She then again named the people in my lady's room at the birth, and that herself went into the room after the birth of the child with the water, and that it was about duskish; and that lady Altham kept her chamber a month or six weeks, and that the child was christened before my lady left her room, and was christened in the yellow room up one pair of stairs, but does not know who were at the christening. Says, she was three months in the service before the birth of the child, and a quarter of a year after. Says, that Mary Doyle came into the service before her: does not remember that they had any particular conversation about the child at that time, and has never seen her since, and knows not if she should know her now: knows not whether she or Mary Doyle left the house soonest. Says, she did not wash any of my lady's linen. She was asked, if she was married? Says she is, and has children.

The examination of these witnesses having taken up all Friday till eleven of the clock at night, the Court observed to the counsel, that as there was a great number of witnesses more to be examined on both sides, so it would be impossible for them, or the jury, to continue hearing the cause through, without an adjournment; and therefore recommended it to the parties to consent to such adjournment: Accordingly both parties readily expressed their consent, and the same being reduced into writing, and signed by the attornies on both sides, the Court adjourned till 9 o'clock the next morning.

The Lord Chief-Baron made a compliment to the jury, and expressed his sense of their honour and integrity; that the nature of the thing required an adjournment, though there was but one precedent of adjourning a jury on a trial of that kind; but as they were gentlemen of such strict honour, any confidence might be reposed in them, without danger of any prejudice resulting from it.

Saturday, November 12, 1743.

The Court being met about 9 o'clock in the morning, according to adjournment, the jury were called over, and answered to their names; and then the counsel for the plaintiff proceeded to examine their witnesses, as follows:

Christopher Brown sworn.

Says, he knew the late lord Altham about 33 years ago, and knew lady Altham on her first coming to Dunmaine about 30 years ago, and knew her to have a son about 28 or 29 years ago. Being asked his cause of knowledge, says, he lived a servant to esq. Anthony Cliff, who was invited to the christening of the said child. That deponent went to Dunmaine that day, and waited at table on his master. Says, he remembers Mr. Anthony Colclough, Mr. Cliff of Ross, Mr. Anthony Cliff, and captain Tench were at the christening, but does not recollect the other persons. Says, it was in the beginning of summer as near as he can tell: being desired to point out the month; says, it was in May as near as he can guess. Says, he did not see any lady there but Mrs. Pigott; and said there were plenty of entertainment and great rejoicings there; says, deponent was sent several times with messages from his said master, (who lived at Clinyduff, about three miles from Dunmaine) to enquire how my lord, and lady, and the child did: saw the child afterwards at Dunmaine in my lady's lap, and with the nurse Joan Landy, and never saw him but at Dunmaine. Deponent waited at table the day of the christening, and heard them toast, The lady in the straw and the young christian.

[Cross-examined.]

He was asked as to the time of drinking of the above health? Says, he can't tell, whether it was before or after dinner. Says, he is sure Mr. Colclough, Mr. Cliff of Ross, and Mr. Anthony Cliff were there, and says there were several others at dinner, whom deponent can't recollect. Says, my lady did not dine with them. Heard it was Mr. Loyd that chris-

tened the child, and remembers that he dined there; says, he knew him very well, and that he lived at Ross; says, Mrs. Pigott was at the head of the table; says, that all that dined there, to best of deponent's remembrance, are dead; says, that deponent dined along with the servants; remembers Mr. Taylor and Dennis Redmonds to dine there; says, no woman-servants dined with deponent; says, he thinks Anthony Dwyer was the butler, but never saw him before that day. He was desired by defendant's counsel to name the servants who dined there. He says, I cannot name them, would you have me tell you what I don't know? Says, deponent drank several healths, and was very merry, but knows not what particular healths were drank: says, there was not a bonfire on the night of the christening, but heard there was one the night following, but deponent was not there? Being asked what meat there was for dinner; says, I don't know; would you have me keep an almanack in my head? says, he cannot tell whether the christening was above or below stairs; says, he did not see the child till day of the christening, nor the nurse; cannot tell whether he saw captain Sutton there that day, or that he dined there: says, he remembers captain Tench being there, because he was married to his master's sister, and that Mr. Colclough was there, because he was one of the gossips; says, his master did not stay at Dunmaine that night. Being asked if he knew Thomas Rolph the butler: says, that one Dwyer was butler, and attended that day; says, he did not know my lady's woman. Being asked if he saw Mrs. Heath; says, he did not know her. Being asked to whom he delivered the messages, when he came from his master and mistress with services to Dunmaine; says, he delivered them to one Mr. Taylor, and that Mr. Taylor returned the answers to deponent. He was asked, how he came to deliver messages always to Mr. Taylor, and not to the other servants; he says, because, he was my lord's gentleman; and deponent always enquired for him. Being asked if Mr. Taylor is reputed to be dead or alive; says, he does not know, and has not seen him these 20 years past. Being asked if he knew Mary Doyle, or Eleanor Murphy; says, No. Being asked if he ever saw lady Altham; says, Yes, at the house of Dunmaine, in the parlour, with the child in her arms. Says, he believes he saw the child about a year afterwards. Says, my lady was a tall fine slender woman. Believes she was taller than deponent, but says he never measured her. Says, she was thin in the face. Being asked if she was a handsome woman, says she appeared so to deponent. Says, he cannot tell the colour of her hair, for that she had powder in it the day deponent saw her, and that he never saw her but once in the parlour, and sitting down. He was then asked how he could know she was a tall woman; says, she appeared to be tall by her bulk and figure. Says, he lived with Anthony Cliff a servant for 21 years: says, that my lord visited deponent's master at his house, but my lady did not, nor did deponent's master's sisters visit my lady. Being asked where the company dined the day of the christening; says, in the parlour of the house of Dunmaine, as near as deponent can guess, fronting the great yard, says, he does not know that the room had any other name than the parlour. Being asked who was at the sideboard; says some of the servants stood there, but deponent does not know who it was: Says, Anthony Dwyer attended as butler, and deponent attended his master. Says, every gentleman's servant waited at table, is sure Mr. Cliff of Ross dined there, and that one M'Gee his servant waited on him. Says, he does not remember the names of all the servants that dined with him at the same table; but thinks that all the servants dined there. Does not know how many tables there were there: can't tell particularly whether Redmonds or M'Gee dined with deponent at the same table, says, the servants dined in the common hall at a long table; and deponent remembers but one table there. Says, the hall was on the same floor with the parlour where the gentlemen dined; says, the common hall, the parlour and the kitchen were on one floor, to the best of deponent's remembrance; says, he does not know but some dined in the kitchen; does not think he went down stairs to the kitchen.

John Scott sworn.

Says, he was servant to Mr. Pigott, who lived within three or four miles of Dunmaine about 33 or 34 years ago (before Mr. Annesley, lord Altham's son was born) at a place called Tyntern; and deponent knew lord Altham at Dunmaine about 30 years ago. Says, deponent went for England with sir Harry Pierse's son, and sir Harry followed in May, and returned in July, about 28 or 29 years ago. He was asked if his master was in mourning; says he was, but knows not on what occasion. Says sir Harry Pierse married a daughter of Mrs. Pigott's. Says, he was sent several times from Mrs. Pigott to lord and lady Altham, with messages and how-do-yous, to know how their child did. Being asked what the reputation of the country was, in relation to my lord's having a son; says, it was commonly understood by all the neighbourhood, that my lord Altham had a son by his lady; says, he has seen the child brought by the nurse to Mrs. Pigott.

[Cross-examined.]

Knew the house at Dunmaine very well; says he used to go through the yard to the kitchen. Being asked if the kitchen was on the same floor with the parlour: says, it is not; that it is under the best parlour; says, that deponent was born near Dunmaine-house, and knew it. Says it is about 10 or 12 steps going up to the front of the house. Says, there is a little parlour below stairs on the left-hand, and that the other parlour is on the right hand as you go in. Says, the common hall was between the kitchen and the little parlour. Being

asked if the hall where the servants used to dine was on the same floor with the parlour? says, No. That when you came into the house, it was into a lobby or entry, which deponent believes was about 5 or 6 foot broad, and 16 foot long. Says, deponent was servant to counsellor Piggot; and that it is about 28 or 29 years ago deponent went to England, as near as he can guess, and continued in England from the latter end of March till the beginning of July. Says, sir Harry Pierse was in London, and lodged at St. Martin's. Can't tell whether queen Anne was living or dead then. He was asked, if he ever was in Yorkshire? says, he was not. Said, he landed at Parkgate, going to England, and took shipping there at his return home. He was asked, if he took notice of the proclaiming of the king? Says, he did not. He was asked, if he could tell whether the rebellion of Preston was before or after his going to England? Says, he cannot tell. Says, he never was in England but once. Says it was after his return from England, that lord and lady Altham's child was born. Says, he cannot tell upon what occasion sir Harry Pierse went to England. Says he cannot recollect whether their return from England was before or after 1713; but as near as he can guess, it was about 28 or 29 years ago. Says he lived in Mr. Piggot's family for 7 years; and that he lived there about a year, or a year and a half before deponent went to London. Deponent mentioned afterwards some gentlemen with whom he had lived a servant.

An application was then made to the Court by one of the defendant's counsel, for liberty to call one Mr. Brehan, sovereign of the town of Ross, to view this witness. Brehan accordingly appeared, and viewed him, and said he knew him; and Scott said he also knew him very well; and then Brehan was ordered to retire.

Christopher Brown was ordered by the Court to be called again, to be examined as to the situation of the house of Dunmaine, and to tell some of the servants' names.

Says, the house of Dunmaine had a front and a back door; but does not recollect whether he went up to the front part of the house by steps or not; nor was he sure whether or no the gentry dined in the best parlour. Said, the parlour he spoke of was the room on the left hand going in, and that the kitchen was on the same floor with it. Says, he remembers Anthony Dwyer lived there in the quality of a butler. Believes one John Lambert was there, and one Rolph under-butler; but does not remember Owen Cavenagh there. Says, that Martin Neefe and Mrs. Heath might live there; but does not remember them. Believes he spoke once to Anthony Dwyer to deliver a message. Says, that deponent lived at Dunmaine with Aaron Lambert, esq. before lord Altham lived at Dunmaine.

Joan Laffan sworn.

Says, that she knew lord and lady Altham. That deponent lived at colonel Dean's in the year king George came to the crown; afterwards deponent left that service, and went for some time to live with her friends, and in the year following went into lord Altham's service. Says, it was not a whole year between the time of her living with col. Dean and coming to lady Altham's service. Does not remember the month she came to lady Altham's, but says, it was in the year 1715: and that she was there in the station of a chamber maid, and was employed to attend lord and lady Altham's child (who was called master James Annesley) when it came from the wet-nurse; and that he was kept like a nobleman's child. That the child was about three or four months old when deponent came to the service, and was about a year and a half in deponent's care; that my lord and lady were very fond of the child, and my lady used to send for him up in a morning and take him into the bed, and generally called him my dear. That afterwards the child was taken from deponent and sent to a place called Kinna, in the county of Kildare. That deponent did not go with the child, but remained at Dunmaine; that the butler (whose name was Charles Field) was sent with the child. Says, that lord and lady separated in a very angry manner on account of Tom Palliser, (when the child was about 3 years old;) and deponent was present when Tom Palliser's ear was cut off. Says, that after the separation lady Altham went from Dunmaine to Ross, and lodged there at one captain Butler's. Says, that she was present when my lord and lady parted; that she saw my lady at the door, with the child in her arms; that my lord came out of the house in a great rage, and asked where his child was; and upon being told that he was with his mother, he ran up to her and snatched the child out of her arms: that my lady begged very hard she might take the child along with her; but that my lord swore he would not part with his child upon any consideration; that my lady finding she could not prevail, burst out a crying, and begged she might at least give the child a parting kiss; that my lord, with some difficulty, consented, and then my lady drove away to Ross: that as soon as my lady was gone, my lord gave the child to deponent with a strict charge to deponent and to Mr. Taylor not to let my lady have any access to him: but says, that notwithstanding these orders, some of the servants found means to carry the child privately to Ross to see my lady, which when my lord was told of he flew into a very great passion. Says that the child was carried to Ross, without deponent's privity, for that sometimes deponent used to go to Waterford to see a brother of her's who lived there, and some other friends; and in her absence some of my lord's servants, for the lucre (as she believes) of getting a piece of money from my lady Altham,

took those opportunities to carry the child to New Ross. Says, that the Christmas eve, after the separation, the present earl of Anglesea, who was then captain Annesley, was at Dunmaine house, and not seeing the child, said to deponent, Where is Jemmy, or where is my brother's child? How did his mother behave at parting with him? To which deponent answered, that my lady had begged of my lord very hard to have the child with her; whereupon the present earl made use of an extraordinary oath, and said, That he wished his brother had kept none of the breed; and that when he turned away the mother, he should have packed off the child, and sent them both to the d——l. Says, that she is of a good family, and would not have waited on the child, if she had believed him to be a bastard.

[Cross-examined.]

Says, great notice was taken of the child both by my lord and lady. Says, she saw the child immediately after she came into the service. That sweet whey and broth were made every day at my lord's house for Joan Landy the nurse, and fresh meat constantly sent to her house, which was about a quarter of a mile from the house of Dunmaine, and the nurse was charged not to eat greens or salt meat. Says, that my lady herself would go sometimes in the evening to the nurse's and carry the child home. Says, lord Donneraile was at Dunmaine about a month when deponent had the care of the child, and took delight in playing with him, and once drew out a handful of gold that the child might take his choice of some of the pieces. Says, she is particular as to my lord Donneraile's being at Dunmaine, because she particularly remembers his running-footman's running a race for six guineas; says, lord Donneraile when he went away, took shipping at Ballyhack (a sea-port near Dunmaine.)

Says, that the child was always or generally shewn to the company that came to Dunmaine house. Deponent was asked, if Mrs. Giffard (captain Giffard's wife) visited lady Altham? Says, that as near as she can guess, deponent saw her three or four times there, but that she was not so grand a woman as to be intimate with my lady; does not know whether Mrs. Giffard saw the child at Dunmaine, the time of her coming there being much out of deponent's memory. Believes Mrs. Giffard lived about a mile from Dunmaine; and might visit my lady before the child was under deponent's care; says, that Mrs. Giffard did not visit Dunmaine after the separation. Says, that the child was kept very fine, and was generally dressed with a scarlet velvet hat, white feather and laced cloak when he used to be shewn to company, and had cambric and holland things of all kinds. Says, that one Nancy Butler was laundry-maid. Being asked, if Mrs. Giffard dined with my lord and lady when she came there? Says, she believes that she did. She was asked, if Mrs. Lambert visited my lady? Says, she did very frequently, and that Mrs. Pigott and Mrs. Butler did also frequently visit there. She was asked, if the child was shewn to Mrs. Lambert? Says, it was often shewn to her, and that the wet-nurse, or dry-nurse, were the persons who shewed the child to the gentlemen and ladies that visited there. She was asked, if she knew colonel Palliser; says, she has never seen him but once; says, she wishes his son Tom Palliser never had been at Dunmaine, for then the accident of the separation had never happened. Says, she remembers that the day his ear was cut off, she had the child in her hand, and the child shewed deponent some of the blood which had fallen from Palliser's ear on the ground; says, he shewed it her by pointing his finger to the ground where some drops of blood were. She was asked, if Mr. Thomas Palliser saw the child? Says, he did. Says, that the occasion of my lord's cutting off Mr. Palliser's ear, was, that some of the family had made my lord jealous of him, and contrived that morning to get him into my lady's chamber when she was in bed and asleep, and then they brought my lord, who being by this stratagem confirmed in his suspicions, ordered Tom Palliser to be dragged out of my lady's bed-chamber by the servants, and with a sword was going to run him through the body; but the servants interposed, and begged my lord not to take away his life, and only to cut off his nose or one of his ears; and accordingly the huntsman was ordered to cut off his ear, which he did in the room next the yellow-room. Says, the servants kicked him down stairs, and turned him out of the gate, and that this happened on a Sunday morning; that my lady left the house of Dunmaine the same day, and went to Ross. Deponent was then asked, if colonel Loftus visited there? says, she does not remember he did. She was then asked about the servants, if she knew Anthony Dwyer? Says, she did; has heard that he was a poor lad, and that my lord first took him as a page. She was asked if she knew Charles Meagher? Says, she did, and that he was the butler. She was asked if she knew one Rolph a butler there? Says, he was not there in deponent's time. Does not remember Owen Cavanagh; says, she knew Mrs. Heath, my lady's woman, and Martin Neefe a smith that lived there. Says, she remembers William Elmes, who lived within two miles of Dunmaine, and that he was a farmer; but never saw him at Dunmaine house, nor any of his family. Says my lord visited at Mr. Houghton's. Being asked, if she ever was in England; says, she was, better than a year and a half ago; that she went there last 25th of March was twelvemonth. She was asked, if she knew William Henderson, a Quaker; says she does, and that she saw him at Waterford, before she went to England. She was asked, if she went to his house in London; says she did. She was asked where it was she took shipping; says, at Ballyhack. Where it was she landed; says, at Bristol. She was asked, how she became acquainted with Henderson; says, that being at Waterford, he sent

her a message, having heard (as she believes) that she had lived in lord and lady Altham's service; that thereupon she went to him, and he asked deponent, if she knew of any child that lord and lady Altham had? that she answered him, she did know of their having a son called James, but (added deponent) what signifies that now? he was long since transported, and I believe he is dead. To which Henderson replied, that he was not dead, that he was very well, and then in London. Says, that one Bridget Howlet, Joan Landy, and ——— Nowlan, went in the same ship with deponent. She was asked if she made any affidavit before Mr. Robert Snow of Waterford? Says, she never did, and that he never took any thing in writing from her in relation to the child; but says, she was sworn before a master of Chancery in London, and examined there. Says, that the chief of her business to England was to see her nephews, who were sailors on board some of the king's ships, expecting to get some money from them, and that she did not go on account of Mr. Annesley. Says, she never received a penny for giving her evidence; says, that Joan Landy, Bridget Howlet, and deponent went from Bristol to London with Henderson (whom they met at Bristol) in a coach and four; says, she paid a crown for her passage to Bristol, and a pistole for her coach hire to London, all of her own proper money. Believes Henderson paid for the rest of the company, and that he paid all the bills and expences on the road to London. Says, she would have gone to London, if Henderson had not applied to her; says, that Henderson took lodgings (in the same street where he lives) for Joan Landy, Bridget Howlet and deponent, and believes that he paid for them; says Henderson told deponent, that if she would live with him, he would give her as good wages as any in Ireland; that accordingly deponent hired with him as a servant for about a year. Says, that one Mr. Paterson an attorney, and Mr. M'Kercher spoke to her in London about the present affair.

[Mr. Baron Mounteney said, he knew Mr. Paterson, and gave him a good character.]

Deponent was asked, if Joan Landy lived any time at Henderson's? Says, she did as kitchen maid. She was asked what condition Joan Landy's house was in at the time of her nursing of the child? Says, it was put into tight comfortable order, fit to receive my lord and lady's child; says, that the child's fine clothes were always kept at the great house of Dunmaine, to dress him in when company came to my lord's Says, that after deponent left my lord's service, she went to Kinna, in the county of Kildare, to get her wages from my lord, and there she saw the child, which was then about four years old, in the care of one Mrs. Mary, and says it was the same child that had been under deponent's care at Dunmaine; says, that Joan Landy had a child of her own, which was nursed by her sister when she was taken to nurse Mr. Annesley, and says, they called the nurse's child James Landy; says, she heard many years ago that he was dead; says, that it was reported that Joan Landy was married to a sailor, and that the child was his, and that he was gone abroad; and afterwards it was said to be my lord's child; but says, that my lady never heard of my lord's being the father, till after she had parted from him. Believes, that if my lady had known it before, she would never have admitted Joan Landy to nurse her child. Being asked, if she had ever seen father Downs at Dunmaine house? says, she has. She was asked as to her religion; says, she is a Roman.

Thomas Brooks sworn.

Says, he is a piece of a surgeon, and is about 48 years old, and that he lives near Farree in the county of Wexford, between Ross and Wexford, within three miles of Dunmaine: says, that about twenty-eight or twenty-nine years ago, a messenger came from lord Altham to deponent's father's house (who was a farmer) to fetch deponent, in great haste to my lord's house. Cannot recollect particularly the time of the year, but to the best of deponent's knowledge it was in the spring, for the boughs of the trees were green, and it was in the evening, and light enough for deponent to do his business; says, that when deponent came to Dunmaine he saw Mrs. Shiels of Ross (the midwife) with whom deponent was acquainted, and she shewed deponent the way into lady Altham's bed-chamber, and deponent was ordered to breath a vein or to bleed my lady, which deponent accordingly did. He was asked how he knew she was lady Altham: says, she was called my lady; that she was sitting in her bed, and as deponent supposed very unwell, for she cried, O my God! several times. That immediately after deponent had done his duty of bleeding her, he quitted the room and was shewed into another, where deponent got meat and drink, and refreshed himself: says, that deponent staid in the house a good part of the night; and that some time after deponent had eat and drank, Mrs. Shiels came down to the room smiling, and said, the lady was delivered of a fine boy. He was asked, if he knew Mrs. Heath at Dunmaine; says, he did not, and that he had no business to take notice who was in the house when he went on such occasions. Says, that the messenger came for deponent to his father's house, and desired him to go to my lord's house at Dunmaine; but did not say on what account he was wanted there.

[Cross-examined.]

Says, he went up one pair of stairs to my lady's room. Says, he saw the servants go to and fro, but did not see my lord, and was not paid. Says, that he went into the house streetways. Says, that he knew one Redmonds a servant in the house. Says, it was a boy that wore a livery that came for deponent. Being asked, if it was usual to bleed women in

labour; says, he was not told she was in labour; and that he did not see any signs of labour about her. Says, he staid a good part of the night in Dunmaine house. Says, he bled my lady in the arm, but cannot tell which arm. Says she asked deponent no questions; that she reached out her hand by Mrs. Shiels's directions, who held the pewter-plate, in which the blood was received. He was asked, how many ounces of blood were taken from my lady; says, he cannot tell the quantity, for he bled by guess; that the midwife bid him not take much blood. Says, he cannot tell what hour the boy came for deponent. Says, he brought no horse for deponent, but deponent got one for himself, and rode hard, because the boy told him he was wanted in great haste. He was asked, if the lady was dressed; says he took no notice whether she was dressed or not. The bed-clothes came up to about her middle, she had a gown on, and was sitting in the bed, and there were three or four people in the room.

He was asked, if Sutton the surgeon was in Ross at that time; says, he cannot tell. He was asked if lady Altham was a fair woman; says, her person is greatly out of his knowledge, for he did not take much notice of her, but says, she was not fair. Says, deponent had bled some of the servants before. Says, he does not know whether he had heard of the queen's death before that time or not. Says, he never heard any lady called lady Altham but one; has seen her before and after that time, but cannot tell how long before, for he never booked it. Says, he does not know but he saw her more than once before he bled her. He was asked, how he came to know she was lady Altham; says, she was called so. Says, he has been in all about three times at Dunmaine house. Says, he bled many people before he bled lady Altham; that he is now about forty-eight or forty-nine years old, and has practised surgery about twenty years; but says he knew how to bleed when he bled my lady Altham; that he learned to bleed of one Graham (who lived in the Queen's county) but did not serve his time to him. Says, he does not know what age he was of, when he was taught to bleed, but when he bled lady Altham, he was near his manhood. Being asked if he remembers all the persons whom he bled twenty years ago; says, he does not. Being asked if he ever bled any other woman in labour; says, he bled madam Sutton when she was in labour. Says, he received a summons about a fortnight ago, to give his evidence in this cause. Says he does not understand anatomy.

Mr. *Lawrence Misset* sworn.

Says, he knew lord Altham, when he lived at Kinnay in the county of Kildare, about two miles and a half from the place where deponent lives; says, deponent, when about 17 or 18 years old, went to school to a place called Dowdings-town, and that there was a boy then went to the same school, whom the scholars called lord Altham's son. Deponent thinks the child could not be less than six years old, and says he continued about a month there; says, the school-master's name was Bryan Connor; that being a Papist he was persecuted by a Protestant school-master in the neighbourhood, who wanted to banish him from those parts; that some of the neighbours being concerned that the poor man, who had lived so long among them, should be banished or disturbed, requested my lord to take him under his protection. And deponent says, that having had the honour to hunt sometimes with my lord, he took the opportunity to speak to his lordship about it; to which my lord answered, that he had been spoke to on Connor's behalf, and intended to send his son to school to him, which, he believed, would hinder the other school-master from disturbing him; that accordingly, at the request of the neighbouring farmers, my lord sent his son to Connor's school: says, he cannot remember the year that this happened; believes it might be some short time after my lord came to live at Kinnay, but does not know either when my lord came to Kinnay, or when he went away, but thinks he knew his lordship there a year and a half; that deponent is about 42 or 43 years old; says, that lord Altham continued at Kinnay after his son came to Connor's school. Being asked where the child dieted and lodged, says, he does not know, but from hearsay, believes it was near Kinnay; says, he does not remember the boy's being attended with a page or a footman, but says, lord Altham used frequently to call for him himself at the school. Says, deponent generally called the boy young lord Altham, but did not know how he was called by his father; says, he saw him at Kinnay after he had quitted Connor's school; says, that deponent and Mr. Connor the school-master used, on Saturdays, to go a fishing near my lord Altham's house at Kinnay, and my lord met deponent and Connor twice or thrice at the river a-fishing, and invited them into his house, where deponent saw the boy; that lord Altham brought him into their company, and introduced him as his son; but deponent could not distinguish, at the years deponent was then of, whether it was as his lawful or unlawful son; but remembers that lord Altham once said to deponent, Lally, I hope you will see this boy earl of Anglesea; and deponent says, he was reputed in the neighbourhood where he lived to be lord Altham's son.

[Cross-examined.]

Says, he has heard that Mr. Annesley was a son got of my lady when she was away from my lord—Mr. Annesley being shewn to deponent on his examination in Court, to know if he could say he was the same person he saw at Kinnay, deponent said, he could not say he was the identical person, it being so long ago. Being asked how the child was clad at school; says, he had a laced hat, and was in a coat and breeches, and deponent takes him to have been no less than six

years old. Deponent being asked what his own age was at that time; says, he believes he was about 16 years old, for that by the reputation of his family, he was 43 years old last July, and deponent has been married 13 years last April. Being asked if he was at Connor's school in the South-Sea year; says, he remembers to have heard of the South-Sea year, but does not think he was at Connor's school then; cannot say how near it was to the time of the rebellion of Preston or the death of queen Anne; but says, that by computation he must then have been about 17 years old; says, he went to other schools besides Connor's school. Being asked if he might not be 20 years old at that time; says, he does not think he was; remembers he was grown up. He was asked if lord Altham was free and familiar with the boys who hunted with him; says he was. Deponent was then asked again, whether he was 16, 17, 18, or 19 years old at that time; says, he cannot be certain whether he was 16 or 17 years old; says, he went to France in 1723; that after leaving Connor's school, he went to a school at a place called Nauss to learn the mathematics, and that he did not go to France till some time after his leaving that school. Deponent was again desired to ascertain the time of his own age when he saw the child at Kinnay; says, he would willingly do it if he could, but that it is a long time ago, and therefore he could not be exact; but says, he is sure he must have been 15 years old at least, because he could wade through the river.

James Walsh sworn.

Says, he knew lord and lady Altham, and knows that lady Altham had a child; says, there was some dispute between them which caused a separation; and thereupon lady Altham parted from Dunmaine, and came to lodge at the house of Mr. Butler, (who was deponent's stepfather) at New Ross, in the county of Wexford; says, that he saw her the day she came there, and that she was in very great trouble and affliction, and shed abundance of tears; that she complained lord Altham had used her so ill, that, if it were not for two considerations, the cruel treatment she had met with would break her heart. Deponent being asked whether he knew what these considerations were, says, that my lady said, one of them was, that she had a tender, indulgent, and best of fathers, (the duke of Buckingham) and the other, that she had a promising young son, who, she hoped in God, would be a comfort and support to her in her old days.

[Cross-examined.]

Being asked if he ever saw that son; says he cannot say he ever saw him. Says, this conversation was about 27 years ago, and passed in the presence of deponent's stepfather, and mother. Says, the day lady Altham left Dunmaine she came to Ross, and it was on a Sunday, and deponent saw her ladyship that day coming up to Mr. Butler's house; says, he had heard before that time, that my lord had a child, and that he was nursed at Dunmaine; says, he has been told that the child was brought to Ross to see his mother, my lady Altham, and deponent computes the child was then about two or three years old; says, he does not know Joan Landy; says, lady Altham came to Ross in a chaise or chair, and to the best of deponent's remembrance, it was drawn by one horse; and fancies her waiting-maid, Mrs. Heath, came along with her; says, it was before dinner my lady had the before-mentioned conversation with deponent, and that my lady dined with deponent's step-father and mother, and deponent's then wife; says, he saw lady Altham at Ross at that house very often after that day; says, he took lady Altham to be the duke of Buckingham's daughter; for deponent's step-father having a suit of law in England, mentioned it one day to my lady, and desired her interest with the duke of Buckingham, who, he said, might befriend him in it.

Mr. *James Cavenagh* sworn.

Says, he was acquainted with the late lord Altham, when he lived at a place called Carrickduff, in the year 1721 or 1722, or thereabouts, and was his neighbour there, about a year and a half, or two years. Says, lord Altham had with him a child who was deemed his only son; that the child lived in the house with his father, and deponent often saw him there, he generally visiting my lord once or twice a week; says, he always observed him very fond and respectful of the child, as a parent should be; said, he never heard my lord say who was the child's mother; but never had any doubt of his being legitimate, or ever so much as heard that he was illegitimate till lately. Deponent particularly remembers, that one day my lord, the child, and this deponent were walking in my lord's garden at Carrickduff, and deponent taking notice of the young gentleman, said, My lord, master is grown a fine sprightly boy; I hope your lordship takes good care of his education; to which my lord said, that he had a tutor in the house to instruct him, and declared to deponent, that if that boy lived, he would one day or other be earl of Anglesea. Deponent says, he then took the child to be eight or nine years old; says, my lord usually carried his son abroad with him, to visit the neighbours, and brought him to deponent's house particularly, and the child was by every body that lived in the neighbourhood treated and deemed as lord Altham's lawful son. Deponent never saw the child after he left Carrickduff, to the best of his remembrance.

[Cross-examined.]

Says, he does not know when lord Altham parted from his lady, and never heard him talk about the child's mother at all; says, he became acquainted with my lord at Carrickduff, but cannot tell whether this was before or after

the South Sea year; says, he visited my lord as a gentleman; says, my lord likewise visited Mr. Charles Byrne and Mr. Bridgers, who lived in the neighbourhood, and one Mr. Derenzy. Deponent says, he often saw my lord and the boy go about publicly together, and has seen the child with him at public meetings.

James Dempsy sworn.

Says, he knew lord Altham at Carrickduff, in the year 1721, and that my lord had a son; says, the occasion of his knowing it was as follows: one Mr. Thomas Owens came to deponent, and proposed to him the taking care of his lordship's son, in quality of a tutor, for which deponent was to have eight pounds a year; that deponent agreed to the proposal, and accordingly went and instructed the child at my lord's house at Carrickduff for about half a year; but deponent finding by the neighbours, that it would be more advantageous for deponent to teach the child abroad, on account of teaching the neighbours' children; deponent applied to his lordship for leave to teach his son abroad, to which his lordship agreed, and the child was attended to the public school, by one of his lordship's servants; says, the child continued under deponent's care for near two years; says, the people called the child the young lord, and that my lord acknowledged him to be his son; says, the young gentleman was kept in decent apparel; that he had a fustian coat when at school, and a coat of scarlet cloth on holy days and state days; says, that deponent taught him to read English, and that the child was then about seven years old; says, that about a year ago, as Mr. Annesley (the lessor of the plaintiff) was returning from the county of Wexford to Dublin, in company with Mr. M'Kercher, one Mr. Mark Owens, and other gentlemen, they called at Hacket's Town in the county of Catherlough, near which place deponent lives, and deponent happened to be in the next room to them in the inn, where they put up; and deponent was sent for into their company, and when deponent came into the room, he was desired to look about the company, to see if he knew any of them; says, he presently knew Mr. James Annesley, and pointed to him; and said, This is James Annesley (lord Altham's son) if he be living, who was under my care for some time; whereupon Mr. Annesley kissed deponent, and asked him whether he had heard of his being in the kingdom; to which deponent replied, that he had not; says, Mr. Annesley mentioned to him what great hardships he had undergone since he was under deponent's care, but deponent cannot remember what particular hardships he mentioned; says, he never saw him since the time he was at Carrickduff before that day, nor was deponent informed before that time of his being in the kingdom: says, lord Altham recommended him to deponent's care as his son; says, he has heard Mr. Annesley was transported about 15 years ago out of the city of Dublin; says, deponent left Carrickduff before lord Altham left it.—The deponent was desired to look about in court and try whether he could see the person whom he said to be lord Altham's son, and to whom he was tutor; whereupon (after looking about) he pointed to Mr. James Annesley, and said, he was the very person to whom he was tutor, and the same person he saw in Hacket's Town aforesaid, in company with Mr. M'Kercher and others.

[Cross-examined.]

Says, he saw Mr. Annesley at Cullen's, an innkeeper at Hacket's Town, and that no person desired him to go to the house, but deponent went to eat a steak of beef for breakfast, and knew not of Mr. Annesley or his company being there; says, he lives at Ballymacooly near Hacket's Town; says, he believes Mark Owens (one of the company) enquired from the woman of the house if deponent was in town, and that it was upon that occasion deponent was sent for into the room to their company. That deponent was told, there was a person who would be glad to see him; says, he believes Mr. Owens might tell Mr. M'Kercher about deponent, for that he never knew Mr. M'Kercher before that day; says, he knew Mark Owens about 25 or 26 years ago; that Mark Owens often saw deponent at Carrickduff, and was with my lord when deponent was tutor to the child; says, that Mark Owens was in the room with Mr. M'Kercher and the rest of the company when deponent went in; says, that he did not see him for two years before that time, nor ever had any discourse with him about Mr. Annesley. Says, he never heard before he saw lord Altham's son, that he was in the kingdom; says, it was the woman of the house that brought deponent into the company, and that it was Mr. M'Kercher asked him if he knew any one in company; says, that he did not know who was in the room before he went in. Says, he is about 37 years old; that he never was acquainted with lord Altham before he was employed as a tutor to his son; and that it was Mr. Thomas Owens (who was deponent's father's landlord) that recommended deponent as a careful, sober young man, and fit to be tutor to the child. Being asked, if he went to mass or to church; says, that he goes to mass; but that he did not know much of religion when he tutored Mr. Annesley, for during the six months that he staid in the house he neither went to church or mass; but says, he has a better notion of religion now (thank God.)—Says, that lord Altham never examined deponent whether he was a Roman or Protestant, and believes my lord did not know of what religion he was. Being asked, if he is in holy orders now; the counsel for the lessor of the plaintiff objected to that question, and the witness refused to answer it. Being asked, if he knows Thompson Gregory; said, he does; and that he lived at Carrickduff when deponent was there. Says, he was told, the child had one Thorpe tutor to him for some

time. Says, that after deponent saw Mr. M'Kercher at Hacket's Town he had some conversation with Mr. Francis Thornell about Mr. Annesley. Says, he did not see Mr. M'Kercher since he saw him at Hacket's Town until the Saturday before his examination, and did not see Mark Owens since till the Saturday before his examination. He was asked, if Mr. Annesley had his own hair or a wig when he was tutor to him; says, he had hair of his own of a flaxen colour, and not a wig. He was asked, whether he had his own hair or a wig when he saw him at Hacket's Town; says, that one's hair is now tossed up in such a manner that its hard to distinguish between a person's own hair and a wig, therefore deponent could not take upon him to be certain whether it was his own hair or a wig he had at Hacket's Town. Says, that deponent went to school himself for about two or three years after he was tutor to Mr. Annesley. Being asked, what he learned at school; says, one Mr. Hughes taught him the Odes of Horace.

Charles Byrn sworn.

Says, he knew the late lord Altham at Carrickduff, in the year 1721 or 1722, and deponent lived within three or four miles of the said place. Says, my lord had a child whom he called his son, and who by others was called Master Annesley; and that he was reputed lord Altham's lawful son; and deponent was very frequently in company with lord Altham, and says, his lordship was very kind and fond of the child, and behaved to him as his own child. Says, he knew lord Altham better than a year, and that he visited deponent and other neighbours with the child. Says, he had a white feather in his hat. Being asked, if he believed the child to be my lord's lawful son; deponent protests, that if the best duke in England had brought a bastard to visit in his family he would have resented it, and cut his nose; and that he always looked upon the child as lord Altham's lawful son. Says, that being invited to the house of one Mr. Redmonds, he met my lord Altham there; and that they toasted, 'That the child might live to be earl of Anglesea.' Says, that my lord thanked the company, and took the health as a compliment. Believes the child was then seven years old, or thereabouts, and that my lord used to take him on his knee. Says, that my lord used to take the child with him to hurlings;* and bought a little horse for him to ride upon; and that the child was dressed very gay. Being asked, if he knew him now; says, he cannot swear to him at this distance of time. Being asked, if he knew to what place my lord went from Carrickduff; says, he does not know. Says, that something struck deponent as to Mr. Annesley's features when deponent was lately introduced to him: but being asked, whether, if he had met him without being introduced to him, he should have known him; says, he should no more have known him than the king of Morocco.

Charles Cavenagh sworn.

Says, he knew lord Altham about 20 or 22 years ago at Carrickduff, and knew him there about two years; says, he saw a child there about 6 or 7 years old, whom lord Altham said to be his son, and treated as such. That his lordship seemed very fond of him; and the child was reputed to be his son, and treated as such by the servants, that is, with good manners and respect; and (to the best of deponent's memory) they called him master James.

Nicholas Duff sworn.

Says, he knew lord Altham when he lodged in Cross-lane, Dublin, about 20 or 21 years ago; and he had a young gentleman with him who was called James Annesley, and my lord treated him as became a lord's son; and deponent is sure he was his own son by my lord's own declarations. That deponent kept a public house in Loftus's lane near Cross-lane, and heard lord Altham say, If I live to be earl of Anglesea, Jemmy will be lord Altham. For that lord Altham was very free and familiar with deponent, and used to drink with him. Says, Jemmy Annesley went to school in Proper lane, to one Daniel Carty, and two of deponent's sons went likewise to the same school; and that deponent saw a servant, who (deponent was told) was my lord's servant, attend the child in going to school, and coming from it; and that the servant wore my lord's livery. Says, the child was sometimes called master James, and sometimes master Annesley, and sometimes the young lord Altham; and he was then about 8 years old, as near as deponent can guess. Says, my lord lived about a year in Cross-lane. Being asked, if he heard of one miss Gregory; says, that one miss Gregory was in my lord's family; and that she, along with one Betty Lester, (a butcher's daughter) used to visit deponent's house, and call for liquors: and deponent says, that nobody gainsaid the child to be my lord's lawful son. Says, my lord at another time told deponent, You may live to see this child earl of Anglesea. Says, Carty kept a Latin school, and that children of responsible people were put there.

[Cross-examined.]

Being asked if he ever carried a chair; says, What of that? I am a gentleman now. Being asked if he is porter to Mr. M'Kercher; says, No, I don't go of errands. Being asked if he opens Mr. M'Kercher's door to people; says, "Sometimes I open it. But I have no wages, I tend to oblige Mr. Annesley and Mr. M'Kercher. I came from London to oblige Mr. M'Kercher, I was acquainted with him there. I heard in London that Mr. Annesley was returned from transportation, and that he

* Hurlings is a diversion used in Ireland much like the game of cricket.

lodged at one Henderson's; and it was Mr. M'Kercher told me where Mr. Annesley lodged." He was asked if he ever sweptbefore Mr. M'Kercher's door; he replied in an angry and loud tone, No. Being asked how long he had the coat now on his back; says, Ever since I bought it last spring. And deponent added, Why don't you ask me where I bought this wig? Says, he was formerly a farmer before he came to Dublin.

Catharine O'Neile sworn.

Says, she knew lord Altham when he lived at Carrickduff, and that deponent was employed there about 22 or 23 years ago, to take care of my lord's son, who was called James Annesley, and deponent also attended the child to Cross-lane, Dublin; and says, she attended him in all about a year, and that he was reputed and treated as my lord's son. Being asked if she knew miss Gregory; says, that Mrs. Eleanor Gregory lived at Carrickduff (when deponent came there) as my lord's relation; and when my lord came to Dublin, deponent heard she was my lord's bed companion. Says, she remembers the child's birth-night kept at Carrickduff, and bonfires and rejoicings made on that occasion; and several of the neighbours invited. Says, that after she left the young gentleman in Cross-lane, he came one day to see deponent in James's-street, in a very poor mean condition; and begged of deponent to speak to his father in his behalf; that accordingly deponent did apply to my lord, who said, the boy had got some vicious tricks, which when he had broke himself of, and behaved better, he would take proper care of him. Upon which deponent answered: Ah! my lord, these are only base contrivances of miss Gregory; that my lord said his son was taken care of, and that he paid for his board; that it was true enough Miss Gregory did not like the child, and that if he was to take him into the house, she would not let him be at peace, and therefore he was obliged to keep him abroad. Says, that the child was sent to lodge and board at Mrs. Cooper's in Ship-street, and that it was from Mrs. Cooper's he came to deponent to James's-street, and that he came alone without any servant or person attending him. Says, that Cross-lane was the first place where my lord lodged in Dublin after he left Carrickduff, and that he afterwards moved to Proper-lane before he went to Inchicore,* where he lived when deponent spoke to him on behalf of his son; says, that when my lord first came to Dublin, lady Altham lodged in Stable-lane, and she sent for deponent to come to her; that deponent went, and my lady asked her how my lord and Miss Gregory behaved to the child; to which deponent answered, that while he was under her care, they behaved very well to him; but that (by repute) they did not behave so well to him since. Says, my lady called master Annesley her child, and said, she was very desirous to see him, but that she was afraid her doing so, might be a means to turn the servants out of their bread, and be a detriment to the child. Says, that deponent asked the child why he did not go to see his mamma, my lady Altham; to which the child answered, that he was forbid to see her, and that he durst not go, for fear his father should come to hear of it, and refuse ever to see him again. Says, this was about 18 or 19 years ago, to the best of deponent's memory. Says, that the first time she saw Mr. Annesley (since he came from abroad) was about a year ago, at his lodgings in Linnen-hall-street, and that she knew him again the moment she saw him; and deponent (looking about the Court) pointed at Mr. Annesley, and said, He is the same person whom I attended when he was a child.

[Cross-examined.]

Being asked what condition Mr. Annesley was in when he applied to deponent in James's street; says, he was in a low condition. She was asked as to the colour of lady Altham's hair; says, she cannot tell if it was black, but if not, it was a dark brown. Says, lady Altham lodged in Stable-lane, at one Cavanagh's, but does not know his Christian name. Being asked if the child ever went to school while he was at Carrickduff; says, he went to school to one Mr. James Dempsey at lord Altham's house, and went also to school to him when he taught abroad.

Mr. *John Byrne*, brewer, sworn to the Voire Dire, and then in chief.

Says, he knew lord Altham about 19 years ago, when he lived in Proper-lane, and that a boy called master James lived then in lord Altham's house, and deponent saw him at the door and windows of my lord's house, and the child used to play in deponent's yard, and was generally reputed by all the neighbours, and by deponent, to be lord Altham's lawful son. Says, that he has very often seen him playing, and took particular notice of him, and from the knowledge of his physiognomy, is positive that the lessor of the plaintiff is the same person now grown up to manhood whom he saw a boy. Says, that when Mr. Annesley lived in Proper-lane, he was about eight years old.

[Cross-examined.]

Deponent was asked, how long lord Altham lived in Proper Lane; says, he cannot tell; but that when my lord left his house there, he went to Inchicore, and left the boy behind him; says, he never saw the boy since the year 1724 till lately. He was asked, where the child went to school; says, he heard he went to school in Proper-lane to one Carty. Says, he was then told, that miss Gregory disagreed with the boy, and that this was the reason of his quitting his father's house. Says, the boy

* Inchicore lies within a mile of Dublin.

was in very indifferent apparel, and believes his son might give him some support, but never heard his son say he did.

Mrs. *Charity Blake* sworn.

Says, she knew lord and lady Altham, and frequently visited her when she lived at Temple-bar; that the last time she saw my lady, was when the Pretender was reported to be in Scotland; says, deponent's maiden name is Annesley, and lord Altham and deponent were cousin-german's children; says, she never heard lady Altham say she ever had a child, or was with child, but has heard so by common report.

The Examination of the above witnesses ended at 11 o'clock on Saturday night the 12th of November, when by the like consent as on the night before, which was likewise signed by the parties and their respective attornies, and read in open court, the Court adjourned to the next Monday morning at nine of the clock.

Monday, November 14, 1743.

The Court being met about nine o'clock in the morning, according to adjournment, the jury were called over, and answered to their names, and then the counsel for the plaintiff proceeded to examine their witnesses, as follows.

Edward Lutwich sworn.

Says, he was a trooper in brigadier Napper's regiment, and in 1717, or 1718, was quartered at Ross in the county of Wexford; thinks it was the summer before the war was proclaimed against Spain. Says, he knew and saw the lady Altham at Ross; that deponent being bred a shoe-maker, followed his business when occasion required; says, he was recommended to my lady Altham, and her ladyship employed him to make a pair of damask shoes, and gave him some white damask for that purpose; says, that before the time he had promised to carry home her ladyship's shoes, he was sent for to come to her; that when deponent came to her ladyship's lodgings, he saw her with a little boy, about three years old, and her ladyship told deponent, she had sent for him to make her child two pair of morocco leather shoes; that deponent accordingly took measure of the child, and made him a pair of red, and a pair of black leather shoes, and in about two or three days carried them home to her ladyship's lodgings; that deponent enquired if the young lord was within, but being told he was gone, deponent asked to see her ladyship, which he accordingly did, and my lady told deponent, that the child was gone away the day before; and the same time expressed herself to this effect, I had better be wife to the meanest tradesman in town, than to lord Altham, for then I should have the comfort of often seeing my child. Deponent was asked if he ever was at Dunmaine? Says, he was at Dunmaine several times, and saw the child there; says, that when deponent saw him at Ross, he was clad as a person of quality's child, and that he stood at the window when deponent took measure of him, and for which purpose deponent took off his shoes, and then put them on again.

[Cross-examined.]

Being desired to name some of the officers of brigadier Napper's regiment when he was in it, deponent named colonel Buckland, quarter-master Linegar, Mr. Langton, and other officers; says, that when deponent went to lady Altham, she lodged at one Wright's house, which is at the right-hand of the street as you go up the hill, and that it was a private house. Says, that the first time deponent called, the child was not with my lady, that it was a servant whom deponent did not know shewed him into the parlour to my lady; that the parlour was on the left-hand, and deponent does not remember that he saw any body with her ladyship that first time. Says, that the second time of his going there, (which was two or three days after the first) deponent saw the child, who appeared to be about three years old, and took measure of him. Says, there was a woman along with the child, whose name deponent never enquired; that my lady was in the same parlour she was in when deponent first waited on her. Being asked if he was sure that it was not her ladyship's bed-chamber; says, he does not suppose her ladyship would admit him to come into her bedchamber. Being asked whether my lord and lady lived separate at this time; says, he knew they did, and heard that Mr. Thomas Palliser was the occasion of it. Being asked if there were any other shoe-maker in Ross; says, there were, particularly one Allen. Being asked where he the deponent lives now; says, he resides in London, but has been here about three weeks; that his last post was in the Guards, and that he has now a pension from his majesty; that he has also a freehold in the county of Surry, and voted in the last election for my lord Baltimore, and the Speaker of the House of Commons. Being asked how Mr. Annesley, the lessor of the plaintiff, came to hear of deponent? Says, that after the trial of Mr. Annesley at the Old Bailey, deponent being in company in London where they were talking of him, deponent declared upon the word of a man, That he believed Mr. Annesley to be the son of lady Altham, as much as deponent was the son of his mother; which declaration, he supposes, occasioned his being applied to, to give evidence. Being asked, if he could be positive whether my lady said, make the shoes for 'this child,' 'or my child?' Says, that to the best of his knowledge, my lady said, 'my child:' and that when deponent carried the shoes home, her ladyship used these very words, or to that purpose, That she had better be the poorest tradesman's wife in town than lord Altham's, for then she might

have the pleasure of seeing her child often; says, that her ladyship paid for the shoes when he carried them home, and said to deponent, I am paying for these shoes, perhaps they will not fit; to which deponent made answer, that he believed they would, for that he had been pretty exact in taking the child's measure, and durst say they would fit. Being desired to name some other persons for whom he made shoes; says, he made shoes for madam Loftus, (and named several others) and added, that he had custom enough, for that he made shoes for the troop.

Bartholomew Furlong sworn.

Says, he knew lord and lady Altham about thirty years ago; that deponent's business at that time was to buy corn for the merchants of Ross. Says, that deponent coming one day from Ross, met lord Altham as he came from hunting, and that my lord spoke to him, and asked him if he did not deal in corn, for that he wanted twenty barrels of oats for his stable, and ordered deponent to buy it, and said he did not care how soon; that deponent accordingly went to some of his neighbours (whom he named) and bought of them ten barrels a piece. Says, that after this time, my lord frequently sent to deponent to buy butter, cheese, and bacon. Says, that about half a year after deponent had bought the corn, deponent went to Dunmaine with some bacon, and that he saw lady Altham there, who appeared to be big with child, and deponent heard in the family that she was ready to lie in. That thereupon deponent applied to one Pierce Sutton to get the nursing of the child for deponent's wife; telling him it would be doing deponent infinite service. That Sutton advised deponent to get a letter from captain Tench (who was very intimate with my lord and lady) recommending deponent's wife, for that would do more than he could do; says, he accordingly got a letter from captain Tench to that purpose, and delivered it to my lord at the gate of Dunmaine house as he was returning from hunting; that my lady came out to meet my lord at the gate, upon which his lordship told her that deponent had brought him a letter from captain Tench, recommending his wife to nurse her ladyship's child; to which my lady answered, that she would do any thing to oblige captain Tench, and as soon take one of his recommending as any body's; and then her ladyship asked deponent several questions about his wife's age, and if her milk was good, and how long deponent's child was born, and likewise asked deponent what he would have a year, if doctor Brown (who then lived at Ross) approved of his wife's milk; that deponent asked 10*l.* a year, whereupon my lady said, that whoever nursed her child must live in the town, that she might see it whenever she had a mind; that my lord said he would give deponent 6*l.* in money, two acres of ground, the milk of two cows, and build a house for him; and my lady said, at the same time that she would give 20*s.* more; and as deponent was going away, her ladyship gave deponent half a crown, and ordered deponent to send his wife to her, which he did accordingly. Says, that doctor Brown (as deponent's wife told him) examined her milk and objected to it, because it was disturbed; says, at that time deponent's child was ill, which had affected his wife's milk, as he supposes. Says, that deponent went afterwards to the house of Dunmaine, and saw my lady, who told deponent she was sorry that his wife had not good suck. Says, he does not know of her ladyship's being brought to bed, any more than as he heard it from the neighbours, and its being reported so in the family.

Says, deponent saw a child about a year and a half afterwards at Dunmaine, standing by my lady and her ladyship holding him by his leading strings, and deponent remembers that a woman was standing by with a basket of live chickens, and that the child cried for one of them, and deponent took a chicken, and gave it to the child, who held it in his arms, and my lord kissed the child, and called him Jemmy.

[Cross-examined.]

Deponent was asked his age; says, he is about 55 years old. Being asked how many children he has had; says, he has four children living, and had two others, who are dead; that he has been married about 33 years. Being asked if the child on whose milk his wife proposed to suckle my lady's child was now living; says, he is alive, and that his name is Michael, and that he is about 28 or 29 years old. Being asked how long his wife was brought to bed before he applied for the nursing: says, about two months. Being asked in what month she was brought to bed; says, either in February or March; says, Pierse Sutton is dead, and deponent is sorry for it; that he lived about two miles from lord Altham's, and nearer to my lord's than deponent lived, and was an acquaintance of my lord's; says, deponent had no acquaintance with my lord, before he employed deponent to buy the corn; don't know whether my lord wore a wig or his own hair; but says, he rode on a little black horse, and was a very small man, but spoke loud; says, my lady was taller than my lord; that she was a tall, black woman, with a good complexion. Being asked, whether by a good complexion he meant a fair one? says, she looked well in the face, but not altogether so white as other women that he has seen. Being asked, if she was a lean or a fat woman; says, she was not a fat woman. Deponent was then shewn a fresh-coloured gentleman in court, and asked, whether my lady was as fair as that gentleman; says, she was not so fair. He was asked of what complexion his wife was? says, she was a brown woman; that lady Altham was not of the same colour; that they ought not (in one day) to be compared together; that to be sure lady Altham was fifty times beyond his wife, though his wife was more pleasing to him,

Deponent was asked, if he knew doctor Brown; says he did, and that he is dead, but deponent never spoke to him. Deponent then pointed to one Mr. Eager in court, and said, he lived with his father for seven years. He was asked what he gave a barrel for the oats he bought for my lord; says, he gave 4*s*. 6*d*. a barrel, and that my lord paid the money when the oats were delivered. Being again asked, with whom he made the agreement about the nursing of the child; says, with my lord and lady, and that it was my lady who gave him the half crown; says captain Tench is dead; says, the child cried in my lady's arms when the chicken ran away, and my lord said, Jemmy, Jemmy, don't cry. Being asked, if the child called for the chicken; says, he did not speak, but stretched out his hand, and made signs, as if he wanted it again.

The Right Honourable *Hugh Montgomery* earl of Mount Alexander;

Says, he knew lord Altham, and that a great many years ago he was in company with his lordship, captain Groves, and others, at a public house on the Glib,* called Serjeant Kite's, where they eat oysters; says, he heard lord Altham say, By G—d, Groves, my wife has got a son, which will make my brother's nose swell.

The counsel for the defendant begged leave to ask lord Mount Alexander a few questions.

[Cross-examined.]

Being asked how long is it since lord Altham spoke those words about his wife's having a son; says, upon his word and honour he cannot tell how long ago it is, nor how long it was before lord Altham died. Says, he never heard of my lord's having a bastard. Being asked if he was intimately acquainted with lord Altham; says, he was acquainted with him by their sometimes taking a glass together; that he did not visit lord Altham at his house; but that they frequently met at the said house to eat oysters; that captain Groves was at that time providore of the hospital. Being asked what time of the year it was that the said conversation happened; says, most likely in the winter, because oysters are then in season; says, there was no other conversation on the subject at that time, nor did he ever hear my lord talk on that subject either before or since.

Margaret Hodgers sworn.

Says, she once saw lady Altham at Mr. King the apothecary's in Charles-street, in 1722 or 1723. That it was upon the following occasion: the deponent having a house on Ormond-key, and lodgings to let, my lady's woman and a man came to deponent, to know whether deponent could board a lady, with her woman and man-servant; says, she does not know the woman's name, but that the man lived in Montrath-street, Dublin; says, that she came to an agreement with them to lodge and diet my lady and her woman, and a man-servant, for 60*l*. or 70*l*. a year: that they having objected to there being no locks on the rooms, deponent said, she would get locks put on immediately, and the man gave the deponent a pistole earnest, and deponent got the locks put on next morning; says, that in a few days the same man came again to deponent, and told her, that the doctors had advised my lady not to lodge at deponent's house, because it was too near the water, and the air would not agree with her constitution; that thereupon deponent returned the pistole she got for earnest; and about a fortnight after she met an acquaintance, (one Mrs. Lloyd), to whom she told the story; that Mrs. Lloyd said deponent was a fool for giving back the earnest; and advised deponent to wait on my lady herself, and acquaint her how she had been served, and to ask if it was with her ladyship's knowledge.

Says, that accordingly deponent went to my lady, in order to expostulate with her; that she went to Mr. King's in Charles-street; that she went up stairs into my lady's room; that her ladyship was sitting, being in a weak condition in her limbs; that deponent begged her ladyship's pardon for taking the liberty to wait on her, and mentioned the occasion of it; and at the same time told her ladyship, that she was her countrywoman: says, that her ladyship asked her how long she had been in the kingdom, and the occasion of deponent's coming over; to which deponent answered, that she came over to get some money that was owing to her; whereupon my lady said to deponent, I wish I had never seen Ireland, and I wish you better luck in it than I have had; for my lord Altham has used me cruelly, and has aspersed my character. Says, that in the course of that conversation, deponent asked her ladyship if she had any children; to which my lady answered, Yes, I have a son.

[Cross-examined.]

Says, she had this discourse in the year 1723. Being asked by Mr. Daly, one of the defendant's counsel, when it was she came to Ireland; said, About the year 1720, or 1721; and now I live near Howth, where I had the honour to dine with you (meaning Mr. Daly) at lord Howth's. Being asked, whether my lady's woman was present when her ladyship said she had a child; says, nobody was present, but that her woman was in and out of the room; says, that my lady gave a sigh, when she said she had a son.

Being asked if Mr. King is living; says, she believes he is, because she has never heard of his being dead.

Being asked what sized woman my lady was, and of what complexion; says, that she was of a swarthy complexion, and dark brown hair; but, as she was sitting, can't tell what height she was of.

* The Glib is the place where butchers' shambles are in Dublin.

Mr. *Thomas Byrne* sworn to the Voire Dire, and then in chief.

Says, he knew lord Altham when he lived in Proper-lane, about 19 or 20 years ago, and remembers he left Proper-lane in 1724. Says, that he had a child with him there, who was reputed to be his son; that deponent was very well acquainted with the child, for they were boys in the same street, and used to play together every day; says, he believes my lord lived about a year in that street; and is positive my lord left it in 1724, because deponent's father returned from the country then, and put the charge of his business (which was that of a brewer) into deponent's hands. Says, deponent went to school to one Clark's in the Cloysters; and my lord's son to one Carty's in Proper-lane; and deponent used to call upon him several times at the school; and says, my lord lived in Proper-lane at the time his son went to school there.

Says, that my lord seeing his son and deponent one day at play together near his door, said to his son, Jemmy, come, and bring in master Byrne along with you; and thereupon master Jemmy and deponent went in, and my lord brought them into the parlour; and when my lord had been with them about half a minute, or a minute, he was called out by somebody, and deponent saw no more of his lordship at that time.

Says, that when lord Altham left Proper-lane his son remained in the house after him; and he came to deponent to take his leave of him, and told deponent that one Mr. Cavenagh, a dancing-master, was going to put him out to board. Deponent being asked, how old the boy was then, says about ten years old, and about two or three years younger than deponent. Says, that Mr. Annesley, a good many months after his taking leave of deponent, came to him in Proper-lane, and made great complaints of the treatment he had received in Ship-street, where he had been put to diet and lodge, and said, that he had been to Mr. Cavenagh who had refused to receive him in his own house, and that if deponent would not receive him into his care he did not know what to do, nor where to go; whereupon deponent advised him to go to his father lord Altham's house at Inchicore; to which the boy replied, that he durst not go, because of one miss Gregory, who was there with his father, for that she could never agree with him, and that she used him ill before, and that it would be to no purpose for him to attempt going there.

Att. Gen. My lord, I desire to have the sense of the Court upon this part of the evidence: the witness was going to say what the plaintiff told him: so long as this was for connection, I made no objection to it; but he is going by a side-wind to reflect upon the credit of a person, who may be produced in evidence for the defendant; this makes it material to object to this part of the evidence.

L. C. B. It may be material to know what reason the boy gave for refusing to go to my lord Altham.

Att. Gen. The boy's declaration cannot be evidence for him.

L. C. B. I shall confine the witness to facts.

Says, that when the boy refused to go to his father's, deponent invited him to stay with him, and brought him into the house unknown to his (the deponent's) father, and he staid with deponent about five or six weeks; that sometimes he lay in the same bed with deponent, and sometimes in the hay-loft; that the reason of his putting Mr. Annesley in the hay-loft, was lest deponent's father should discover that he entertained any body in the house without his leave or knowledge, and be angry with deponent for so doing. Says, that as deponent's father had no family, when he came home early he used to go to bed before deponent, and then deponent carried the boy to his own bed, as there was no danger then of his father's knowing that Mr. Annesley was in the house; but at other times deponent had not the same opportunities, and could not bring him to bed unknown to his father, and therefore was obliged to conceal him in the hay-loft, where deponent gave him meat and drink unknown to his father.

Says, that the intimacy deponent had with the boy arose from his having been his play-fellow: and that it was out of friendship to him the deponent supported him. Being asked, if he observed lord Altham to take any care of the child, says, he did not observe my lord to take any care of him while he was with deponent, and believes his lordship did not know where he was. Being asked how the boy came to leave him, and what became of the boy after he had left deponent; says, that the boy grew tired of staying with deponent under such restraint, and said he would go to his father to Inchicore; but deponent does not know what became of him but by hearsay.

Says, that the school where the boy went, was next door to where deponent lived, and that when he first came to Proper-lane he wore a scarlet coat, and all the genteel boys of the street were his play-fellows. Deponent being desired to name some of those boys, mentioned Watty Ames, son to captain Ames; two sons of one Robert Byrn, a brewer; a son of one Reily's (where deponent lodged.) Says, he did not see Mr. Annesley since, until his return from the West Indies. That when Mr. Annesley came first to this kingdom, Mr. Richard Mathews met deponent at the Globe coffee-house, invited him to dinner the next day, and requested deponent to meet him at the coffee-house after change time. That deponent accordingly went the next day and met Mr. Mathews at the time and place appointed. That Mr. Mathews sent for a coach, and he and deponent's father, and deponent went into it: but instead of their going to Mr. Mathews's house, on Usher's Quay, as deponent expected, Mr. Matthews ordered the coach to drive

to Jervis-street, to Moore's the apothecary's, which this deponent at first thought somewhat strange, and when the coach had stopped at Mr. Moore's, Mr. Mathews, his father, and deponent went into the house, and they were shewn into a dining-room up one pair of stairs. That Mr. M'Kercher came into the room and saluted them; but that he was a stranger to deponent, deponent having never seen him before. That soon after three other gentlemen coming into the room, Mr. Mathews asked deponent if he knew any of their faces; whereupon deponent looking very earnestly and separately at them all, knew Mr. Annesley, and said, That is Mr. Annesley, whom I knew at lord Altham's in Proper-lane, and was formerly my play-fellow. Says, his image was as fresh in deponent's memory as when he last saw him, which was, when he was about ten years old. Says, this was, as deponent believes, about two or three days after Mr. Annesley's first landing in this kingdom. Says, he knew of Mr. Annesley's being returned to Ireland, but that this was the first time he saw him after his return. That deponent had no conversation with his father about him, and did not know before then, that he lodged in Jervis-street; but says, that after deponent was in the coach, and the coach was directed to drive to Jervis-street, he had some notion that they were a going to see Mr. Annesley: for deponent had been told by the boy at the coffee-house the day before, that Mr. Mathews and Mr. Annesley were at the sign of the Bear the night before, (which was two days before the day of deponent's seeing him) and that they had sent for deponent, but deponent happened not to be at the coffee-house when the message was left there. Says he never saw the other gentlemen (who came into the room with Mr. Annesley) before that time. Says, he knew Mr. Annesley's face as perfectly as any face in the world. Being desired to look about him in Court to see if he knew him, then deponent pointed to Mr. James Annesley (the lessor of the plaintiff) and said, by virtue of my oath he is the person I knew at lord Altham's in Proper-lane, that was taken in by me at my father's house, as aforesaid, and that I spoke to at Mr. Moore's, in Jervis-street, in company with Mr. Mathews.

[Cross-examined.]

Says, that he is 34 years old next January. Being asked who lived with lord Altham in Proper lane, says, miss Gregory and her mother, and some servants, and the boy who was reputed lord Altham's son. Says, he was reputed his lawful son by all the neighbours, and went to school to one Carty in Proper-lane. That Carty taught Latin and to read English; but can't tell of what religion he was. Deponent being asked what religion he himself professed; says, he is a Roman Catholic. Says, many of the neighbours' children went to school to Mr. Clark in the Cloysters: and admits, that it was a more creditable school than Carty's. Being asked, how often he was in my lord's house; says, never but once, and that was the time my lord desired the child to call deponent in: that they were both playing at marbles. Says, he believes the child remained about two days in the house after my lord left it; but is not sure as to the number of days. Says, there was one boy and maid-servant left in the house after my lord left it. Being asked, how long after taking his leave of deponent, Mr. Annesley came back to him in Proper-lane; says, about five or six months; and believes it was the latter end of the year 1724. That deponent was then 13 or 14 years old. Says, he heard that lady Altham was his mother, and never heard he was a bastard till his last coming over to Ireland.

Michael Waldron, gent. one of the Attornies of the Court of Exchequer.

Says, he thinks he has seen the late lord Altham. Says, that a young gentleman (who went under the title of lord Altham's son) was at school with one Barnaby Dunn, in an alley next door to Warborough church, in Warborough-street, when deponent went to school there. Is not certain of the time, but believes the young gentleman might be then 10 or 11, or at most 12 years old. Says, that deponent went to Dunn's for about two years, and that the young gentleman continued there about 7 months at school. Believes he lodged in Ship-street, but does not know who visited him. Says, he was called by the scholars young lord Altham, and particularly by Mr. Cavenagh, the dancing-master's son. That he remembers the school-master one day made use of these words: That if he was a duke's son, let alone a lord's son, he would correct him. Says, that deponent used to go with his sister to Mr. Cavenagh's dancing-school, and there saw Mr. Annesley; but does not remember to have seen him any where else after he left Dunn's school.

[Cross-examined.]

Being asked, if he had seen Mr. Annesley since his return to this kingdom, and how he came to be introduced to him; says, he has been in company and dined with him. That he voluntarily went to his lodgings in College Green, and introduced himself, in order to do him all the justice in his power. Says, he really believes he is the person he went to school with, as aforesaid; but will not swear positively to his face or features at this distance of time.

[Hereupon the Lord Chief Baron said, that the last time he was in London, as he was walking in St. James's Park, he accidentally met with a gentleman whose face or features he could not remember, until he was reminded thereof, though he formerly had gone to school with him.]

Barnaby Dunn sworn.

Says, he knew lord Altham. That deponent kept a school in Blue-boar alley in Warbo-

rough-street, and at that time one Dennis Cavenagh (a dancing-master) introduced master James Annesley to deponent as lord Altham's son, and put him to deponent's school. Says, that Cavenagh used these words to deponent: As you regard me, take care of this young gentleman; he is lord Altham's son. Is not positive how long he was at deponent's school, but believes he was there about 8 or 9 months; but does not remember any gentleman's coming to see him there. Said, that lord Altham some time afterwards said to deponent; Mr. Dunn, you were recommended to me as a sober careful man to instruct youth; I have therefore sent my son to you; take care of him, and you shall be rewarded.

Says, that he received a letter in the country from Mr. Michael Waldron, expressing that he would be glad to see deponent at his father's in Dublin, about some particular business, but the letter did not mention what the business was; that deponent thereupon came to Dublin, and went to Mr. Waldron's father, pursuant to the directions of the letter, but Mr. Waldron not being there, deponent was directed to go to Mr. Waldron's own lodgings, which deponent accordingly did, and there met Mr. Waldron in the morning; that after having saluted each other, Mr. Waldron expressed that he was glad to see deponent, and asked deponent, if he remembered lord Altham's son, who went to school to deponent; deponent said he did remember him, and told Mr. Waldron, that he went to deponent's school at the same time: Yes, replied Mr. Waldron, I did go along with him to your school. That then Mr. Waldron dressed himself and brought deponent along with him to College Green, where they went into an house, and were shewed a room, and asked to breakfast. Says, that the moment deponent saw Mr. Annesley come into the room, he knew him, and advanced to him, and kissed him. Says, he had observed a little cast in his eyes when he was a boy, and the remembrance of that made him know him, and deponent remembered likewise his features, and knew him as well as any man living; and says, by virtue of his oath, if he was a dying man, he could safely swear he knew him to be the same person.

[Cross-examined.]

Says, that deponent instructed lord Kingsland and his brother, at lady Kingsland's house in Queen-street, for about 5 or 6 years; that Mr. Annesley came to deponent's school sometime in July 1724, and deponent is sure of the year because deponent got a note from lady Kingsland's receiver dated 21st of September, 1724, which deponent has kept ever since (deponent drew the same out of his pocket to shew it) and Mr. Annesley was at school with deponent some time before the date of that note. Says, that Mr. Cavenagh afterwards told deponent that my lord had not money (on deponent's applying for that purpose) but deponent would be considered by his lordship.

Being asked where Mr. Annesley lodged when he went to school to deponent; says, he lodged in Ship-street; for that upon his absenting himself from the school, deponent enquired, and being informed that he lodged in Ship-street, went to look for him, and found him at his lodgings there; and deponent told him then, that if he was even the lord Anglesea, and under deponent's care, he would punish him for absenting from his school.

Being asked what he taught Mr. Annesley; says, he cannot at this distance of time tell, whether he taught him Latin, nor what book he read, but believes he taught him to read and write. Says, he found that the child had been at another school before he came to him; cannot tell how old he was then, but says he appeared to be 9, 10 or 11 years old. Being asked if the child was attended with any servant; says, that sometimes a servant clad with a blue cloth came along with him, but not always.

Thomas Byrne being ordered by the Court to be called again.

Says, that he believes it was in the beginning of summer, 1724, that my lord Altham left Proper-lane. Being asked, if he could recollect how the boy employed himself while he stayed with deponent in Proper-lane, or if he then went to school; says, that he did not go to school then, that he was about the door, and sometimes lay concealed in the house, and believes he lodged with deponent about Christmas time. Says, that when he first came to take his leave of deponent, he told deponent he was going to board in Ship-street, and deponent remembers he mentioned the name of Cavenagh.

Patrick Plunket, brewer, sworn.

Says, that deponent knew lord Altham in the year 1723, to the best of deponent's remembrance, and that his lordship lived in Proper-lane, next door to deponent's father, and deponent used often to go a hunting with him, his lordship then keeping a pack of hounds, and by that means deponent became intimately acquainted with him; and says, that he often drank with his lordship. That he saw a child at my lord's house, who was called my lord's son, and whose name was James Annesley, and deponent saw my lord frequently speak to him. Says, that Miss Gregory often used to complain to my lord of the child, and deponent twice or thrice interceded and got a pardon for him. That the faults the boy was charged with, was either telling lies, or being missing from school—heard Miss Gregory call him Jemmy, and the servants call him my lord's son; and says, he was treated by every body as lord Altham's child. Deponent having said he interceded for the child when Miss Gregory complained of him, deponent was desired to tell in what words he spoke to my lord; says, that to the best of his remembrance it was in words to this effect; I hope, my lord, you will pardon master James, and he will never do it again.

Says, that deponent understood Miss Gregory hated the boy; that she was mistress of the house, and that whatever she commanded was done. Says, that one of the times my lord and Miss Gregory were in such a passion that they were going to beat the child. Says, it was the general reputation of the country that he was lord Altham's legitimate son, and deponent never heard any suspicion to the contrary until admiral Vernon had sent Mr. Annesley from the fleet to London. Being asked how he knew that admiral Vernon had sent him to England; says, that lady Anglesea sent for deponent about May last was twelvemonth, and asked deponent if he knew lord Altham, or a bastard son of his; to which deponent answered, that he knew a pretty little boy, that was in the house with lord Altham, who was reputed to be his son, but not a bastard: lady Anglesea replied, He is a bastard son of my unfortunate lord, and added, that it was admiral Vernon sent him home to England. Deponent was asked, when he first saw Mr. Annesley after his first coming to this kingdom; says, he never saw him since April 1723 or 1724, till last October was twelvemonth, when deponent saw him in a house near Mary Church. That shortly after Mr. Annesley came first to the kingdom, deponent met one Cook a linen-draper, who asked deponent how long he lived in Proper-lane; to which deponent made answer, that he lived there about 26 years; Mr. Cook thereupon asked deponent if he knew lord Altham when he lived there; deponent said, he did: Then said Cook, it is reported that a son of his is come over here to claim the Anglesea estate. I believe, said deponent, it is James Annesley; yes, that is his name, replied Cook, or to that purpose: I know him perfectly well, said deponent, he went to school to one Carty's in Proper-lane, and though it might be somewhat difficult to know him at this distance of time, yet upon recollection, I have a perfect idea of his face and features, and will hold a dozen of wine I should know him from a hundred, unless he is greatly altered; says, he did not know a word of Mr. Annesley's being in the kingdom, till Mr. Cook had told him of it; says, Mr. Cook mentioned that he was going to his lodgings to see him, and deponent having a desire to see him, offered to go along with Mr. Cook; says, they went to Mr. Annesley's lodgings, and that candles were just lighted; says, they were received at the parlour door, and introduced into the room; that there were several gentlemen there, but nobody spoke to deponent; that deponent looking round, immediately knew Mr. Annesley, and went up to him, saluted him, took him by the hand, and said, Mr. Annesley, you are welcome to the kingdom, I am glad to see you. Says, that deponent took notice of his looks; and that the melancholy manner in which deponent saw him when he interceded for him with lord Altham in Proper-lane, as aforesaid, had made so strong an impression on deponent, that he could not but remember him; and says, that his eyes and face are very familiar to him, and that deponent is positively sure he knows him. Being desired in Court to point out the person he meant, he accordingly pointed to Mr. Annesley, and said, he was the same person who went to school to Mr. Carty's when he taught in deponent's father's yard, and who lived with lord Altham at his house in Proper-lane, and was reputed his son.

[Cross-examined.]

Defendant's counsel said to deponent, You say, you took notice of his eyes from the melancholy manner you saw him in, and that this made you remember him; was he in the same melancholy manner when you first saw him at his lodgings, since his coming over? Says, he was not in a melancholy manner then, but yet his face was familiar to deponent, by deponent's having taken particular notice of it on account of the concern he expressed when deponent interceded for him. Says, that when the boy went to school in Proper-lane, deponent was about 22 or 23 years old; says, he never heard my lord say he was his son, but that he was generally reputed to be so; says, lord Altham left Proper-lane about the beginning of May, 1724, and went to Inchicore; that deponent went to France about the 27th of May, just after lord Altham left Proper-lane, and returned to Dublin in August; says, he never enquired for the child after his return from France. Being asked if he knew Thomas Byrn who lived in Proper-lane; says, he did: Being asked where Thomas Byrn lived when his father was in the country; says, he lodged at one Reily's in Proper-lane: being asked, if he thought he should have known Mr. Annesley if he had met him accidentally; says, he believes he should.

Amos Bush, esq. sworn.

Says, he remembers when he was in the college of Dublin, he knew a little boy about 10 or 11 years old, who got his subsistence at the college by running of errands; that he was called James Annesley, and deponent was told he gave himself out to be lord Altham's son; says, that he took him into his service and maintained and clothed him, and paid for his lodging, and intended to take him to the country; but that upon the boy's assuring him he was lord and lady Altham's son, and often telling him so, and adhering very particularly always to the same story, deponent wrote to the country to his grandfather, acquainting him, that he had taken a little boy to be his servant, who said that he was lord and lady Altham's son; whereupon his grandfather, in answer to his said letter, wrote, that no such person was a fit servant for deponent, and directed deponent to discharge him; whereupon deponent accordingly discharged him. Being asked if he should have known that same person if he had met him accidentally; says, he thinks he should have known him, having so strong an

idea of his face, that he believed he could have painted it, if he had been a limner; says, he was applied to, to go to Mr. Annesley's lodgings, and that he received a message from Mr. Annesley that he would wait on deponent, but that he had a severe cold, and that he had been in search of deponent for several days; that upon hearing of this message, deponent believed him to be the same person who was at the college; that deponent went last night to Mr. Annesley's lodgings, and saw him among several other gentlemen, and knew him at first sight, and said to him, Sir, I recollect your face: and Mr. Annesley said, I recollect your's, and will ever remember it; and deponent says, he never saw him since he was in the college till last night. Deponent was desired to view him in court, whether he was the same person that was at the college; accordingly deponent viewed him, and swore he was the same person whom he took into his service as aforesaid when he was in the college.

[Cross-examined.]

Being asked, whether it was generally believed or thought that the boy was lord Altham's son: says, that some thought by his indigent circumstances that he was not, but others believed he was; that the boy said, it was by the means of a mistress his father kept, that he was turned away; that deponent often asked the boy whether he was lord Altham's son; and that he always insisted he was; remembers deponent once spoke to him thus: You little rogue, you often say you are lord Altham's son; now tell me truth, are you so, or are you not? To which the boy answered, Indeed, indeed, I am my lord and lady Altham's son; and always agreed in the same story. Being asked, whether deponent would have taken him as a servant, if he had believed him to be lord Altham's son; says, he should have chose, in his way of thinking, to take him as a servant, to preserve him from penury, though deponent had really known him to be my lord's son. Being asked, if he knew where my lord lived; says, he did not know where he lived. Being asked, if he did not know it was an improper thing for a gentleman to take a lord's son for a servant; says, if he had understood ceremony then as well as he does now, perhaps he might have thought it improper to have taken him as a servant. Being asked how long he knew him; says, above a month; that when deponent first knew him, he had neither shoes nor stockings; that he was a little scull that used to go of errands. Being asked, how long ago is it since he was in the college; says, he fancies he went first to the college about the year 1722 or 1723; does not particularly recollect the period of time of his going there first, but believes he was in the college seven years.

Dominick Farrell sworn.

Says, he knew the late lord Altham for many years, and had some discourse with him about son of his, but never with Miss Gregory; that he knew the son at Dunmaine, and was well acquainted with him when he was in disgrace with his father, for he used to come to visit deponent, and deponent often relieved and supported him, and recommended him afterwards to one Purcell a butcher, because deponent's wife grudged the child's being in the house, and kept at deponent's expence, who was a sufferer by his father 56*l.* that finding the child was abandoned and neglected, deponent went to my lord to Inchicore, and applied to him, and told him the scandalous and cruel way his son was in, and begged his lordship not to let the poor child continue as a vagabond about the streets; that my lord said, he was in low circumstances, and could not pay for his board, nor could he take him into his own house because of miss Gregory, for he should have no peace if he offered to do it; but my lord desired deponent to support him, and he would not only pay deponent the money he owed him, but thankfully repay what deponent should supply his son with, whenever it was in his power. Says, he went to Dunmaine when the child was about two years old, and deponent had him in his arms; that he took him out of my lady's arms, who was hugging and kissing him; says, he lay there one night; says, he saw the child afterwards at Kinnay in the county of Kildare, which is near the river Liffey, and is positive that it was the same boy whom he had before seen at Dunmaine; deponent saw him afterwards at lord Altham's house on Stephen's Green in this city, and deponent knew him afterwards, when he went to school to one Carty's in Proper-lane, where my lord lived at that time. Being asked, what became of the child after the discourse deponent had with my lord at Inchicore; says, deponent kept the boy for about a month or two, but deponent's wife not being well pleased with this, deponent grew a little cool to the boy, who thereupon went away from deponent's house; that deponent met him, and gave him a little money, and about three weeks after that deponent saw him in Smithfield all in rags and tatters riding a horse; that deponent at the same time seeing one Mr. Purcell a butcher, with whom deponent was very well acquainted, and whom he knew to be a very humane, charitable man, and in good circumstances, and to have but one child of his own, deponent took that opportunity of making the poor boy known to him; that having directed Mr. Purcell to look upon the boy as he was riding the horse, deponent said to Purcell, Could you believe that that boy is the only son and heir of a peer, who one day or other will probably have a large estate? To which Purcell answered, Sure that's impossible. And thereupon deponent replied, I affirm to you he is; and if you will take him home, Mr. Purcell, and succour him, he will be no improper companion for your son, and may live, by God's providence, to be a support to you and your family. Then deponent desired Mr. Purcell to ask the boy a few questions, while deponent would stand aloof, that

he might be satisfied deponent had told him nothing but what was true; that Purcell having asked the boy several questions, and being satisfied of the truth of what deponent had told him, beckoned to deponent to come to them, which deponent did, and observing the boy to be somewhat melancholy, deponent said to him, Jemmy, why don't you speak to me, what have I done to you? And deponent made the boy give away the horse he was riding upon, and then Purcell said to him, that if he would be a good boy, and be advised, he should live with him and his wife, and be treated as their own child. Says, that Purcell took the boy and deponent to his house, and Purcell's wife being informed by them who the boy was, got some warm water, washed and combed him, and put him on a clean shirt of her son's, and told him, that while she had bread, he should not want; says, the boy was put to bed to Purcell's son; says, he has heard that Purcell's wife is lately dead; says, lord Altham was at that time in low circumstances and owed deponent's brother-in-law 250*l.*; that my lord's not paying did not arise from want of principle, but ability. Being asked, if the boy was at Purcell's during the lifetime of lord Altham; says, he was, and that deponent saw him there very often. Being asked where the boy went from Purcell's; says, he heard he went to live with Mr. Tigh at the Hay-market. Being asked when he last saw the boy he had been speaking of; says, last Saturday, at his lodgings in College-green; and that deponent did not see him before that day, since he saw him at Purcell's; that deponent lives in Cork, when at home; that upon hearing of Mr. Annesley, deponent had the curiosity to see him, in order to be sure if he was the youth he had formerly seen, that thereupon deponent went to his lodgings, and immediately knew him to be the same person whom he knew when a child, and said, there he is (pointing to Mr. Annesley in Court) I am positive that is the man.

[Cross-examined.]

Being asked what affair it was occasioned his going to Dunmaine; says, he went for money that was owing to him for lace, head-dresses, handkerchiefs, stockings, and other things he formerly dealt in, which my lord had bought of deponent. Being asked, what business deponent's brother-in-law followed; says, he kept an inn near Smithfield. Being asked, in what year, and what time of the year deponent went to Dunmaine; says, that about April 1717, or 1718, deponent went to the races at the Curragh* of Kildare, and from thence went to Dunmaine. Being asked, if he saw the lady Altham there; says he saw her at Dunmaine, or at least saw a lady there who passed for lady Altham. Being asked, what sort of woman she was; says, she was pretty tall, and round faced, and that she was dressed like a woman of quality; says, he never was at Dunmaine after that time, when he saw the child. Being asked, if he ever heard the name of the nurse, or of Joan Laffan, or that the lord and lady were separated; says, he never did hear the name of the nurse, or of Joan Laffan, but heard of the separation, and that my lord and lady parted soon after deponent was at Dunmaine; says, he went often to see my lord when he lived at Kinna, and after deponent's return from England where he had been for some time. Being asked if he went to England in spring 1717; says, he cannot tell whether he went to England the same year he was at Dunmaine; says, he was several times at Kinna, his business often calling him thither; says, the child was five or six years old when deponent was at Kinna. Being asked how long it was between deponent's seeing the child at Dunmaine and at Kinna; says, he does not think it was three years; says, the child was then in a coat and breeches, and had a tutor, and remembers the tutor called him to rehearse his lesson before deponent; says, that when deponent was in Dunmaine the child was in petticoats, and had a servant to lead him; says, he saw the child afterwards in Stephen's Green where lord Altham lived before he went to Proper-lane; remembers my lord's living in Proper-lane, but can't say how long he lived there; says, his lordship removed from thence to Inchicore; says, the child was about 11 years old when he was at Purcell's, and had the small-pox whilst he continued in that family. Being asked where deponent removed to when he left Dublin; says, he went to Cork. Being asked what time the debt which was owing to deponent was contracted; says, it was after the year 1715, but that his papers books being left in the hands of another, and and not in deponent's power, he cannot be so particular as to the time as otherwise he might have been.

John Purcell sworn.

Says, he is by trade a butcher. Being asked if he ever knew a boy called James Annesley; says, he did. Being desired to give an account to the Court and the jury how he became acquainted with him; says, deponent happened to go to Smithfield on a Wednesday night about seven o'clock in the evening, where he met Mr. Dominick Farrell, an acquaintance of his, who shewed him a little boy riding on a horse, in a poor and mean condition; and said to deponent, Purcell, is not this a melancholy sight to see a nobleman's child in that condition? That thereupon deponent asked Mr. Farrell who the child's father was; and Mr. Farrell told deponent, it was my lord Altham. That deponent being surprised at this account, asked Mr. Farrell what the meaning was of his father's suffering him to go in that condition? That the boy must certainly have been guilty of some very bad tricks to induce his father to neglect him in

* It is the place where the king's plate is run for yearly.

this manner. That Mr. Farrell told deponent, it was not owing to any fault of the boy's, but to the influence of a mistress whom my lord was doatingly fond of, and who had taken an antipathy to the boy, and Mr. Farrell recommended him to deponent as an object of pity. That thereupon deponent called the boy, and told him that if he would promise to be a good boy, deponent would take him under his care, and that he should never want while deponent had it. That on hearing this, the boy kneeled down and thanked deponent in the most earnest manner. That then deponent took him home to his own house, and introduced him to his wife, telling her, he had brought her a present, and desiring her to take care of the child, who might one day or other live to make her amends for relieving him. That deponent's wife asked deponent who he was; and deponent told her. That immediately she fetched a pot of water, and some soap and bran and washed the child; and put him on a clean shirt of deponent's son's, and grew very fond of him. Says, most people used to call the boy my lord. That in some time after the lad took the small-pox, and all proper care was taken of him in deponent's house. That after the child was recovered of the small-pox, a gentleman, (who was then called Richard Annesley, and is the now defendant, the earl of Anglesea) came to deponent's house, and asked if one Purcell did not live there; and said, he supposed they sold liquors; that the gentleman had a gun in his hand, and sat down, and having called for a pot of beer, asked deponent, if he had a boy in his house, called James Annesley? To which deponent answered, that there was such a boy in the house, and called his wife, and told her a gentleman wanted to see the boy. Says, the child was sitting at the fireside, and immediately saw Mr. Richard Annesley, though he could not see the child by reason of the situation wherein he sat. Says, the child trembled and cried, and was greatly affrighted, saying, that is my uncle Dick. Says, that when the child was shewn to the defendant, he said, So, Jemmy, how do ye do? That the child made his bow, and replied, Thank God, very well. That the defendant then said, Don't you know me? Yes, said the child, you are my uncle Annesley. That thereupon the defendant told deponent that the child was the son of lord Altham who lived at Inchicore. To which deponent replied, I wish, Sir, you would speak to his father, to do something for him. Being asked, if he is sure Mr. Richard Annesley told deponent that the child was lord Altham's son; says, he is sure he did, and that he mentioned that the child's father was then alive. Being asked if deponent understood that he meant that the child was lord Altham's bastard; says, he did not. That the child called him uncle, and begged of him to speak to his father to send deponent something that was handsome for his kindness to him. That thereupon deponent told Mr. Richard Annesley, he desired no gratuity, but wished the child's father would take him into his own care. Being desired to repeat what Richard Annesley said to the child when he came in; says, he called him Jemmy, and asked him how he did; and told him he was glad to see him. Says, that the child, to the best of deponent's memory, told his uncle he had fallen into the hands of good people. Says, that sometime afterwards the child was told of the death of his father, and that he was to be buried at Christ's church; and the child went there and saw the funeral, and afterwards came home all in tears. Being asked when lord Altham died; says, in November, 1727. That in about three weeks after my lord's death, Mr. Richard Annesley, (who was then called lord Altham) came into the market a second time, and sent a man (who belonged to one Jones a butcher) to deponent's house, to desire that the child might come to the said Jones's house in the market; that thereupon the child came, and told deponent, that his mistress (meaning deponent's wife) wanted to speak with deponent; that deponent accordingly went home, and was told by his wife, that the child had been sent for to Jones's house, but that she was afraid it was some trick of his uncle's to use him ill, and that she did not care to let the child go to Jones's without deponent; says, deponent thereupon bid the man return, and tell them the child was coming; and then deponent took a cudgel in one hand, and the child in the other, and went to the said Jones's house, where deponent saw the present earl of Anglesea (who was then in mourning) with a constable, and two or three other odd-looking fellows attending about the door; that deponent took off his hat and saluted my lord, which he did not think proper to return; but as soon as he saw the child in deponent's hands, he called to a fellow that stood behind deponent's back, and said to him, Take up that thieving son of a whore (meaning the child) and carry him to the place I bid you; that deponent asked him whom he meant by a thieving son of a whore; Damn you, (replied my lord) I don't speak to you, but to that thieving son of a bitch, I'll send him to the d——l: upon which deponent said, My lord, he is no thief, you shall not take him from me, and whoever offers to take him from me, I'll knock out his brains; that then deponent took the child, (who was trembling with fear) and put him close between his legs. Being asked how long it was after Mr. Richard Annesley came to deponent's house that he sent for the child to Jones's; says, it was about six or seven weeks, and, to the best of deponent's remembrance, in the month of December. Says, he asked the uncle, by what authority he would do what he threatened? To which the said Mr. Richard Annesley made answer, that he could not make his appearance at the Castle, or any where, but that he was insulted on that thieving son of a whore's account. That thereupon deponent

said, he was surprized that a gentleman, who made the appearance that defendant did, should shew so much malice to destroy a poor creature that was no expence to him, either for clothes or maintenance, though it would better become him, who was the child's uncle, to provide for him, than to suffer deponent, who was a stranger to him, to do it; that the defendant expressed a great deal of anger at his not being able to compass his ends; and after some high words had passed between them, deponent seeing the constable go off, went away with the child in his hand, and carried him home safe to his mammy, (deponent's wife) as he called her. Some time after, deponent saw a constable lurking about his house to carry away the child if he could, as deponent believes; says, the child continued with deponent till February, and then went away without deponent's knowledge; says, he went to one Mr. Tigh's at the Haymarket, as he told deponent some time after; and the reason he gave deponent for going away was, That he saw so many people coming about the house after him, that he was afraid of being taken away by some of them. Being asked, whether he should know the same person now if he saw him; says, that he pitched upon Mr. Annesley among several, the first time he came to this kingdom, without the least hint being given him; and deponent pointed to him in open court, and swore, that Mr. Annesley was the same person, whom he kept in his house, as aforesaid.

[Cross-examined.]

Being asked what time it was that Farrell shewed him the boy in Smithfield; says, in the year 1726, or 1727, and that deponent heard lord Altham lived then at Inchicore. Being asked what time it was lord Altham died; says, he died in November 1726, or 1727; that the boy continued with deponent about eleven months; remembers his coming home to deponent's house from lord Altham's burial; says, he ran from deponent's house to Christ's Church to see it. Being asked whether deponent did believe him to be lord Altham's son when he took him into his house; says, he did believe him to be lord Altham's real natural son, from what Farrell told deponent, who likewise mentioned to deponent, that the child had been in his care, but that his wife thought much of it, and that he was obliged to put him away to keep his wife in temper; that deponent had a school-master to teach the child to write. Being asked if deponent ever went to Inchicore to speak to my lord about the boy; says, he never did, but that he once determined to have gone there, only that he was advised, that my lord was a passionate man, and would not value the shooting him through the head, and that it would be of no service to the child, because of the woman my lord kept in the house; says, that the defendant was called captain Annesley when he came to deponent's house, and told deponent he was brother to the child's father, and says, that the child called him uncle. Being asked whether he did not know that a son is to inherit the title of his father; says he does; but that not being skilled in law affairs, he could not tell why the boy did not succeed my lord Altham his father; but says, the boy went to Mr. Tigh's, a gentleman more capable of such sort of business than deponent. Being asked, if he enquired whether lord Altham had any estate; says, he did not. Being asked if he told Mr. Tigh, that the boy was lord Altham's son; says, he did not; that he was indifferent about the boy, because he went away from deponent without his knowledge; does not remember that he apprized any other person of the family that a son of my lord Altham's was in his care. Being asked if he heard that captain Annesley (the present defendant) became lord Altham upon the death of the late lord; says, he did, but that deponent did not care to interfere in that matter, as long as might had overcome right; and as the boy went away from deponent without his knowledge, deponent did not think it incumbent upon him to meddle in it. Being asked if the boy was sharp; says, he was. Being asked whether he heard the boy say any thing of his right to any title or estate; says, he heard him say, he hoped to be earl of Anglesea. Being asked how he knows the boy went to Mr. Tigh's; says, he saw him at Mr. Tigh's door, and in a livery, which gave deponent great concern; says, Mr. Tigh was generally called counsellor Tigh. Being asked how he knows it was a constable that came about his house, and that he lurked for the boy; says, he looked like a constable; that one day he lifted up the latch of deponent's door, and when he found he was perceived, he ran away. Being asked if he believed that the present defendant intended the boy any mischief, when deponent went to Jones's; says, he did suspect that the defendant intended him harm. Being asked why he did not then apply to some justice of peace or other magistrate for redress; says, he did not care to go to law about it, but that he took care to keep the boy close within doors, after the defendant had made this attempt. Being asked in what part of the house defendant was when deponent found him at Jones's; says, he was in the kitchen, and that the constable stood in the entry behind deponent's back, and two or three without side of the door; that the boy said to deponent, Dear Sir, don't let them take me away, that's uncle Dick, they will destroy me: upon which deponent told him, he would lose his life before he should be taken from him; says, that some people hearing the noise came and asked deponent if he wanted any assistance. Deponent being desired to name some of the people who came to his assistance, he named Mr. Bignell, who he said was dead; says, the constable went away; can't tell who the constable or the other ruffians were, never having seen them before; says, the boy remained with deponent about two months after that; and as deponent thought all things over, he made him-

self easy without going to a magistrate, thinking himself able to protect the child. Being asked if the child said he was lord Altham's son; says, he did; says, Dominick Farrell told deponent that he had seen the child at Dunmaine in my lord's house, and that his mother was a relation of the duke of Buckingham. Being asked what sort of a son Farrell told him the child was; says, that he told deponent the child was lord Altham's real natural son. Being asked if he was positive Farrell told him he was lord Altham's real natural son; says, he is positive he did. [Hereupon Mr. Hamilton, one of the jury, asked deponent, what deponent meant by a real natural son?] Deponent answered, I mean a son got by lord Altham's wife. Being asked by the defendant's counsel, whether the present defendant, when he came to deponent's house, did not say the child was lord Altham's natural son, as Farrell said he was; says, he does not remember that his uncle called him natural son, but said that he was his brother's son, and that lord Altham was his father. Being asked, if he knows Mr. Charlton the attorney, or Mr. Stone; says, he does know them. Being asked if ever he told them, or any body else, that he saw the boy a shipboard; says, he did not, to the best of his knowledge, but that his son might tell them so. Being asked what the boy called deponent's wife; says, sometimes he called her Mammy, sometimes mistress; says, he kept the boy, in hopes that when he came of age, he might prove himself to be lord Altham's son, and recover his birthright; that the boy never did any thing for deponent, but sometimes ran of errands; says, he has heard the boy went on ship-board. Being asked if Jones was an honest man; says, he was; but heard he went crazy about the streets, telling every body he was ruined by lord Altham, the present defendant; says, he gave the boy no ill usage that might induce him to go away, but that he having, during the time he was with deponent, staid out all night (which was but about three or four times in all) deponent corrected him for it some of the times.

Thus ended the third day's examination of plaintiff's witnesses, about eight o'clock on Monday night the 14th of November: and the Court, by like consent, as before, which was signed by the parties and their attornies, and read in open court, adjourned to the next morning at nine of the clock.

Tuesday, November 15.

The Court met according to adjournment, and the jury being called over as before, answered to their names, and then the plaintiff's counsel proceeded to examine their witnesses, as follows:

Shellcross Ash, gent. one of the Attorneys of the Court of Common-Pleas, sworn.

Says, he was acquainted with the late lord Altham, and that shortly after his death deponent happened to be in company with his brother, the present earl of Anglesea (the now defendant) when a gentleman in the company having mentioned that there was a boy at lord Altham's burial who made a great noise, and cried, and called himself lord Altham's son; the defendant made answer, and swore he was an impostor and a vagabond, or words to that effect, and ought to be transported. Being desired to tell the Court how he came to be in defendant's company, and what was the occasion of this conversation; says, that soon after the late lord Altham's death, deponent was in company with the present earl of Anglesea, then lord Altham, (deponent being concerned in his affairs) and that either one Cavenagh (a dancing-master) or one Wilkinson, (persons who used to attend his lordship) having been sent by him to Mr. Hawkins king at arms, to desire him to enroll my lord as baron of Altham in the place of his brother the late lord Altham, came back, and gave his lordship an account in presence of this deponent, that Mr. Hawkins said he could not enroll him, for that there was some reason to think, that the late lord Altham had left a son, for that a boy has made a great noise at his funeral in Christ-church, crying and telling every body aloud, that he was the son of the late lord Altham. My lord was angry at hearing what Mr. Hawkins said; and declared, that the boy was a vagabond and impostor. I said, that if he was a vagabond, there was a method to get rid of him, which was to get him indentured at the Tholsel and transported: deponent believes my lord said, the boy was a bastard, though he gave no other reason to induce deponent or the rest of the company to believe him such, than his lordship's speaking in an angry manner. That deponent thereupon said to my lord, that Mr. Hawkins's refusing to enroll his lordship might not perhaps be on the boy's account, but because he wanted his honorary fees; whereupon my lord said, that if that was all, he would satisfy him: And deponent says his lordship soon after took his seat. Being asked, if he did not afterwards hear the defendant say, the boy was transported; says, he never heard my lord say the boy was transported; but that sometime after the boy was gone, upon some of the company's talking of him, the defendant said, he was gone; and that he said it in an easy manner, without any heat.

[Cross-examined.]

Being asked, when he first heard of the boy; says, he never heard of him till after the death of the late lord Altham. And deponent has dined with the late lord Altham, and never heard him say he had a son. Nor did deponent ever hear him say who was to inherit his estate.—Says, he never heard any person reputed to be his heir but the defendant. Says, the late lord Altham died intestate; and that the defendant took out administration to him. Being asked, where it was my lord said that

the boy was gone; says, it was most likely in a tavern, amongst his usual acquaintance. Being asked, if he consulted deponent about the boy's transportation: says, he did not.

Mark Byrn sworn.

Says, he has known the defendant a long time, but can't tell directly how long. Being desired to give an account to the Court and jury if he was at any time employed by any, and what person to transport any, and what boy; says, that about sixteen years ago, one Donnelly, a constable, met deponent (who was at that time likewise a constable) and told deponent he had a good job for him, which he was to get a guinea for; and deponent should have a share of it: And Donnelly desired deponent to go along with him. That deponent accordingly went along with him to one Jones's house in Ormond-market, and the present earl of Anglesea was there (who was then called lord Altham) and there was a small boy there, which my lord said was his brother's son. My lord charged the boy with stealing a silver spoon, and that he was a thief, and desired deponent, and the said Donnelly and others, who were there with my lord, to take him away to George's Quay. That accordingly they took the boy away, and carried him towards Essex-bridge; and there a coach was got, into which the said Donnelly, the boy, and deponent went; and the coach was ordered to drive down to George's Quay, says, my lord was there as soon as the coach; but deponent does not know, whether my lord walked or went in a coach or chair. Says, there was a boat waiting at the Slip at George's Quay, and the boy was put into it by Donnelly, and lord Anglesea went into the boat down the river, and deponent returned home. That next day Donnelly came to deponent and gave him a shilling; whereupon deponent demanded half a guinea, as the part which Donnelly had promised him; but never got it. There was a mob followed them when they carried the child away. That the boy cried very much, which he believes occasioned the mob. Says, the boy told them, he was afraid his uncle was going to kill or transport him. Being asked, whether there was any thing done to prevent the transportation; says, he saw nothing done to prevent it. Being asked, if the boy mentioned the lord Altham (the now defendant) as his uncle; says, he did. Being asked, when it was he first saw the boy since this time; says, he never saw him since that day till lately. Being asked, if he and Donnelly had any staves as constables; says, they had not: but that they were publicly known to be constables. Being asked, if they had any warrant; says, they had no warrant as he saw.

[Cross-examined.]

Being asked, if my lord was at Jones's house before deponent came; says, he was. Being asked what time of the day it was; says, he does not know whether it was morning or afternoon, but that it was daylight. Being asked what time of the year it was; says, he believes it was in the spring. Being asked in what part of the house he saw the boy; says, in the kitchen; says, he is positive that my lord Altham, (who is now the defendant) is the person that was there with him; says, they did not stay long in Jones's house, but were ordered directly to take the boy away; says, the door was open and free for every one to go in and out. That my lord said, the boy was his brother's son, and had stolen a silver spoon. That the boy cried, and said, I fear he will kill me or transport me. Being asked, if deponent knew what was going to be done to the boy; says, he did not at that time, but apprehended nothing right was going to be done. That it was not said in the coach what was to be done. And when the boy was got into the boat deponent was surprised, and began to believe that something out of the way was intended, and that they were going to send him over sea. Being asked, whether he enquired for any warrant for what he did; says, he did not. Being asked, if he did not believe it unlawful to transport the boy without a legal order, or without trial; says, he did believe so, though he did not acquaint any of his companions that he thought so. Being asked, what clothes the boy had on; says, he can't tell. Being asked, if Donnelly is living, or dead; says, he is dead. Being asked how long he had been a constable at that time; says, he believes something more than two years. Being asked, who were lord mayor or sheriffs that year; says, he don't know; but was sworn in constable before the lord mayor. Being asked, if Donnelly told him what the job was when he first spoke to him about it; says, he did not; but believes he received his instructions what to do before he met the boy. Being asked, if he ever saw my lord Altham (the present defendant) before that time; says, he had seen him several times. Being asked, what my lord said at that time; says, my lord bid deponent take away the boy: and that deponent took him accordingly. Says, they walked till they came to Essex-bridge, where they met a coach. Says, he was afraid to go into it. That the mob followed them all the way to George's Quay. That it was Donnelly who directed the coach to drive there. Says, deponent assisted in putting the boy into the boat, and went along with him down the steps. Says, Donnelly and one James Reilly, who (he thinks) wore a livery, held the boy. Being asked, if Reilly was in black; says, he was not. That deponent did not see him till they came to George's Quay. That deponent staid till they went off, and saw them row the boat beyond the Walls. Being asked, if John Purcell was at Jones's that day; says, he did not see him there. Says, he did not see my lord from the time he was at Jones's till he saw him at the Quay. Being asked, what clothes my lord had on; says, he can't tell. Being asked, if Reilly went into the boat; says, he did. Being asked, for what reason they took coach; says, to keep the boy from the crowd. Being asked,

how long deponent was on the Quay before the boy went off; says, about a quarter of an hour. Being asked, how he came to give evidence in this cause; says, he was sent for by Mr. Annesley, the lessor of the plaintiff, when he came to Dublin, to whom he gave the above account. Says, the boy went crying all the way. That there was a great many people on the Quay, but nobody endeavoured to take the boy from them. Says, that Donnelly and the boy went down the steps; and that the boy was so tired with crying that he was hardly able to speak. Says, that several people enquired what was the matter at the Quay, but deponent would not tell them.

James Reilly sworn.

Says, he lives now in London, and has a house of his own. That he knows the defendant, the earl of Anglesea, and lived with him as a servant for about 11 months, about 15 or 16 years ago. That he knew the late lord Altham who had been dead about three months when deponent came into the defendant's service. That before deponent came into his service he lived with surgeon Green on Arran's Quay: and remembers he left his service on New-year's-day, and after that went to live with lord Altham (for he was then called so, who is now earl of Anglesea.) Being desired to give an account if he was at any time, and when, employed by any person, and whom, about transporting any, and what boy; says, that about a month after he came to live with my lord, he was (with some constables, whose names were Bryan Donnelly, John Donnelly, Mark Byrn, and Patrick Reilly) employed by my lord to look for one James Annesley. That my lord desired deponent if he met the boy, to carry him to an alehouse and send for his lordship as soon as possible. That deponent and the rest went several times in search of the boy; but that Mark Byrn was but once with them. That they searched about Smithfield, New-market, and down Ormond Quay. Says, that one day as deponent came to town from Inchicore he received a message to wait upon my lord at one Darrenzy's in Castle-street (who was married to one Kennelly's daughter.) That deponent accordingly went there, and found that my lord was gone away: but presently a porter came there to deponent from George's Quay, to inform him that my lord wanted him there, and deponent went along with the porter to George's Quay, where my lord was. That when deponent came there, my lord whispered him to go and borrow a guinea for him. That deponent accordingly went to Mrs. Kelly's at the Butcher's Arms, near Inchicore, and got the guinea and returned to my lord at George's Quay, and gave him the guinea; and deponent saw my lord give the guinea into John Donnelly's hands, and then John Donnelly went away. Says, there was a boat at the Slip, and Bryan Donnelly and Mark Byrn brought the boy, who was immediately put into the boat, and my lord, Bryan Donnelly, John Donnelly, the boy, and deponent went into the boat, and they rowed to a ship that lay down the river as far as Ring's-end.* That when they came to Ring's-end the boy was put on board the ship, which was to sail to one of his majesty's plantations, as he has been informed. [On deponent mentioning his information the counsel for the defendant told him, he must talk from his own knowledge and not from information, which was confirmed by the Court.] That my lord went on board the ship with the boy, and nobody else, and the boy cried bitterly; and my lord staid on board a few minutes, and then returned to the boat, and they rowed back to George's Quay. Says, he does not know to whom that ship belonged. Being asked, when it was he first saw the boy at George's Quay; says, he did not see him till deponent returned to my lord with the guinea. Being asked, if he was acquainted with the boy; says, he was, ever since he was about six years old; that he knew him at lord Altham's house in Stephen's Green, and in Proper-lane; and believes him to be my lord and lady's child. Says, he heard my lord Altham (the present defendant) say, one day when he was affronted for taking away the child's birth-right, that he would take a course with him. Says, deponent used to hear people curse my lord several times on the boy's account, both before and after the boy was gone.

[Cross-examined.]

Being asked, how long it is since deponent came over here; says, last Sunday was three weeks. Being asked if he is a servant now to any body; says, he has not been a servant these four years, and he lives in King's-street, St. James's, Westminster, and sells cambrics and hollands. Deponent was asked, if he knew a certain lord (who was named) and whether he was not his servant; says, he knows his lordship, but is not at this time his servant, though he is in hopes to be his lordship's house-steward at his return to London, being very well recommended to him, and that upon deponent's coming here to give evidence, his lordship had given him a protection. Being asked what time of the day it was when he got to George's Quay; says, in the afternoon; that it was in the spring of the year, and that it was duskish at their return; says, the ship lay down below the walls in Ring's-end. Being asked how long it was before they returned from the ship to George's Quay; says, he believes it was an hour and a quarter going to the ship and coming from it. Being asked again who went into the boat; says, my lord went first into the boat, and that Jack Donnelly, and Bryan Donnelly, and the boy, and two others, whose names he does not know, went in afterwards, and that deponent was the last that went in. Being asked if he knew Mark Byrn

* Ring's-end about a mile from Dublin, where ships are stationed that sail outwards.

before that time; says, he was acquainted with him sometime before. Being asked where my lord lived when deponent was in his service; says, at Inchicore; that deponent wore his livery; says, he was not long out of Mr. Green's service before he went to live with my lord. Being asked if he has seen Mark Byrn lately; says, he met him last Saturday and last Monday in the Backhouse, where the witnesses for Mr. Annesley (the lessor of the plaintiff) are entertained, but does not remember to have had any discourse with him about Mr. Annesley. Being asked if he saw him at George's Quay; says, he did. Being asked, if Byrn went along with them to the ship; says, he did not; that he came no farther than the Slip; says, my lord was at a beer-house near the Slip when deponent came to him. Being asked where the house is which he calls the Butcher's-arms; says, near Inchicore. Being asked whether he went to and from the Butcher's-arms on foot or on horseback; says, he walked thither and back again to the Quay. Being asked whether Inchicore or the Butcher's-arms is nearer Dublin; says, that Inchicore is nearer; being asked if he can recollect what time of the day it was he left the Quay and went to the Butcher's-arms; says, about two o'clock: and how long it was before he returned; says, about three o'clock; and that in about three or four minutes after Donnelly got the guinea, the boy was brought and put into the boat; says, John Donnelly went out of the house first, and was followed by my lord down to the Slip. Being asked for what wages he hired with my lord; says, for four pounds a year. Being asked if he knew the boy was to be transported; says, he did, because he heard it talked of several times before it was done; and deponent knew that the guinea he was sent to borrow was for the constables. Being asked if he thought it a lawful thing to transport a boy in this manner without any proper authority; says, he knew it was not a lawful thing to transport the boy, but that he thought himself obliged to do what his master ordered him, though an unlawful act; says, that when my lord sent deponent to borrow the guinea, he ordered him to go to the Hog in Armour in James-street, which deponent did, but not being able to get it there, deponent went to the Butchers Arms; that when my lord sent deponent in search of the boy, he directed deponent not to take him in Ormond-market, for fear Purcell the butcher should alarm the market boys, and rescue Mr. Annesley from him, but to go in search of him to Smithfield, College Green, and on a Sunday to the Long Meadows; says, that my lord had a lodging in Dublin in Fishamble-street; that deponent lived at Inchicore, where he worked in the garden until my lord gave him clothes; that deponent got a livery that had been wore by another servant who lived with my lord before, and says it was of a blueish colour; says, the gardener's name was Robinson; and my lord had besides deponent a little boy that once lived at a coffee-house. Being asked whether deponent wore any black clothes whilst he was with my lord; says, he did not. Being asked how my lord dressed the day he was at the Quay, whether in a full dress or undress; says, he believes he was not in a full dress, but as he used to dress every day about the house; says, the late lord Altham died sometime before deponent left Mr. Green's service; says the boy, the day he was carried on board, had on that livery deponent saw him wear whilst he lived with Mr. Tigh; says, he never heard where the boy was found; says, deponent lived about twelve years in Ireland after the boy was transported; says, my lord turned deponent out of his house about two o'clock in the morning; that my lord coming home one night to Inchicore from Dublin, deponent had wrapt himself up in an old blanket, and seated himself in a chair close on the inside of the gate, that he might wake the easier when my lord came home, and so not make his lordship wait; that my lord having words with the coachman who drove him home, about his fare, deponent opened the gate, to hinder him from running the coachman through the body, as he threatened; that my lord coming in, and seeing the chair and blanket at the door charged the deponent with an intent to rob him; to which deponent replied, That if he had any such intent, he should hardly have thought of carrying away an old blanket and a chair not worth a groat; that thereupon his lordship flew into a great rage, stripped deponent of his coat, waistcoat and breeches, and in that condition turned him out of doors, though it was a mizzly night, threatening, with many oaths and curses, to send deponent to Kilmainham gaol, if he did not get away from his door that instant; that deponent having got some clothes at Dublin, went the next day to my lady, and told her his case, and desired her to intercede with my lord for his wages, and three guineas he had laid out for my lord; says, that my lady promised to intercede for him, and gave deponent 7*s.* to buy him shoes and stockings; that my lord hearing of this, issued out his own warrant and got deponent taken up by a constable at Palmerston for the 7*s.* under pretence that deponent had defrauded my lady of the money under false colours; says, that rather than lie in gaol, deponent paid the 7*s.* and thereupon deponent was discharged. Says, he never was paid his wages by my lord; and that he was so afraid of his lordship, that one day when deponent lived as a servant with lord Mountjoy, seeing my lord come in there, deponent hid himself for fear of him.

Mr. *George Babe* sworn.

Says, he is an officer of his majesty's customs, and clerk of the ship-entries of the port of Dublin, inwards and outwards. Deponent then produced the book of entries, belonging to the customs, in which the following entry was read.

[Entered outwards, 18th of April 1728, the James of Dublin, burthen 100 ton, Thomas

Henry master, by order for Philadelphia; James Stephenson, William Clancy, Benjamin Clegg, owners.]

Says, that before the entry is made, there is an affidavit made that the ship is going to the place mentioned in the entry, and when the entry is made, and not before, the ship is permitted to sail; but says, the date in deponent's book is the time of making the entry, and not of the ship's sailing.

Mr. *Andrew Cromie* sworn.

Says, he was very well acquainted with Mr. James Stevenson, that he was a merchant, and is dead. That deponent served him 13 years as clerk; that deponent came to him in June 1720, and left him about September 10, 1733, and that Mr. Skellern and Mr. Nowles were clerks to Mr. Stephenson at the same time; says, that Mr. Stephenson traded very much to the West Indies, where he used to send beef and butter, and all other provisions, but that his chief business was to hire servants and send them to Philadelphia. Being desired to explain the nature of that trade; says, that there used advertisements to be published giving notice of the time a ship was to sail for Philadelphia, whereupon servants came to Mr. Stephenson's house, and when they had come to an agreement with him, he kept them at his expence till the ship sailed, and there was an entry made in his books of every person's name and profession, whom he had agreed with in that manner, and when the ship was ready to sail, the persons were brought to the Tholsel of the city of Dublin, and there indented before the lord mayor. Deponent then produced the book wherein entries of this sort were made when deponent was clerk to Mr. Stephenson. Being desired to read an entry of the ship James, sailing in April 1728, he read as follows:

[An Account of Men and Women-servants on board the ship James which went over the bar of Dublin, 30th April, 1728.]

and reads the name James Annsley entered as a servant among other names in that entry, and swears, that it was Mr. Shellern wrote that entry, deponent being well acquainted with his hand-writing, and that he is dead; says, he does not know of any servants going but what were indentured; that the usual method was this, the master made out a list of all the persons on board his ship, and the merchants' clerk went on board and called over the names in the master's list, and before the ship sailed every person walked by, and answered to his name, so that they saw that every person in the list was actually on board, and this list being entered in the owner's books, was the charge upon the master. Being asked, if the persons on board at the time the list is so called over are asked any questions whether indentured or not; says, they are not asked any question at all.

[Cross-examined.]

Says, the ship James lay at Essex-bridge, but cannot tell whether the servants were put on board at the Quay; says, they are brought to be indentured before the lord mayor, who examines them (if under age) and enquires who they are, who their parents are, and what are their reasons for going, and is very cautious whom he indents; says, Mr. Gun the town-clerk, or Mr. Gun's clerk, takes an entry in the Tholsel books of all such as are indentured before the lord mayor; says, that sometimes servants were indentured before a justice of the peace, and remembers some being indentured before Mr. Hawkins when he was a justice of the peace for the county of Dublin; says, the master or mate of the ship may perhaps set down in his list persons as servants who are not so; but, to the best of deponent's knowledge, all servants were carried before the said lord mayor, or Mr. Hawkins, to be indented. Being asked if ever he knew of any one that was taken by force aboard of any ship; says, he does not; says, that every person found on board when the list is taken of the servants' names, would be set down in the list as a servant, even if he was to declare himself unwilling to go, or whether the clerk found him indentured or not, and the clerk would not upon that account stop the ship; says, the clerk generally delivers indentures to the master before he calls the list of the servants aboard, but that the list is as often called over without the indenture as with it; says, the master of the James might have servants on board without the knowledge of Mr. Stephenson, and that some of the persons entered in Mr. Stephenson's list might not have been indentured; says, no return was ever made by Thomas Henry the master (who navigated the ship) to Mr. Stephenson of that voyage; that when he sailed away, at that time he had a good character, but afterwards turned out to be a very sad man, having wronged Mr. Stephenson of 4,000*l.*

Mr. *Henry Gun*, town-clerk of the city of Dublin.

Deponent produced a book, which he said was an indenture book kept at the Tholsel by the town-clerk of the city of Dublin, containing a list of persons indentured before the lord mayor, as servants for the plantations, beginning in May 1699. [Reads the names of the several persons indentured from the 21st of March 1727 to the 26th of March 1728, upon which it was observed by plaintiff's counsel, that in the list of those entered to Thomas Henry, the name James Annesley (which is the name in Stephenson's book) is not to be found.] To this it was answered by the defendant's counsel, "That there is one James Hennesley appears to have been indentured the 26 March, 1728, which they insisted is the same person that is named James Annesley in Stephenson's book, although by a mistake of the clerk a little mispelt, and observed, that even in Stephenson's book the name is not spelt exactly right; for the name is Annesley; whereas, in Stephenson's book, it is spelled Annsly: But what

clearly proves that the name Hennesley in the Tholsel book, is the same with Annsley in Stephenson's is, that there is no such name as Hennesley in Mr. Stephenson's book, or any like it, except that of Annsley." To this the plaintiff's counsel replied, That because the name of Hennesley did not appear in Stephenson's book, it did not follow that it must be Annesley mispelled; for there are 20 persons named in the Tholsel books more than in Stephenson's; so that Hennesley may be one of the 20 names omitted in Stephenson's book, but was plainly a different name from Annesley; and therefore, as the plaintiff's counsel had proved that Mr. Annesley was actually put on board a ship, and sent to Pennsylvania by the defendant, it was incumbent upon him to shew by what authority he did it.

Richard Tigh, esq. sworn.

Says, this gentleman (James Annesley) lived with deponent for some months, when he was a boy; that he came to deponent in a very poor condition, from one Purcell (a butcher) who lived at the back of deponent's house, in Phenix street; that sometime after Christmas 1727, deponent's son brought him into the house unknown to deponent, out of charity, he being turned out of doors by lord Altham, who was reputed to be his father; and the boy was in deponent's house sometime before he knew of it; says, the boy appeared to be about 13 or 14 years old; continued with deponent till he was transported; says, there was a yellow livery waistcoat in the house, which was formerly worn by deponent's son's servant, and finding it fitted the boy, deponent's son put it upon him; says, it was not long after deponent missed him from his house, and heard he was gone on ship-board, and that one Peter Murphy told deponent the boy was transported. [Here the witness was interrupted by lord Anglesea's counsel, who observed to him, that as he was bred to the law, he must know he ought to give nothing in evidence from hearsay.] Says, he does not know by what means the boy withdrew from deponent's family, the boy having no occasion given him to be uneasy in it; says, he was reputed to be lord Altham's lawful son, and says it was after lord Altham's death, the boy came into deponent's family. Being asked, why, since he thought that the boy was lord Altham's son, he did not take some steps to assert his right to his father's estate; says, the boy was with deponent so short a time, that he took but little notice of him or his affairs, but that if he had stayed with deponent some time, deponent does not know but he would have taken some steps to assert his right; says, he has seen Mr. Annesley since his return to this kingdom, and is fully persuaded he is the same person that lived with deponent; says, he heard nothing of him since his leaving Dublin about 15 years ago, till deponent received a letter about him from a person in Jamaica, who was on board admiral Vernon's fleet, giving an account of the hardships the boy had undergone, and that admiral Vernon had ordered him to be sent home; says, one Mr. Reilly, an agent for the present lord Anglesea, came to deponent's house, and asked if deponent had a letter relating to Mr. Annesley; that he came from my lord Anglesea to desire leave to read it; says, he gave Mr. Reilly the letter, and desired him to sit down and copy it, but he said it was very long, and that my lord would take it as a favour if deponent would let him have the letter, and he would return it the same day or the day following, with thanks. That thereupon deponent gave Mr. Reilly the letter, but it has never been returned; says, that a clerk of Mr. Coulthurst, who was attorney for the earl of Anglesea, as he informed deponent, came to deponent, and produced an affidavit ready drawn for deponent to swear that James Annesley, who lived with deponent, was reputed a bastard son of the late lord Altham, which deponent refused swearing. Deponent further said, it was in April 1728 James Annesley was taken from him.

[Cross-examined.]

Being asked whether if he had looked upon the boy to be lord Altham's son, when he was in deponent's house, deponent would have clothed him in an old ragged waistcoat; says, he did believe him to be lord Altham's son, yet did clothe him with that old waistcoat, and would have done it though he had been sure that the boy was my lord's son; for that he came to deponent in a very poor mean way from Purcell's, just out of the small pox, having the red marks of it in his face; says, deponent's own son is dead. Being asked, what he conjectured to have been the occasion of the boy's leaving his house; says, he conjectures the boy was spirited away, and still believes he was kidnapped; says, that Peter Murphy, the boy who lived with deponent, after Jemmy went away, told deponent he had been on board of a ship, and had seen Jemmy Annesley lamenting and crying, that his uncle had stole him away, and was going to transport him. [The counsel for the defendant observed, that this was hearsay only; to which the counsel for the plaintiff answered, that as deponent was asked as to his belief, he ought to tell the ground and reason of it.] Deponent being asked, if he afterwards made any enquiry about the boy, or took any steps in his favour, upon hearing that he was taken away by force; says, he did not, the ship being gone immediately after Murphy had told him of it; and as to the boy's right, says, the prosecution of it would have been attended with trouble and expence, and there was so little likelihood of deponent's ever seeing the boy again, that deponent thought it most prudent not to trouble himself any farther about it. Being asked, why he did not inform Arthur, late earl of Anglesea of this matter, since deponent could not but know that the earl had such a hatred for the present one, that he would have been glad to have captained the right of the young

man in prejudice of his uncle; says, he had no acquaintance with earl Arthur, nor did he know how matters stood between the said late and present earl.

John Broders sworn.

Says, he knew Mr. Annesley, and saw him in America about 14 or 15 years ago; that deponent and his brother having been riding out there one cold morning, they called in at a house that was open, in order to warm themselves; that while they sat at the fire a boy came in with a gun and a dead squirrel; that deponent's brother, in discourse with the boy, asked him what countryman he was; that the boy said he was an Irishman, and came from the county of Wexford; that he was born at Dunmaine; that his name was James Annesley; and that he was lord Altham's son. Says, he told them he was a servant to the master of the house, and had been kidnapped by his uncle; says, he cannot swear to Mr. Annesley's face, but that from what he told deponent of the conversation they had in America, he believes him to be the person he saw and talked to there.

Mr. *John Giffard* sworn.

Q. Do you know the plaintiff Mr. James Annesley?

Giffard. Yes, Sir.

Q. Did you know when it was that he arrived in England from the West-Indies?

Giffard. No, Sir.

Q. Do you know of any prosecution carried on against the plaintiff by the defendant for murder?

[The question is objected to by the counsel for the defendant.]

Mr. Fitz-Gibbon, of counsel for the plaintiff. My lord, this witness is brought to shew that the lord Anglesea, knowing that the plaintiff claimed the estate of the family, as son and heir to the late lord Altham, expended vast sums of money on a prosecution, which he set on foot against him for the murder of an unfortunate man at Staines, in Middlesex, though the person killed stood in no degree of relation to my lord Anglesea, that could have engaged him to have taken up this matter; and that the relations of the deceased being convinced that the killing was only accidental, had intended a very slight prosecution; but that the defendant, who was no way related to, or acquainted with the person killed, employed a solicitor, and carried on a severe prosecution against Mr. Annesley at a very great expence, and declared he would spend 10,000*l.* to get him hanged.

It will also appear, that while he laboured to convict the plaintiff for murder, he knew the person, whose death gave occasion for the prosecution, was killed by accident. And this we apprehend to be a circumstance proper to be laid before the jury, to shew that my lord Anglesea, conscious of the plaintiff's title, took these methods to cut him off.

Mr. *Recorder,* (Eaton Stannard, esq.) of counsel for the defendant. My lord, I apprehend that the evidence now offered is not legal evidence in this cause, because it appertains not directly to it; it is a collateral thing. It was proper to shew the plaintiff to be the legitimate son of lord Altham, and that he was intitled to the lands ejected; but to produce evidence of a trial in England, is very improper; in my apprehension, this is no evidence in this trial of ejectment. The taking away a person, and secreting him after the title accrues to him, is a material evidence to shew that he could not assert his right sooner; but how is the indictment of a man for this murder, be it accidental or not, relative to this cause? For pending the indictment, it was no hindrance to him to put in his claim when he pleased, and to assert his title.

This cause was tried in England. Can you have all the witnesses there brought before you? Could any person concerned for lord Anglesea foresee that this indictment would be introduced? And therefore my lord Anglesea could not be prepared to have the witnesses of that trial here. I say, it is not proper to introduce it, for what man living could guard against it?

This evidence is offered, as I apprehend, to raise a presumption that the plaintiff is the legitimate son of the lord Altham, because the defendant endeavoured to destroy him; and then the question will be, Whether such evidence is proper to be admitted? It would be a question whether any improper measure taken to affect the life of the plaintiff would be evidence; but where, from their own opening the case, it does appear to your lordship nothing more than a proceeding according to the regular and open course of the law, with humble submission, that in this case or any case whatsoever, is not to be imputed to a man as a crime. As they state it, there was a prosecution for murder, whereas the killing was accidental, every homicide in the indictment is laid murder; and if there was a prosecution on this indictment, is it not a material circumstance, that this indictment must have had the sanction of a grand jury? Here has been an indictment, is all that they have said, and a prosecution upon that indictment. I desire your lordship to consider, whether my lord Annesley, or any other person, might not have carried on the prosecution? Nothing is more frequent, in murder especially, than that the prosecution is carried on, not at the expence of the crown, though the prosecution is in the name of the crown. Will it not then be a matter of very great consequence, to say, that this shall be imputed to a man as a crime, and affect him not only as to his character, but his fortune? Your lordship cannot judge now whether or not this prosecution was what they would make it appear to be, without entering into the merits of the cause. How can it appear to your lordship whether this was a real murder, or the person escaped only by a favourable verdict?

And therefore we hope, for the sake of evidence, that it may not be made a precedent of in other cases.

Serj. *Marshal*, for the plaintiff. My lord, we have endeavoured to lay before the jury a spiriting away of the now lessor of the plaintiff, at a time when he was extremely young, not capable of asserting his right, and with a view of putting him out of the way of ever asserting that right. We now come to offer evidence, to shew that the malice of the defendant did not rest there; that after he had actually caused him to be transported, the lessor of the plaintiff, at his return, unfortunately killed a man; what we now propose to lay before your lordship and the jury, is the very extraordinary part that the earl of Anglesea took in that trial; a trial wherein he was not any way concerned. When the witness shall be permitted to tell you what expence the earl was at in this prosecution, it will strengthen that evidence, of the defendant's spiriting away the lessor of the plaintiff, and shew the defendant's continued design of removing this gentleman from any possibility of asserting his birthright. And therefore we humbly hope your lordship will permit us to go into this evidence; and submit it to the jury, whether there could be any reason but one for such an uncommon proceeding.

Mr. *Harward*, for the plaintiff. My lord, I apprehend, that every matter which in any degree tends to shew whether the plaintiff was the lawful son of the late lord Altham, or no, is proper evidence to be laid before the jury. This evidence now offered, is to shew that the present lord Anglesea, conscious of the plaintiff's legitimacy, undertook the prosecution to take away his life, and spent great sums of money in it. If it is an act of the defendant's, it is proper for the jury to consider, *quo animo* he undertook it, whether from a public spirit of justice, or a private view to take away the life of this rival to his estate; for every act of the defendant that can give light to the jury of the opinion that my lord himself had of the plaintiff's right, is proper evidence to be offered to them. We have already laid evidence before the jury that we apprehend clearly shews that the lord Anglesea had, several years ago, spirited away this plaintiff, to prevent his asserting his right to the estate. This now offered is a further proof of my lord Anglesea's opinion concerning his right; and to corroborate that evidence that has been already laid before the Court, we have a right to produce it, as a further instance of this lord's own opinion, that it was necessary for him to come at his life at any rate. The question is not now, whether the prosecution was just or not? Whether Mr. Annesley was guilty or not of the murder charged on him? He has been acquitted. I must beg leave to say, if he had been found guilty, and got a pardon, and came to seek his right in this Court, my lord's carrying on the prosecution might have been imputed to a zeal for justice; but being acquitted, there is room for the jury to consider, whether his interfering was not owing to some other motive, and some other end than that of public justice. The single question is, Whether my lord Anglesea, being a stranger to the deceased, became a voluntary prosecutor, for the death of a man who stood in no degree of relation to the family, from a principle of justice, or to gratify some private end of his own? It might have been very proper for lord Anglesea to have expended such large sums of money in prosecution of justice, had he been any way related to the deceased; but as he was not, his expending such unusual sums in a prosecution no ways relating to him, more than to any other stranger, argues, that it was to answer his private ends, by securing his own title to the estate, if he could prevail to have the plaintiff found guilty of murder. If we were going to charge him with any thing that might involve him in any sort of guilt, the objections might have been proper, but as we are not, they can carry no weight.

L. C. Baron. This witness was produced to shew that the prosecution against the plaintiff, for killing a man at Staines, was promoted and carried on by the defendant, and at his expence; which, as it was an attempt to take away the plaintiff's life, his counsel have insisted is proper to be laid before the jury, as further proof of the present defendant's distrust of his own title, and his opinion of the now plaintiff's right: and this has been offered without any previous evidence, that the defendant had been convicted or prosecuted for the malicious prosecution of the plaintiff, or that the Court, before whom the plaintiff was tried for that supposed murder, had, by any act of theirs, declared their opinion that this prosecution was malicious, as is frequently done by ordering the prisoner a copy of his indictment.

This is a new attempt, and were it necessary for me now to give my opinion, I should think it ought not to be admitted.

The prosecution in itself was not unlawful, on the contrary, it is the duty of every man, especially in the case of blood, to take care that the offender be put upon his trial. And therefore, without entering into the merits of that case, the motives of the prosecution cannot appear; and those alone can, in my apprehension, introduce this evidence as pertinent to the matter in issue in this cause: who, without going farther, can say, this prosecution, though lawful, was carried on with an unlawful intention? I apprehend the Court can't judge whether the prosecution was frivolous or malicious, unless the indictment was tried over again here; but as it is a matter worthy of deliberate consideration, and this trial will last another day, the counsel for the plaintiff may proceed to some other evidence, and we, if it be insisted on, will give you our opinions in the morning.

Mr. Baron *Mounteney*. It will always give me concern, to find myself under a necessity

of delivering a sudden and immediate opinion upon any question, the contrary sides of which are with equal zeal contended for, by gentlemen of such figure and character in their profession as those concerned in the present cause: that concern must be extremely increased, whenever I have the misfortune to differ in opinion, either from my Lord Chief Baron, or my brother Dawson, for both of whose opinions I have the highest regard; and still infinitely more so in the present cause; the immense consequence of which will incline me to hesitate even upon such points, as I should otherwise be most extremely clear in. I shall therefore very gladly avail myself of that opportunity, which, as my Lord Chief Baron hath been pleased to mention, the adjournment of this cause will afford us, of giving this matter a farther consideration.

But my present opinion is, that the evidence now offered ought to be admitted; and the foundation of my opinion is this: Every act done by the defendant, which hath a tendency to shew a consciousness in him of title in the lessor of the plaintiff, must, I think, be admitted, beyond all controversy, to be pertinent and legal evidence in the present cause: I think that the evidence now offered hath that tendency, and consequently is proper to be admitted.

This evidence of the prosecution, in my apprehension, stands exactly on the same footing with the evidence of the kidnapping; (against which not the least objection was attempted by the defendant's counsel) for I can by no means enter into the distinction of lawful and unlawful acts; which seems to have so much weight with my lord chief-baron.

That unlawful act was not therefore, in my apprehension, to be admitted in evidence, because unlawful, but, because, it had a tendency to shew such a consciousness, as I have mentioned, in the defendant: and if the carrying on the prosecution (which must be admitted to be a very extraordinary, though lawful, act of the defendant) hath the same tendency, it ought upon the same principle, to be admitted.

Many instances, I believe, might be put of lawful acts done by one party, which yet, it could not be controverted, would be legal and material evidence for the other. One instance occurs to me at present, which I think cannot bear the least dispute. Suppose it could be proved, that the defendant had offered to the lessor of the plaintiff a considerable part of his estate, or a large sum of money, to compromise this very suit—will any of his counsel say, or can any man living imagine, that this would not be legal evidence in the present cause? And yet, the compromising of a law-suit is not only, universally, a lawful, but is, generally speaking, a commendable act.

Cui bono hath ever been esteemed one of the strongest, and most unanswerable arguments in all cases: And therefore, the fact which I have mentioned, would be not only legal, but, in my apprehension, most exceedingly material evidence to be left to the jury; who would be the proper judges *quo animo* such an offer was made.

As to the fact now offered to be proved, it is possible indeed, that the noble lord might take up a prosecution, deserted (so far as appears) by the near relations of the deceased (the persons most likely to have carried it on, if they had thought Mr. Annesley guilty of murder) merely out of a public-spirited regard to justice; it is likewise possible, that his motive for engaging in it might be an interested one—a consciousness of right in that person, and consequently that, unless that person could be put out of the way, the titles and estates which he was in possession of would be insecure.

I think the jury will be the proper judges upon the whole evidence in this case, upon which of these two motives, it is most probable, the defendant acted: and that therefore the evidence of that fact ought to be admitted, and left to their consideration.

This, I say, is clearly my present opinion: but, as I mentioned before, I shall make use of the opportunity of considering it further; and, if I find reason to think that I am at present mistaken, I will mention it to-morrow, and shall be exceedingly glad to change the opinion which I have now given for a better.

Mr. Baron *Dawson.* I am very glad that there is no necessity for our giving our opinions immediately on this point, I shall therefore decline giving any positive opinion, as we have this night to consider of it, and in the mean time the gentlemen on both sides might look into the cases to clear it up to the Court. The prosecution here is agreed to be a lawful act, and is not immediately relative to the matter in issue. The difficulty with me is, that if this be given in evidence, a jury may, from a lawful act not immediately relative to the issue, draw an unwarrantable consequence.

If the act were unlawful, it would undoubtedly be good evidence, there could be no other way of accounting for the party's subjecting himself to legal punishment: but where it is not unlawful, it may be dangerous to leave the intent to the jury. We will consider of this matter, and give our opinions in it to-morrow.

The Rev. Mr. *Abell Butler* sworn.

Says, he is minister of the parish of Tyntern and Owenduff. That he has known Dunmaine these several years; says, it has no church in it, but is united to the parish of Owenduff; and there is no book kept therein for registering of marriages or christenings.

Joshua Barton sworn.

Says, he knows the present earl of Angleses, and knew the late lord Altham very well, and has been often in his company and eat and drank with him. One particular night deponent was in his company at Inchicore, and did not part from him till about four o'clock in the

morning; and deponent remembers he asked my lord to this purpose: My lord, would you be angry with me if I should ask your lordship a question; and his lordship said, he would not take it amiss. Whereupon deponent asked his lordship, Pray, my lord, is the little boy, that runs about the streets of Dublin in such a poor condition, your lawful son, or a bastard? My lord answered, That James Annesley, that poor boy, is my lawful son by my wife. And added, that he could not keep the boy at home, because of the woman he kept. Says, my lord at that time had a pension from the crown, and was needy enough. 'Tis true, he kept a pack of hounds, but one hound was ready to eat the other. That deponent kept a farm and lived at Island-bridge; that the boy used to be up and down, and lie in the ditches near Inchicore, waiting to get a bit from the servants; and deponent saw the boy about two years before my lord's death, and often supplied him with meat and drink.

[Cross-examined,]

Being asked if ever deponent put my lord in mind of the boy afterwards; says, he did not think it so right, as it was more properly his lordship's own business. Being asked, how he came to ask his lordship if the boy was his lawful son; says, because he doubted it, from his lordship's taking so little care of him; says, it was 4 o'clock in the morning when they parted, the time deponent spoke to him about his son, for deponent looked at the hour when he came home; says, that, if my lord could, he would never let company go away from him till the morning. Being asked if they were drunk that morning when they parted; says, deponent was not drunk, for that he remembers his coming home well enough, and particularly through what field he came; and says, my lord was so sober, as to wait upon deponent to the door when he came away.

Thus ended the fourth day's examination of the plaintiff's witnesses, about 7 o'clock on Tuesday night the 16th of November, and the Court, by the like consent as of the night before (which was likewise signed by the parties, and their respective attornies, and read in open court) adjourned to the next morning at 10 o'clock.

Wednesday, November 16.

The counsel for the plaintiff proposed to examine Mr. John Giffard to what he had heard the defendant say concerning the lessor of the plaintiff, and his title; and being called upon to open the nature of that evidence;

Mr. *Harward*, of counsel for the plaintiff, spoke as follows: My lord, the conversation Mr. Gifford had with lord Anglesea was to this purpose: Mr. Giffard is an attorney of reputation in England, and as such has been twenty years or thereabouts employed by this noble earl in his business, as he had occasion for him. When my unfortunate client was to be tried at the Old Bailey, that was the time lord Anglesea had greatest occasion for this Mr. Giffard; and it will appear to your lordship that lord Anglesea disclosed his intentions to him in this manner: "I am advised that it is not prudent for me to appear publicly in the prosecution, but I would give 10,000*l.* to have him hanged. Mr. Jans my agent shall always attend you. I am in great distress; I am worried by my wife in Ireland; Mr. Charles Annesley is at law with me for part of my estate, and," says he, "if I cannot hang James Annesley, it is better for me to quit this kingdom and go to France, and let Jemmy have his right, if he will remit me into France 3,000*l.* a-year; I will learn French before I go."

Mr. *Daly*, of counsel for the defendant, objects to Mr. Giffard's being examined, since as an attorney he was to keep the secrets of his client, and if he is a gentleman of character, he will not, and as an attorney he ought not to disclose them; and cited the case of Cutts and Pickering, 1 Vent. 197.

Serj. *Marshall*, for the defendant. But if an attorney will voluntarily come and disclose any secret, he ought to be heard.

Mr. *Blake*, of counsel for the defendant. An attorney or solicitor might not, nor is he compellable to disclose the secrets of his client; this is a privilege inherent in the office of an attorney or solicitor: but as this privilege has its source in a public consideration, I shall, with submission to better judgment, insist that this exemptive privilege is not merely and solely the privilege of the solicitor or attorney, but is, in law and reason, the right and privilege of the client. Formerly, persons involved in contests and litigations appeared in court personally, and pleaded and enforced their several demands and respective defences, and beyond all doubt retained some secrets unrevealed; but when, from an inevitable variation of things, an increase of trade, and an exuberance of opulence, legal altercations became innumerable, then it became necessary to employ others to represent the parties engaged; these persons are denominated attornies or solicitors, and they, in the nature of things, must unavoidably be trusted with the most retired and secret thoughts and actions of their employers, not only with respect to suits actually instituted, but also with regard to suits threatened or intended to be commenced; for a person menaced, if directed by prudence, will be conducted by vigilance and caution, equally as if attacked; therefore it is absolutely necessary to extend this privilege to the client, and not restrict it entirely to the solicitor, especially as there may be some of that profession, who cannot be supposed to be actuated by such principles of honour and virtue, as an office of so great confidence requires; I mean the person now produced to be a witness for the plaintiff. The case of lord Say and Seal, in Macclesfield's Reports, I think, is an authority in point.

Mr. *Recorder*, for the defendant. My lord,

formerly persons appeared in court themselves; but as business multiplied and became more intricate, and titles more perplexed, both the distance of places, and the multiplicity of business, made it absolutely necessary that there should be a set of people who should stand in the place of the suitors, and these persons are called attornies. Since this has been thought necessary, all people and all courts have looked upon that confidence between the party and attorney to be so great, that it would be destructive to all business, if attornies were to disclose the business of their clients. In many cases men hold their estates without titles; in others, by such titles, that if their deeds could be got out of their hands, they must lose their fortunes. When persons become purchasers for valuable considerations, and get a deed that makes against them, they are not obliged to disclose whether they have that deed. Now, if an attorney was to be examined in every case, what man would trust an attorney with the secret of his estate, if he should be permitted to offer himself as a witness? If an attorney had it in his option to be examined, there would be an entire stop to business; nobody would trust an attorney with the state of his affairs.

The reason why attornies are not to be examined to any thing relating to their clients or their affairs, is, because they would destroy the confidence that is necessary to be preserved between them. This confidence between the employer and the person employed, is so sacred a thing, that if they were at liberty, when the present cause was over that they were employed in, to give testimony in favour of any other person, it would not answer the end for which it was instituted. The end is, that persons with safety may substitute others in their room; and therefore if you cannot ask me, you cannot ask that man; for every thing said to him, is as if I had said it to myself, and he is not to answer it. Now, the question will be, for whose sake it was instituted? Be sure, for the sake of the person employing him. Who then has the option that he should be examined? Why, the employer; because otherwise it would be in vain to fix a confidence in persons, if that person was at liberty on any account to shake him off, and say, While I was employed by you, it was not in my option to disclose it, but now that I am not, I will unravel all. As it was for the sake of the employer that attornies were instituted, they cannot in civil suits become witnesses without the consent of the employer; therefore, I submit it, whether the option is in the attorney or in the person who is the employer; and if in the employer, as I think it must be both for his safety and advantage, the attorney neither can nor ought to reveal what is entrusted to him. In pleading, it is, 'ponit in loco suo attornatum,' the attorney is as himself. And it is contrary to the rules of natural justice and equity, that any man should betray himself. I apprehend it is not material whether this be a *turpis causa* or not; as this man was employed by my lord Anglesea, he can be asked no other questions than my lord Anglesea himself.

My lord, I must submit it, whether an attorney's testimony should be received, although he offers to give it? And in the next place, I submit it, whether this kind of testimony in this criminal case ought to be received? It would be very little satisfaction to a client to be put to apply to the Court for an attachment against this person who offers to lay his evidence before the jury, if his testimony could be received. I apprehend that person is in the place of the client, and as he entrusts him with secrets, he is not to disclose them without his leave; and if he should disclose them out of court, an action of deceit lies against him. And though an attorney should not insist upon his privilege, yet it is in the power of the employer to insist upon that privilege, and to say he is the person entrusted with his secrets. Now, in this case it is much stronger, for here it is said, that he is employed by my lord Anglesea. Now, if that party cannot disclose those secrets in a civil case, he ought not, for a stronger reason, in a criminal case; because that is subjecting his client perhaps to a criminal prosecution.

Mr. Lee, of counsel for the defendant. My lord, if the attorney confess judgment upon record, it shall bind the *conusor*, though done without warrant; and the reason is, that the attorney appearing for the party is, since the statute of Merton, considered as the party himself. If then the attorney and party are considered as one person, why shall the one be offered to be examined in this cause, when the other cannot?

Serj. *Marshall*. I do admit in some cases the attorney ought not to be permitted to disclose the secrets of his clients; but that must be where the confidence was necessary and lawful: but here the trust was unlawful, and the attorney could not conceal it without breach of his oath, as an attorney, which was to do right to all men. This was a criminal secret, that was not only to affect the plaintiff's property and life, but also to acquire a title in which the public were interested; so that it became the duty of the attorney to disclose it

Upon which the Lord Chief Baron desired to ask Mr. Giffard a few questions, and he was called up accordingly.

Mr. *John Giffard* sworn.

Q. Are you an attorney of any, and what court?—*A.* I am an attorney of the Common Pleas in England, and a solicitor of the High Court of Chancery, and sworn and admitted as such by virtue of the act of parliament.

Q. Did you know the defendant the earl of Anglesea?—*A.* Yes.

Q. Were you ever agent or solicitor for him in any, and what cause?—*A.* In the year 1722, lord Anglesea employed me to assist him on a particular occasion to make his defence.

Q. Name the parties.—*A.* He was prose-

cuted, the king against him, as Richard Annesley, esq.

Q. Were you employed in any other cause?—*A.* In the year 1722, the same year when an action was brought against him at the suit of one George Risden. But from the year 1722, until he became earl of Anglesea, I never heard of him. In the year 1737 I met him in London, and he desired me to solicit an affair between him and his countess that lived at Bidiford.

Q. Name the next cause.—*A.* Between the right honourable Maurice Thompson lord Haversham, and the earl of Anglesea.

Q. The next.—*A.* I was concerned in another, the same year, and attended it, (it is very well known through the Houses of Lords and Commons in England) in order to throw a Bill out of the House of Commons, for the exemplifying the late earl of Anglesea's will.

Q. Go on.—*A.* I was likewise concerned in a particular cause, between my lord Anglesea, in the year 1741, and one Mrs. Simpson of this place; and have also sued out several writs out of the Court of Common-Pleas, at the suit of my lord Anglesea, against one Henderson a Quaker.

Q. Go on.—*A.* I likewise was employed by lord Anglesea in a cause, wherein his lordship was plaintiff, and one Rachael Cooper was defendant.

Q. Go on.—*A.* I issued out writs against Henderson, at the suit of one Banks, by lord Anglesea's directions.

Q. Go on.—*A.* I was sent for, and commanded by him to solicit and carry on a prosecution against the plaintiff Mr. Annesley.

Q. Have you been retained as agent or solicitor for the earl of Anglesea, in any other causes within these three years?—*A.* I do not know; some frivolous thing might have slipped my memory, but I was not concerned in any other cause, since the prosecution of Mr. Annesley.

Q. Name the time when you were retained by the earl to prosecute that murder.—*A.* The second day of May, 1742.

Q. The conversation that passed between you and my lord, to which you are now produced as an evidence, was it before, or after, that time?—*A.* There were several declarations, some before, and some after. The conversations were from the 7th of December 1741, to the time of Mr. Annesley's being discharged at the Old-Bailey.

Q. When was the bill of indictment found against Mr. Annesley?—*A.* The bill was found in June, and he was admitted to bail in July sessions, 1742.

Q. On what day is the murder laid in the indictment?—*A.* On the first of May, 1742, the 15th year of the present king.

Q. Were you agent or solicitor for lord Anglesea at the time that the conversation passed, before the 2d of May?—*A.* Not for the cause of Mr. Annesley.

Q. Were not the other causes subsisting?—*A.* The causes were on writs which were never executed.

Q. I desire you may answer directly, whether the conversation before the 2d of May was not on some affair in which my lord Anglesea consulted and advised with you as his agent or solicitor, designing to employ you in that affair?—*A.* No, my lord, it was not; for I did not expect to be employed by him again, he having employed Mr. George Garden and Mr. Adam Gordon.

Q. Name the people.—*A.* Mr. Garden and Mr. Gordon. They are attornies, they are partners, and I received my instructions, in a great part, from them; my lord ordered me to take directions from them, and I have instructions under Gordon's own hand-writing.

Q. Had my lord Anglesea those conversations with you relative to the plaintiff, between the 7th of December and the 2d of May, as intending to employ you, or not?—*A.* I never was employed, nor intended to be employed, in any suit for or against him, during that time.

Q. When did you first receive instructions from Garden and Gordon?—*A.* In a week after the first of May.

Q. Had you any instructions from them, except what were relative to the prosecution, in relation to the plaintiff?—*A.* No; no instructions but what were relative to the prosecution.

Q. Did you charge lord Anglesea with any term fees in the year 1741, relative to particular suits?—*A.* I believed I charged 10*s.* 4*d.* for lord Haversham's suit.

Q. In what term did you charge it?—*A.* I find that cause was in the vacation between Hilary and Easter term, and was concluded before Easter term came. It was depending in Hilary term 1741, and was concluded before the next term.

Q. Was it depending for any time before Hilary term?—The beginning of it was the 20th of January, the essoign day before Hilary term.

Q. Were you concerned for lord Anglesea from the latter end of November to the beginning of January 1741?—*A.* I was concerned in issuing out some writs.

Q. And do not you think, if any suit had depended upon them, you would have been concerned?—*A.* I do not know but I might.

The Witness goes off the table.

Mr. *Prime Serjeant*, (Anthony Malone, esq.) for the defendant. An attorney shall not disclose any thing whatsoever in a collateral question, that shall affect the property of the client.*

* In the "Trial at Bar," &c. the following speeches are inserted after this of Mr. Prime Serjeant:

L. C. B. One Mr. Trevor, an Attorney, was attached in this court, in the cause of Magill against Savage, though he pleaded, that, as an attorney, he ought not to disclose his client's secrets.

Serj. *Tisdall*, for the plaintiff. My lord, we propose to examine to no fact which came to his knowledge as an attorney, in any suit in which he was employed for lord Anglesea: but he declares he never was employed in any suit relating to the lessor of the plaintiff, nor was even intended to be employed in any suit relating to this trial. We hope, therefore, we are proper to give in evidence several declarations and conversations lord Anglesea had with the witness concerning the lessor, his title to this estate, and the necessity he apprehended himself under of putting him out of the way at that time. We do not propose to examine him as to any facts relating to the prosecution of that suit in which he was then employed; we desire only to examine him as to the conversations with lord Anglesea concerning this cause; and I apprehend we have undoubtedly a right to examine him as to these points.

I cannot say, but the gentlemen on the other side have good reason to oppose this evidence, which, if it appears in the manner we are instructed it will, must be an evidence of great weight. I shall first beg leave to consider, whether an attorney may be examined to any matter which came to his knowledge as an attorney. If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one, which lies on every member of the society, to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare. For this reason I apprehend, that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a cause wherein he is concerned, the obligation to the public must dispense with the private obligation to the client: but in this case the witness proposed to be examined was not attorney to the defendant in any case relative to his testimony. And the secrecy of the attorney is necessary to the client in that cause only, for the carrying on of which he is under a necessity to entrust him. For this reason I agree, that whatever is communicated to him from that necessity ought not to be disclosed, even in a future cause, wherein he is not concerned; but as the client is not obliged to entrust his attorney with any of his secrets, but such only as are relative to, or may be useful for carrying on the cause in which he is employed; if he trusts him with any matter foreign to that, even during the time that he is employed, with any matter which was not necessary, or any way material to the cause depending, he is not obliged to conceal it.

I beg leave to say, as there was no necessity upon the client to entrust him with it, so mutually there can be no obligation upon the attorney to conceal it; for as the only obligation which lies on the attorney to secrecy, arises from the necessity of confidence between him and his employer, from the necessity the client must be under to entrust him, it cannot extend to any case where that confidence was not necessary, where the client was not under such a necessity. If this be admitted, the matters we propose to examine to are quite foreign to those suits in which the witness was employed for the defendant. My lord Anglesea was indeed under a necessity of entrusting him with all the evidence that he thought necessary for the prosecution carried on against the plaintiff in England, and the attorney is under an obligation of concealing that evidence: but was he under a necessity of telling the attorney he wanted to put this man out of the way, or that he was entitled to his honours and estate? This was a secret he ought in prudence to have kept within his own breast, and not to have discovered. This was a secret not necessary to be communicated, and therefore not to be concealed.

Upon these principles, therefore, I should submit it to your lordship, that we must be at liberty to examine Mr. Giffard as to those conversations which were no way relative to the matter in which he was then employed by the defendant, and which, if true, as they are represented to us, import a design contrary to all laws of nature and society.

Mr. *Walsh*, for the plaintiff. I do admit that an attorney shall not be examined to any fact disclosed to him by his client as an attorney, relative to a cause wherein he was employed; because a client must of necessity entrust the secrets of his title to his attorney, to enable him to conduct his suit; and therefore the attorney stands in the place of his client, who cannot be examined as a witness against himself. But this rule can never be extended either to a case where the matter was not communicated to him as a secret, in the cause wherein he was employed, or before he was employed as attorney in that cause; because there the client was not under any necessity of disclosing the fact to him; and if it were otherwise, this inconvenience must happen, that no attorney could ever be a witness against a person, if he ever happened, upon any occasion whatsoever, to be his attorney. The question then is, whether the fact to which we want to examine Mr. Giffard was communicated to him by lord Anglesea, as his lordship's attorney, or not? or whether he was actually

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Counsel for the Defendant. That case was very different from the present one.

Mr. Trevor was required to answer (upon a bill filed against him) what the substance of a will was, which it appeared he had formerly copied.

He pleaded, it is true, that being attorney for Mr. Savage, he ought not to disclose the secrets of his client. But it appearing to the Court, that he was but about fourteen years of age when he copied the will, and was not then an attorney, an attachment was granted against him, to compel him to disclose what was required of him.

employed by him in the prosecution of Mr. Annesley, at the time the discourse we would examine him to happened? It is true, Mr. Giffard had been attorney to lord Anglesea in several suits before this conversation happened; but he could not be at that time employed in the prosecution of Mr. Annesley; because it appears, that this discourse happened before the coroner's inquest sat, or any prosecution began on that account; so that I apprehend this case does not come within the rule I mentioned, and that Mr. Giffard ought to be examined. But besides, what we would examine him to is, not as to any secret in the prosecution itself, but only as to lord Anglesea's intention and design in engaging himself in the prosecution. But I must mention another reason, which puts this matter out of doubt, and that is, that this prosecution was at the suit of the crown; if any secrets were in that suit, they were the king's secrets, the revealing of which could be no inconvenience to lord Anglesea, or affect his property; If an attorney is a subscribing witness to the execution of a deed by his client, he does not attest it as attorney, and therefore he may reveal his client's having executed such deed.

If a conversation happened between an attorney and his client, even relating to a cause he is concerned in, but before he was concerned, he may disclose it; and therefore, my lord, I apprehend, for these reasons, that Mr. Giffard ought to be examined as to the point we have opened.

Mr. *Harward.** I apprehend, that what is contended for by the gentlemen on the other side, is not supported by the authorities they have relied on: because, in all the cases quoted by them it does appear, that the attorney proposed to be examined, was the attorney or agent in that very cause that was then to receive a determination, and it appears that the secrets to which he was to be examined, were secrets that came to his knowledge from his client concerning that very cause. So that the cases quoted do not maintain the objection made; for this witness was never in this cause employed as agent, or in any other, in which the title to the Anglesea estate was controverted, as it is here; so can't be said to violate any confidence reposed in him, as to any secrets concerning the title to the estate; for that could not come in question on the prosecution for murder, or be in any sort necessary for the client to reveal to him to carry on the prosecution; and therefore not within the rule laid down, That the client has a privilege to hinder his attorney from disclosing any of the secrets communicated to him necessary to carry on the cause he is employed in: And in the case of Cutts and Pickering in Ventris, it was agreed, that if the secret came to him from his client before he was retained, he might be examined; and a retainer in a capital prosecution cannot, in the nature of the thing, imply any trust in the attorney to keep the secrets of the title to an estate, no way to be in question in that prosecution: and the case of lord Say and Seal mentioned, makes rather for us than against us; for there the attorney employed to suffer a recovery was examined against his client as to antedating a deed to make a tenant to the Præcipe; for that the time of executing a deed could not be called the secret of his client; and the rule laid down on the other side, in such general terms as it is urged, instead of promoting public justice, would subvert it, and screen all villainies that could be contrived to carry a cause. I take the distinction to be, that where an attorney comes to the knowledge of a thing that is 'malum in se,' against the common rules of morality and honesty, though from his client, and necessary to procure success in the cause, yet it is no breach of trust in him to disclose it, as it can't be presumed an honest man would engage in a trust that by law prevented him from discharging that moral duty all are bound to, nor can private obligation cancel the justice owing by us to the public. But the trust reposed in this attorney was, to carry on a prosecution of murder. The matter disclosed by this lord to him was foreign concerning the title to an estate; then, how can the revealing of that be a breach of trust, when not within the trust he was employed in? The prosecution was properly at the king's suit, and not at the lord Anglesea's; this ejectment was not then even in contemplation, or could be foreseen that the title to the estate would ever come in question; so, what lord Anglesea declared to him concerning the title, is no more within the bounds of the trust reposed, than if any other person had declared it to him, for whom he never was employed.

But to go a little farther, suppose I employ an attorney to recover Blackacre for me, and I bring an ejectment for it; while he is thus employed, I come and discover to him that I have forged a deed which relates to Whiteacre in my possession, and which is the right of another

* In the "Trial at Bar," &c. this speech of Mr. Harward begins thus:

"If even an act of parliament was made, that no attorney should disclose the secrets of his client, yet that act, in numberless cases, would have no weight, because no act whatsoever can be consistent with reason which would subvert the laws of God. And to conceal a crime, is in some measure to become a party to it. Surely there never was a stranger instance of iniquity than the present; a design of the blackest dye against the life of an innocent person. And shall a man; because he has once been concerned as attorney for the assassin, have his mouth shut for ever? Such a doctrine would be to protect villainy against all virtue and innocence. Shall an attorney stand by and see a man kept out of his estate and honour, and all that is dear to him, and not speak, because the criminal has once been his client? no sure, unless he has a mind to become a party to the crime by the concealment of it."

man; might not the attorney hereafter disclose that forgery, to enable the other to recover Whiteacre from me? For he never was employed or entrusted as an attorney by me in that case. So, in the present case, the attorney was never employed in any cause where the title of the estate was or could come in question; so not at all within the reason of that necessary privilege given by law to the client, to hinder his attorney from disclosing any of the secrets communicated to him, necessary for, and relative to the carrying on of the cause he has engaged himself in to prosecute. The thing therefore that varies this case from the rule of privilege laid down on the other side is, that this attorney was never concerned in any suit of my lord's relative to the title of the estate, and to which we now produce him; and there can be no such privilege, but where there is such suit and retainer for that individual purpose, and cannot extend to concealment of secrets disclosed under the confidence of ordinary friendships or discourses.

And lastly, as it is a discovery to the agent to contrive the death of an innocent man, that there is no protection whatsoever can be given to dispense with that moral engagement he was under to the discovery of it; if this unfortunate gentleman had come to the discovery, that the lord Anglesea and his attorney had entered into a conspiracy to bribe witnesses, could the Court stand by and say, That this witness should not be examined? How can he now then, in a civil case, wherein he never was concerned, have that protection? Will any gentleman deny, that this attorney could have gone and given in an examination concerning this prosecution? He certainly could; for no man can have a protection against the king. And if lord Anglesea was so idle, or if Providence has so ordered it, that he should be so unwary, or so wanton, as to make a discovery of this, and of the plaintiff's title to the estate, he has no privilege against the discovery of it.*

Solicitor General, (Warden Flood, esq.) for the defendant.† I humbly hope your lordship will not admit this person to be examined in this cause. If the question were only to his and this necessity creates a confidence between them.

In the lord Say and Seal's case, it is expressly laid down for law, that if a person entrusts his attorney with a secret, whether it relates to the cause he is actually employed in, or another, the attorney shall not reveal it, because it is the same thing whether he is attorney in one suit or several, there is the same trust and confidence reposed in him, and there seems to be no difference whether the conversation relates to the principal cause in which the attorney is concerned, or to a collateral action, in which he is not; it is in either case grounded on the confidence that arises from the attorney's being employed, and therefore ought not to be disclosed.

Suppose a man indicted for murder consults his attorney or counsel, can any one say (though that crime concerns the public justice as much as any) that the attorney or counsel, so consulted, ought to reveal the secrets of his employer?

Giffard owns he was attorney in several suits for the defendant; what though the colloquium he is called to disclose, was not relative to the specific suit he was attorney in, yet I hope he shall not reveal it; because, my lord's retaining him to be his attorney imported in its own nature a trust and confidence. It was a reliance on this maxim of the law that drew lord Anglesea in to trust his attorney with his secrets.

One of the causes mentioned by Giffard was between lord Haversham and lord Anglesea. With great submission the Court cannot, without going into the nature and circumstances of that cause, know how far the secret, now to be disclosed, was, or was not necessary to my lord's defence in that suit; and therefore I humbly submit whether it ought to be disclosed.

† In p. 56, of "The Trial at Bar," &c. this Speech is given thus:

Mr. *Solicitor General* of counsel for the defendant. The constitution of law that made it necessary to employ attornies, enjoined them to be faithful to their clients, and armed them with several privileges, not for their own sakes but their clients; so that they are the privileges of the client, and not of the attorney; the attorney therefore cannot give up his client's privilege, and reveal his secrets. And, as there scarce ever was an instance of an attorney's being so wicked, I cannot cite many authorities to this point; but I humbly conceive, and there is the less need of it, because the nature of the thing does not require it, an attorney by his profession being obliged to observe secrecy.

The case of lord Say and Seal mentions the privilege of refusing to be examined, as the privilege of the client, and not of the attorney.

And if an attorney at any time, being out of

* In the "Trial at Bar," &c. the following speech of Mr. Prime Serjeant Malone is inserted in this place:

Mr. *Prime Serjeant Malone.* Mr. Giffard acknowledged that he was concerned as attorney for my lord Anglesea from 1722, to 1741; what I therefore humbly contend for is, that he cannot legally reveal any secret communicated to him by the defendant during that period of time that he was his lordship's attorney.

The mutual confidence between client and attorney require the preservation of secrecy.

And as the client cannot be supposed to be qualified to distinguish what is, or is not necessary to his cause, if he should be mistaken, and entrust his attorney with what the attorney should be of opinion was unnecessary, yet surely his attorney ought not to reveal it.

As clients are not versed in law affairs, they must be informed by their attorney, for which purpose they must tell them their whole case,

credit, surely he can deserve none; for he appears under the circumstances of a person who was employed from the year 1722, by this noble person as his attorney: a man willingly betraying those secrets, which, in point of duty and common honesty, he ought to keep. Besides, the secrets he pretends to disclose are such as it was not necessary for my lord to communicate to him, and such as no man in his wits could disclose to any person, under what obligation soever of secrecy, without an unavoidable necessity, which does in no sort appear to be the case here; and this makes what he says the less credible, and him the less fit to be believed as to his competency. The case of the lord Say and Seal, which has been cited, is a full authority that the secrecy indulged to this sort of people by the law, is not for their sakes, but that of their clients. That it is the privilege, not of the attorney, but of the client; and of consequence cannot be waved without his consent. It is true, this privilege will not hold in a criminal case, but is superseded, when it is incompatible with the peace and welfare of the public; but ours is a private case, and falls not within this rule.

Mr. *Harward* mentions the case of Staples and Staples, wherein a settlement that was concealed, but not suppressed, was wanted to be known by Mr. Matthews; when the lord chancellor directed it so, that there was a meeting, by consent of all parties, between the attornies on both sides, and a copy taken and signed.

Mr. *Daly*, of counsel for the defendant, supposes, that if he was concerned for a man guilty of high-treason, the Court could not oblige him to disclose the secrets committed to him by that man.

Mr. *Smith*, for the defendant. If I rightly apprehend the nature of Mr. Giffard's evidence offered by the gentlemen on the other side, it relates to two different kinds of declarations alledged to have been made to him by my lord Anglesea in conversation during two different periods of time; first, the declarations of my lord concerning the right of Mr. Annesley, (the lessor of the plaintiff) and these are alleged to have been made at several times in the year 1741, antecedent to the prosecution of Mr. Annesley; and in the next place, my lord's declarations that he would give ten thousand pounds to have Mr. Annesley hanged; and these are said to have been made during the continuance of the prosecution. We objected to this evidence, that as Mr. Giffard appeared, from what he said on the table, to have been employed by my lord as his attorney, he ought not, by law, to be permitted to disclose any thing that was uttered to him by my lord under the trust and confidence reposed in him as an attorney. There have been two answers given to this objection: First, That the not disclosing the secrets of the client is a privilege given by law to the attorney, and in his favour only, and therefore he is at liberty, if he thinks fit, to wave it. In the next place, the gentlemen say, that the declarations touching Mr. Annesley's right, were made at a time when my lord had no cause depending, and that whatever is disclosed by the client to his attorney, when there is no cause depending in which the attorney is employed, is not within the reason of the general rule; because in such case he may be said to be intrusted as a companion or acquaintance, but cannot be said to be trusted as an attorney; and therefore, they say, Mr. Giffard ought to be examined, at least to these declarations. Before I speak to these points, I shall beg leave to observe in general, that breach of trust and confidence is a thing no ways to be favoured in any man whatsoever, whether he is or is not an attorney; for mutual trust and confidence is one of the strongest cements of human society, and without which it could not subsist; and therefore I apprehend, that the Court will always go as far in every case, as by law they can, to prevent a person from being guilty of so base an action as violation of trust and confidence, although he should be ever so willing to do it.

As to the first point, whether Mr. Giffard ought to be at liberty to wave his privilege; I think the case of my lord Say and Seal, in the book called Macclesfield's Cases, fol. 41, mentioned by Mr. Prime Serjeant, seems to be an express authority that he ought not. In that case, the Court in giving their opinion, lay it down as a general rule, "That an attorney's privilege is the privilege of his client; and that an attorney, though he would, yet shall not be allowed to discover the secrets of his client." The different interests which the attorney and the client have in this privilege, shew this rule to be highly agreeable to reason. As to the attorney, this privilege is an exemption from the general rule, which obliges every one to testify his knowledge in any affair where he is called upon as a witness. By this exemption he is freed from the disagreeable necessity of revealing what was disclosed to him by his client under the seal of confidence; this is a privilege which every honest attorney will set the highest value upon, and will endeavour to preserve; and whenever any attorney desires to be discharged from that exemption, and to be at liberty to wave his privilege, he does, in effect, desire to be at liberty to be guilty of one of the basest of actions, breach of trust and confidence; which as it is a thing highly to be discountenanced in any case, more especially in that of an attorney; he ought not to be per-

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humour with his client, might give up his client's privilege, and discover his secrets, it would be attended with very dangerous consequences. I know, that in the cause, Stephens against Stephens, one Mr. Matthews an attorney was admitted to give evidence, but it was by the consent of all parties.

If, after all we have said, Mr. Giffard is to give his evidence, I am persuaded he must appear in such a light, as to receive but little or no credit.

mitted to do it, let him have ever so strong an inclination to it. As to the client, the interest which he has in this privilege, is very obvious. No man can conduct any of his affairs which relate to matters of law, without employing and consulting with an attorney; even if he is capable of doing it in point of skill, the law will not let him; and if he does not fully and candidly disclose every thing that is in his mind, which he apprehends may be in the least relative to the affair he consults his attorney upon, it will be impossible for the attorney properly to serve him: therefore, to permit an attorney, whenever he thinks fit, to betray that confidence which the client is under such an absolute necessity of reposing in him, would be of the most dangerous consequence, not only to the particular client concerned, but to every other man who is or may be a client. The gentlemen on the other side have attempted to confine and circumscribe this privilege, and to make it extend only to matters disclosed by the client relative to some suit, then depending, in which the attorney is concerned. But I apprehend this would be making the rule a great deal too narrow; for, if the principles on which the rule is founded, are considered, the true meaning of it must be, that the attorney shall not be permitted to reveal any thing that his client discloses to him under a general confidence as his attorney; so that it cannot be material whether a suit was then actually depending or not; but the material point to be considered is, whether the client did not consider him as his attorney, when he so disclosed his mind to him? In the present case, that my lord Anglesea, at the time these declarations touching Mr. Annesley's right are said to have been made, did consider Mr. Giffard as his attorney, cannot be doubted. Mr. Giffard says, That my lord, at several times before, and particularly in the year 1741, had employed him in several suits; that he, after those discourses, employed him again, and in the month of May 1742 discharged him. So that the general confidence my lord reposed in him as his attorney, must be presumed actually to subsist from the time he first retained Mr. Giffard, till the time he discharged him; and whatever my lord said to him during that space of time, touching his affairs, was plainly said to him under confidence as his attorney; my lord had employed him as an attorney before, and plainly intended again to employ him as his attorney afterwards; and because there was an interval, during that space of time, in which my lord was at peace, and happened to have no suits on his hands, to say that his attorney shall therefore be at liberty to disclose what was in that interval revealed to him, would be equally productive of all the ill consequences that would attend his being permitted to disclose what he was entrusted with relative to a suit actually depending; the confidence reposed in the attorney, is the same in the one case as in the other, and his violation of that confidence equally prejudicial both to the client and the public. It has been objected, that what has been cited out of the case of lord Say and Seal, is not the point adjudged in the case: but although the Court do there decide the question before them upon another point, yet the general rule which they lay down (as I have mentioned it) stands admitted. The case of Mr. Matthews, the attorney, was mentioned on the other side: if I am rightly informed of that case, Mr. Matthews had, in the presence, and at the desire of his client, attested and subscribed a deed as a witness. The question asked of him, was touching the execution of that deed, and he was ordered to answer it; but that case is entirely different from the present; whenever a man attests the execution of a deed as a witness, he does thereby engage to prove the execution of it, whenever he is judicially called upon so to do; and his client's desiring him to attest the deed, is a consent that the attorney shall enter into that engagement; therefore that case is no way relative to the present question. This is all I shall trouble the Court with as to the supposed declarations of my lord, antecedent to the prosecution of Mr. Annesley. As to the declarations supposed to have been made by my lord during the prosecution; besides the other reasons I have before mentioned, as to the confidence my lord reposed in him as an attorney, I have another objection against the examining Mr. Giffard in this point. The gentlemen last night produced Mr. Giffard, and proposed to examine him, to shew that my lord Anglesea was concerned in, and assisted to carry on this prosecution; which evidence was objected to on our side, and upon debate the Court seemed to be of opinion, that they ought not to be let in to give that evidence; and I apprehend the point was this morning given up by the gentlemen on the other side: but the examination now proposed, is an attempt to do the same thing in another shape; they were not admitted to give evidence directly that my lord was concerned in, or carried on the prosecution; but if they are admitted to prove his declarations touching his intention in carrying it on, it is plainly doing the same thing in other words, and would be to admit them to do that this morning which was refused last night. The gentlemen have, in proposing their evidence on this occasion, used many harsh expressions concerning the defendant; but I apprehend they are a little too early; harsh reflections should not be used until the facts on which they are founded are proved and given in evidence; whether that evidence shall be given or not, is now the point under the consideration of the Court; and until that matter is decided, I make no doubt but that the gentlemen of the jury will not permit the supposition of facts to have any influence upon them, before the facts themselves shall be proved. Upon the whole, as whatever the Court shall do in this case will be a precedent; and, for the reasons I have mentioned, a precedent of very great consequence, in all other cases between

every other client and his attorney, I hope the Court will be of opinion, that Mr. Giffard ought not to be examined to any of the points proposed.*

L. C. Baron. The objections to Mr. Giffard's being admitted to give the evidence proposed by the plaintiff's counsel, have been argued with great strength; and undoubtedly the public is interested in the event of this question, so far as it may affect the necessary confidence between the client and his attorney or agent, which will make me cautious of fixing boundaries to that trust. The proper way will be to determine this and every like case upon their own circumstances. What has been urged to take the present case out of the general rule, was, that the conversation to which they would examine Mr. Giffard, was neither in any cause wherein he was concerned for the defendant, or relative to any in which he was consulted, or intended to be employed by the defendant, If so, the question will be, whether an attorney shall be permitted to disclose the general conversation he had with his client, without relation to him as his attorney? Now, admitting the policy of the law in protecting secrets disclosed by the client to his attorney, to be, as has been said, in favour of the client, and principally for his service, and that the attorney is *in loco* of the client, and therefore his trustee, does it follow from thence, that every thing said by a client to his attorney, falls under the same reason? I own, I think not; because there is not the same necessity upon the client to trust him in one case as in the other; and of this the Court may judge, from the particulars of the conversation. Nor do I see any impropriety in supposing the same person to be trusted in one case as an attorney or agent, and in another as a common acquaintance. In the first instance, the Court will not permit him, though willing, to discover what came to his knowledge as an attorney, because it would be in breach of that trust which the law supposes to be necessary between him and his employer: but where the client talks to him at large as a friend, and not in the way of his profession, I think the Court is not under the same obligations to guard such secrets, though in the breast of an attorney. If I employ an attorney, and entrust to him secrets relative to the suit, that trust is not to be violated; but when I depart from that subject wherein I employed him, he is no more than another man, especially when the cause I did employ him in is over; because he is not to be supposed, as an attorney, to be a general confident. When the cause is ended, he is then only to be considered with respect to his former employer, as one man to another; and then the breach of trust does not fall within the jurisdiction of this court; for the Court can't determine what is honour but what is law, and all the cases fall under this distinction. The case cited of Cutts and Pickering, 1 Vent. 197, restrains it to what came to his knowledge as attorney; and so I think is the case of lord Say and Seal; the evidence to which he was produced being to the defective execution of a deed, to make a tenant to the Præcipe for suffering a recovery, in which the witness had been employed as attorney, which was the secret of his client's cause.

The Lord Chief Baron was going to mention the case of one Hamilton, where he apprehended the attorney had been examined in Chancery; but being informed he was not, his lordship proceeded:

What I found myself upon is, the nature of the testimony proposed, which appears to me to have been casual conversation between the witness and the earl of Anglesea, which was not necessary to have been communicated to Giffard by his lordship. And as to the private trusts between man and man, we cannot interpose. Besides, as this was in part a wicked secret, it ought not to have been concealed; though, if earlier disclosed, it might have been more for the credit of the witness. I therefore think Mr. Giffard may be examined to the defendant's declarations concerning the plaintiff's person and title.

Mr. Baron *Mounteney.* The prodigious consequence of the cause now depending before us, hath, very properly, induced the gentlemen who are of counsel on both sides, to insist upon, and argue at large, every point arising in the cause, which could possibly bear the least debate. The same reason hath induced the Court to hear gladly, with the utmost patience and attention, every thing which could possibly be offered on either side; and, I think, nothing hath been omitted, which could have been materially offered upon the present question.

For my own part, notwithstanding all the objections which have been raised against the evidence now under consideration by the defendant's counsel, I still continue of the same opinion, which I entertained when the evidence was first offered and objected to; which is, that the question now before us will receive a very easy, clear, and short determination, and that in favour of the evidence proposed. I the rather say so, because I think, that upon the very principles laid down, and upon the authority of the very cases cited by the defendant's counsel, it is to demonstration clear that the evidence now offered ought to be admitted.

* In the "Trial at Bar," &c. after this Speech of Mr. Smith is given the following of Mr. Lehunte:

Mr. *Lehunte*, of counsel for the defendant. If a bill was filed against lord Anglesea, to enquire into the manner of the prosecution against Mr. Annesley, charging it to be malicious, would his lordship be obliged to answer such a charge? No; and therefore I hope that Giffard, without his lordship's consent, shall not disclose any matter relative to that prosecution, which his employer could not be obliged to disclose himself.

Mr. Recorder hath very properly mentioned the foundation upon which it hath been held, and is certainly undoubted law, that attornies ought to keep inviolably the secrets of their clients, viz. That an increase of legal business, and the inability of parties to transact that business themselves, made it necessary for them to employ (and as the law properly expresses it, *ponere in loco suo*) other persons who might transact that business for them. That this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attornies, in order to render it safe for clients to communicate to their attornies all proper instruction for the carrying on those causes which they found themselves under a necessity of intrusting to their care. And if this original principle be kept constantly in view, I think it cannot be difficult to determine either the present question, or any other which may arise upon this head: for upon this principle, whatever either is, or by the party concerned can naturally be supposed, necessary to be communicated to the attorney, in order to the carrying on any suit or prosecution, in which he is retained, that the attorney shall inviolably keep secret.

On the other hand, whatever is not, nor can possibly by any man living be supposed to be, necessary for that purpose, that the attorney is at liberty, and in many cases, as particularly, I think, in the present case, the attorney ought to disclose.

The declarations of the defendant to his attorney, which are now offered to be proved, I shall not mention at large, but shall only take notice of one, which was, that (speaking of Mr. Annesley, the now lessor of the plaintiff) he declared, he did not care if it cost him 10,000*l.* if he could get him hanged. Does any man living, who hears these words pronounced, hesitate one moment as to the meaning and import of them? They speak too plainly to be misunderstood, or doubted of. For God's sake then let us consider, what will be the consequence of the doctrine now laid down, and so earnestly contended for, that such a declaration made by any person to his attorney, ought not by that attorney to be proved? A man (without any natural call to it) promotes a prosecution against another for a capital offence—he is desirous and determined, at all events, to get him hanged—he retains an attorney to carry on the prosecution, and makes such a declaration to him as I have before mentioned, (the meaning and intention of which, if the attorney hath common understanding about him, it is impossible he should mistake) —he happens to be too honest a man to engage in such an affair—he declines the prosecution—but he must never discover this declaration, because he was retained as attorney. This prosecutor applies in the same manner to a second, a third, and so on, who still refuse, but are still to keep this inviolably secret: at last, he finds an attorney wicked enough to carry this iniquitous scheme into execution—and after all, none of these persons are to be admitted to prove this, in order either to bring the guilty party to condign punishment, or to prevent the evil consequences of his crime with regard to civil property. Is this law? Is this reason? I think it is absolutely contrary to both.

As the principles upon which the defendant's counsel have argued, so I think likewise the cases which they have cited make directly against them, and are express authorities in favour of the evidence now offered. In the case of Cutts and Pickering, in 1 Vent. the Court were of opinion, that the solicitor might be sworn to the discoveries made to him by his client before his retainer. The meaning of which I take to be, that such discovery not being made in consequence of the necessary confidence between client and attorney, was therefore not within the rule of secrecy: and if the same reason will hold in the present, or any other given case, even after a retainer, the objection must equally fail. Now I think the same reason does hold in the present case, because the declaration now offered to be proved does not appear, nor could possibly by the defendant be supposed, to be a necessary instruction, or communication between him and his attorney, in order to the better carrying on either that prosecution, or any other legal business in which he had retained that attorney. So that this declaration, after the retainer, stands entirely, in my apprehension, on the same footing as if it had been made before. For to say that the confidence between client and attorney (to which inviolable secrecy is to be annexed) is to be taken in the latitude laid down by the defendant's counsel, is, in my apprehension, to say that which hath no foundation in law, nor the least colour in point of reason.

The other case which was cited by the defendant's counsel, that of lord Say and Seal, is, I think, still infinitely stronger against them; and every reason which the Court in that case proceeded upon concludes directly in favour of the evidence which is the subject of the present debate.

In that case the Court were of opinion (and I think most rightly), that the privilege of an attorney is the privilege of his client; (and so I have always understood the law to be) but, notwithstanding that, the Court admitted the very attorney, who had been intrusted in suffering the common recovery, to prove that the deed to lead the uses of that very recovery was antedated. And what were the reasons upon which the Court proceeded? The first mentioned in the book is, that "the time of executing the deed could not be called the secret of his client." Now, I think in this case, the declaration offered to be proved, can still infinitely less be considered as the secret of the client. The next thing mentioned in the report of that case now produced, is, that "it was a thing he might come to the knowledge of without his

client's acquainting him;" and that, I think, will hold equally strong in the present case. Giffard might have heard from others, that lord Anglesea had made such a declaration; or lord Anglesea might himself equally have made it to Giffard, although he had not retained him as an attorney, it not being, as I have before mentioned, a necessary instruction, nor what could possibly by the defendant be thought so, for the better carrying on the business in which he was retained; and consequently, not proceeding from that confidence which is necessary between client and attorney, and to which, only because, and so far as it is necessary, the privilege of secrecy hath been annexed. The last thing mentioned in the book is that the fact offered to be proved, "was of that nature," that an attorney concerned, or any body else, might inform the Court of it. Now I cannot help thinking from these words, that one ingredient in the determination of the Court, was, that the proof offered in that case was the proof of a criminal fact: if it were, that reason will hold infinitely stronger in the present case. The declaration now offered to be proved, is of that nature, and so highly criminal, that, in my opinion, mankind is interested in the discovery; and whoever it was made to, attorney or not attorney, lies under an obligation to society in general, prior and superior to any obligation he can lie under to a particular individual, to make it known.

I speak this without prejudice: God knows whether such declarations, as have been mentioned, were, or were not, made by the now defendant; but, when we are debating the propriety of the evidence, we are, during the debate (and for argument's sake only) to suppose it true: if they shall afterwards appear in proof, I think they will be exceedingly material for the consideration of the jury; and do therefore most heartily concur in the opinion given by my lord chief baron, that the evidence now offered ought to be admitted.

Mr. Baron *Dawson*. If there had been no objection made on the part of the defendant that the attorney had been employed by him, the plaintiff would have had a right *primâ facie* for his being admitted a witness; therefore to deprive the plaintiff of this right, it must be shewn, that the particulars offered here to be given in evidence came to the knowledge of Giffard merely as attorney for the defendant. Nothing that came properly to the knowledge of the attorney in defence of his client's cause ought to be revealed. I will suppose an unknowing man to have twenty deeds by him, and he delivers them all to his attorney to see which were relative to the suit; he looks them over, and finds not half of them to be relative thereto; I apprehend the attorney is not compellable to disclose the contents of any one of those deeds; neither do I think it necessary that there should be a suit actually depending. If I have an apprehension that a man intends a suit against me, and I employ an attorney to draw a state of my case from my papers, though there is no cause depending, there I apprehend it would be a breach of trust to disclose the contents of those papers, and that the attorney ought not to be admitted to disclose what has been so intrusted to him: and I think, the Court must, in this case, be satisfied, first, that what came to this man's knowledge was not necessary to his client's affairs; and in the next place, that the client could not think it necessary. The cause to be carried on, was a prosecution for the killing of a man; what was necessary for the carrying on that prosecution, I think the attorney ought not to disclose. I think further, that any thing that the client thought necessary, ought likewise not to be disclosed. The motive for carrying on the prosecution against the plaintiff is said to be, because he has a right to the estate the defendant was in possession of. Can any man think that this was necessary to tell the attorney, or that the defendant could have thought it so? What was necessary, or what a man might have thought necessary, ought not to be disclosed. But if the defendant in this case, has gone any thing further, he has trusted him, not as an attorney, but as an acquaintance. The attorney is to keep secret what comes to him as an attorney; but this conversation I don't think was necessary for carying on the cause. Besides, the prosecution was at the suit of the king, so that he could not be looked upon as attorney for lord Anglesea. I agree therefore with my lord chief baron and my brother Mounteney, that the evidence is proper to be given.

I think it proper at this time to mention, that I have considered the point of evidence that was proposed yesterday, and if it was now to be determined, I should be of opinion to allow the evidence; and if the counsel for the defendant should so please, they may take a bill of exceptions.*

Mr. *John Giffard* sworn.

Q. Do you know the present earl of Anglesea?—*Giffard*. Yes, Sir.

Pray, Sir, do you know the present plaintiff, Mr. Annesley?—Yes, Sir.

Pray had you at any time any conversation, and when, with the present lord Anglesea concerning the plaintiff, or his title to the lands in this ejectment, or any other lands?—It was some time between the 7th of December 1741, and May 1742, my lord Anglesea had an appeal from this kingdom to the House of Lords

* As to the operation of professional or other confidence in permitting or requiring a witness to withhold his testimony, see Peake's Law of Evidence, chap. 3, § 4, and the cases there cited. See, also, in this Collection, the Note to vol. 9, p. 611; and what passed upon the examinations of Mr. Hawkins and lord Barrington, in the Trial of the Duchess of Kingston, A. D. 1776. This topic was noticed in the Scots Case of sir David Dalrymple of Hailes v. Grant, M'Laurin's Decisions, 34. See, too, 3 Blackst. Comment. 370.

in England between Charles Annesley, esq. and him, which appeal was heard on the 10th of March 1741.

Court. Answer the question directly.—*A.* I am only giving you the reasons of this discourse. —My lord Anglesea having that suit, and a good many others, with my lord Haversham, Francis Annesley, and Mrs. Simpson, he was very uneasy at it. He said, he would be very glad to send to the present plaintiff, and if he would give him 2 or 3,000*l.* a-year, he would surrender up to him the titles of Anglesea and Altham, and the estate, and go over to France and live there; and then he should be much easier and happier than to be tormented with those people that were suing of him, for that he would rather his brother's son should have it than any other person.

Go on.—For if Jemmy had the estate on those terms, he should live much happier and easier in France than he was here, as he was tormented by law; for it was his right, and he would surrender it to him, (for he did not value the title) rather than Frank and Charles Annesley, and those that were striving to take it from him should have it; and that he would send for a gentleman to teach him the French tongue, to qualify him to live in that kingdom; and accordingly he sent for one Mr. Stephen Hayes.

What is he?—He was an officer in the French service, as Hayes himself and my lord told me; and my lord had him in the house a considerable time, on purpose to converse with him in French.

Did you ever see him there?—I did, my lord, forty times.

Can you recollect any particular time when this conversation happened?—I told you, my lord, it was about March 1741, when he had the appeal in England.

Was it before or after the determination of that appeal?—I believe it was both before and after; the appeal was determined the 10th of March, and he continued in that resolution till May 1742.

And, pray, what altered his resolution then?—Why, on the 1st of May, Mr. Annesley had shot a man at Staines; it was on Saturday, as appears by the indictment and coroner's inquest; upon which, the 2d of May, my lord sent for me, and ordered me to go to Staines, and to enquire into the affair, and to collect the evidence, and carry on the prosecution, and to follow the directions of Mr. Garden and Mr. Gordon, with the assistance of one Mr. Jans, who was a surgeon; which I accordingly did. My lord told me further, that I should follow their directions, and in some small time after (perhaps 3 or 4 days) told me, That they had consulted together, and advised him not to be seen to converse with me, for that it was not proper for him to appear in the prosecution, for fear of its hurting him in the cause that was coming on between him and the plaintiff; and, that he did not care if it cost him 10,000*l.* if he could get the plaintiff hanged; for then he should be easy in his title and estate.

After he told you that he did not care if it cost him 10,000*l.* if he could get the plaintiff hanged, for then he should be easy in his titles and estates, who laid out the money in carrying on this prosecution of this unfortunate man?—Money came privately from Mr. Jans; my lord told me, He was determined, as he was advised, not to appear in it himself, but that I should apply, from time to time, to Mr. Jans, and Mr. Jans should, from time to time, supply me, for that he had ordered him to provide money; and accordingly I had money from him.

What was Jans to my lord Anglesea?—His companion, and manager, and agent, and managed every thing for him.

[Cross-examination.]

Q. Repeat again the time when you first had this discourse with the defendant, of his desiring Mr. Annesley to be sent to.—*A.* Some time before the 10th of March 1741, we had the first *colloquium;* we had the like discourse, at sundry times, between the 7th of December 1741, and May 1742.

When was the first *colloquium,* as you call it?—The first time was some time before the 10th of March, 1741.

Where was Mr. Annesley at this time?—I don't know, I never saw him at that time.

Do you know whether he was in the kingdom of England or not?—I cannot tell. I believe he was.

Do you know for what purpose it was that my lord said these words to you? Was it with an intent that you should apply to Mr. Annesley?—No, I don't believe it was.

Pray now, Sir, do you know of any steps that were taken in order to this accommodation that my lord desired?—I don't know of any, Sir.

Pray, Sir, how soon after this 10th of March 1741, was it, that you first saw this Frenchman with my lord?—Near about that time; I cannot tell exactly. Frenchman he was not, I believe he was an Irish gentleman, a tenant's son of my lord's.

How soon was it that my lord said this after the 10th of March?—Near about the time it was.

Had my lord Mr. Hayes in the house with him?—He had him in the house for that purpose, of learning the French tongue.

Did you ever hear any thing of my lord's applying for an accommodation?—It was very often talked in the house, Sir, that one Mr. Paterson and one Mr. M'Kercher should be sent to.

Do you know of any steps that were taken towards an accommodation?—I know, of myself, of no steps in order to an accommodation.

Sir, I see you have refreshed your memory with papers and memorandums as to periods of time, are they of your own hand-writing?—They are.

I should be glad to know when it was that you put down those periods of time in writing?

—Sir, I put down the days as they came on. I could shew you every day where I was for seven years last past.

Were they wrote about the time the transactions happened?—I always did, since I was a practitioner of the law, keep a day book of every thing I did; and the first thing I do in a morning is, to set down the preceding day's work.

You say, my lord used some words to this purpose, That he did not care if it cost him 10,000*l.* if he could get the plaintiff hanged; and you were the agent under Garden and Gordon, to carry on that prosecution?—I was.

How came you to be employed?—The reason I was sent for was, that I had been a coroner myself in the county of Devon for some years (a dozen or fourteen), and was thought a proper person because of that.

Did you go on with that prosecution till there was a verdict?—I did, Sir.

Pray now, did you inform yourself of the nature of that fact at any time before the trial came on?—I attended the coroner's inquest, Sir, and did inform myself of it. I collected evidences, and drew the brief. I have the brief here.

Did you see, or had you a copy of, the examinations upon which the indictment was found?—I was present at the examination of the witnesses before the coroner, and took some notes of my own at that time, which I have with me.

How was the indictment found?—The indictment was upon the coroner's inquest.

Were there any examinations upon which the bill of indictment was found?—The coroner only took their examinations short, as memorandums. The bill was found upon the evidence of the son of the deceased, and others, *vivâ voce*, before the grand jury.

Were there to your knowledge, any examinations taken in writing?—I was told that sir Thomas Reynell took some examinations in writing; I applied to him for them, but he refused me; I applied to him a second time for them, when he told me that he had consulted with sir John Gonson, and that no examinations should be shewn till they were produced in Court.

Were the same witnesses that were examined before the coroner examined in court upon the trial?—Most of them were, and a great many more.

Were they not all examined?—I believe they all were. A matter of 40 people were examined.

Was your brief framed from the depositions of those people that were examined before the coroner?—My brief was framed from the examinations of witnesses that I took myself.

Pray now, did the case appear, for the most part, to be the same upon the trial, as upon the examinations before the coroner?—No, Sir, it differed vastly.

What was the finding on the coroner's inquest?—Wilful murder.

Recollect some one material circumstance wherein the evidences varied?—I tell you, Sir,——

Was the evidence stronger on the coroner's inquest than it was in court on the trial?—Yes, it was stronger against Mr. Annesley, because the main evidence was taken off upon the trial, for reasons——

Had my lord Anglesea any hand in taking off the main evidence?—No.

Who then took it off?—It was the prisoner who took it off. His evidence was rendered invalid; his evidence was given in court, but his evidence was discredited in court by reason of his character; and there was a strong reason given for it in court by a witness.

What was that witness's name?—It was Paul Keating.

Were there any persons produced upon that trial to the character of Paul Keating?—Yes.

Was Paul Keating for or against the prisoner?—He was for the prisoner.

Who was the main witness that swore against the plaintiff on his trial?—It was John Egglestone.

Had you any conversation with that John Egglestone before the trial, touching his evidence?—I had. He was brought to me by one Williams, that keeps the White-Horse in Piccadilly, and he varied from his evidence that he gave before sir Thomas Reynell.

Were you present when he gave that evidence?—I was not.

How do you know it?—It was declared so in court, and you asked me what passed in court.

Tell us, whether this fact, for which Mr. Annesley was prosecuted, was committed by day or night?—By day. The fact was committed at Staines.

What time of the day was it?—As it appeared upon the examinations, one or two o'clock in the afternoon.

Did it appear to have been done in a public place?—In a meadow.

Did it appear on the trial, that there were any number of persons present?—There were present, John Egglestone, John Fisher, and one John Bettesworth, and one more, I think.

Were there any other of the witnesses that appeared on that prosecution that were discredited on account of their character, besides Egglestone?—There was a variation in their testimony, but that they were discredited for their character, I cannot say.

What time was the trial?—The trial, I believe, was the 14th of July 1742.

What time was the coroner's inquest held?—The 4th of May 1742.

Pray now, when my lord Anglesea said to you, That he did not care if it cost him 10,000*l.* to get the plaintiff hanged, did you understand that it was his resolution to destroy him if he could?—I did, Sir.

Did you advise my lord Anglesea not to carry on that prosecution?—I did not advise him not to carry it on; I did not presume to undertake to advise him.

Did you say any thing in answer to my lord, d what, when he told you, he did not care if cost him 10,000*l.* if he could get the plaintiff nged?—I do not know any particular answer at I made him.

Did you approve or disapprove of his exessions and design together?—I cannot say at I did either.

Did not you go on as effectually after, with e prosecution, as you could?—I did, to be re, Sir. Indeed, I advised my lord Anglesea t to appear upon the trial.

Since my lord had told you, that he would ree with the plaintiff, and go to France, and appoint Charles Annesley, how came you t to tell him, that if he hanged this pretender, would frustrate his designs, and the expections he had?—In answer to what you say hat if the pretender, as you call him, were nged, there would be a greater fund left than or 3,000*l.* a year to go abroad with), it cerinly would destroy that project of disappointg Miss. Annesleys; but then it would put a reater estate in his own pocket.

Was not the intention of the prosecution to isappoint the Annesleys?—No, the intention as to put this man out of the way, that he ight enjoy the estate easy and quiet.

When my lord Anglesea said, that he would ot care if it cost him 10,000*l.* so he could get he plaintiff hanged, did you apprehend from hence, that he would be willing to go to that xpence in the prosecution?—I did.

Did you suppose from thence that he would ispose of that 10,000*l.* in any shape to bring bout the death of the plaintiff?—I did.

Did you not apprehend that to be a most icked crime?—I did.

If so, how could you, who set yourself out as man of business, engage in that project, without making any objection to it?—I may as ell ask you, how you came to be engaged for he defendant in this suit.

Was it before, or after the coroner's inquest, hat my lord Anglesea told you, he did not care f it cost him ten thousand pounds to get the plaintiff hang'd?—I can't charge my memory; t was there, or thereabouts.

Look in your diary, and see.—I'll look in my diary. I cannot exactly tell you, Sir. The second of May was the day I was sent for o my lord, at the White Horse in Piccadilly; and I believe one Thompson Gregory was sent for me, and with a great deal of joy they said that Mr. Annesley had killed a man, and would be hanged. The 3d of May I went to Colebrooke, within three miles of Staines. The 4th of May I went to Staines, and the inquest was held there.

Was it after that 4th of May it was held?—I came home the 5th, and I believe it was that day; for my lord met me at Hounslow, in his coach-and-six, to know how things went on.

Was it at that meeting he said this to you?—I cannot tell. It was within a day or two, up or down. I did not take particular notice.

Did you ever enter down in writing any conversation between you?—I have made memorandums about my business, but private conversation in company I never entered in writing.

Was it not upon the day he sent for you to go down to Staines that he said these words?—I can't say more than I know. I believe it was not. And I believe it was after, or just upon, holding the coroner's inquest.

Did not you understand from thence, that he would lay out that money, in any shape, to compass the death of this man?—I cannot tell. But my lord is very apt to be flashy in his discourse.

Did not you apprehend it to be a bad purpose to lay out money to compass the death of another man?—I do not know but I did. I do believe it, Sir: But I was not to undertake that bad purpose. If there was any dirty work, I was not concerned in it.

If you did believe this, I ask you, how came you to engage in this prosecution without objection?—I make a distinction between carrying on a prosecution, and compassing the death of a man.

How came you to make that distinction?—I may as well ask, how the counsel came to plead the cause?

Did you ever mention to any of your counsel, that my lord made that declaration?—I did not.

If you had told any of them that my lord made that declaration, would they have appeared for you?—I can't tell whether they would or not.

Do you believe any honest man would?*—Yes, I believe they would, or else I would not have carried it on, Sir. And I do assure you, it is the only cause I was concerned in at the Old Bailey in my life, and shall be the last.

Don't you believe, that my lord's engaging in that prosecution was, because the man set up a title to his estate, and not on account of his killing the man at Staines? I believe it was; and believed it then, and do now.

Do not you believe it as an unlawful purpose?—I cannot help that. I was employed by the churchwarden of Staines to prosecute. I should not have been concerned upon any account whatsoever, had not I the sanction of the coroner's inquest for wilful murder, which I thought a justification of the prosecution.

When was it that the church-warden employed you?—The 8th of May, 1742. He wrote a letter to me, "Pray prosecute James Annesley," &c. Signed Stephen Bolton.

Was not this after my lord declared he would spend 10,000*l.* to get him hanged?—It was.

Sir, I ask you, was there any money given to any witness to appear and give evidence?—I don't know of any.

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* In the "Trial at Bar," &c. Mr. Baron Mounteney is reported to have said upon the putting of this question, "An attorney might think himself well warranted by the verdict found upon the coroner's inquest to prosecute, and not think it a bad action."

What sum was given for their attendance?—About half-a-crown a day for their attendance. If there was any dirty work, I knew nothing of it.

Are you paid your bill of costs?—Not all of it.

How much does it come to?—The prosecution cost 800*l.*: but the total remaining due to me is 330*l.*

Was there any body present, when you had this conversation with my lord?—No, I believe not; for we used to converse together alone frequently.

Was Mr. Jans ever present?—No, never.

Was Thompson Gregory present when he went and brought you to my lord?—He came with me.

Did he remain in the room?—I believe he did, all that night.

Was this the 3d of May?—Yes.

Had you that day any discourse about the sum of money that my lord would spend?—No, not that day.

Was it by your advice and directions that that letter was sent to you by the church-warden of Staines?—No, it was by Garden's and Gordon's advice.

Were you privy to it?—Yes, I was. And this letter was advised in order that the defendant might not appear in the prosecution.

Did not you know this was to give a colour?—I did.

Did you think this was for a good purpose?—Mr. Garden, Gordon, Jans, and lord Anglesea had a consultation, and it was thought proper that I should have another person to my assistance, because they would not appear, and my instructions were, to send this order to the church-warden and get it signed, that my lord should not appear in it; and the reason was, that if my lord should appear in it, they thought it would be attended with ill consequences.

Did you know at the time of the trial that Mr. Annesley intended to sue for the title and estate of lord Anglesea?—It was reported he would, that he intended it; and this was in order to prevent it.

Do you know one Mr. Thomas Smith?—Yes, Sir.

I desire to know, if Mr. Annesley gets this suit, whether you will be paid your bill of costs?—No, Sir, if he gets it, I shall lose every shilling of it.

Where do you lodge?—At one Parsons's in King-street.

Are you acquainted with Thomas Smith the cabinet-maker?—I am very well acquainted with him.

Had you any discourse with him about this evidence that you have given to-day?—I have had some discourse with him about it.

Did not you tell him that you had been ill used, and that that provoked you to give in this evidence?—No, I never did; for he knew that I had been ill used. I will tell you what I have said to him: That it was a wrong step in my lord; for this bill of costs of mine would never have come to light, had not I been obliged to sue for my right. That my lord filed a bill in the Exchequer against me in England, to disclose what business I had done for him, and that I was obliged in my justification to annex in a schedule this my bill of costs.

Did not you look upon my lord Anglesea as your real client in the prosecution of the plaintiff?—He promised to pay me, but I did not look upon him as my immediate employer; for my lord told me he had directed Mr. Jans to employ me.

Did you look upon Mr. Jans at this time as your client?—I did look upon him as my client.

Do not you believe that my lord had these discourses with you as his attorney?—No, Sir; for I knew I was never to be concerned in the cause.

In what light then did you look upon that discourse?—I looked upon it to be a discourse to me as a friend.

Was not the discourse with you on the 4th and 5th of May, as his attorney or solicitor?—I looked upon him to be my client.

And therefore did not he look upon you as his solicitor?—I cannot tell what he did.

Did he meet you as his friend, or solicitor?—Sir, there was another man with me.

Were not you employed by him to see the inquest held?—I was. I wish you would produce any person to attempt to prove that I am a dishonest man.

How long have you been a practitioner?—I have had a great many clients in the course of twenty and odd years.

Do not you look upon it as a rule of prudence and honour, for attornies to keep religiously the secrets of their clients?—I do, indeed.

Do not you think, that if a solicitor or an attorney discloses these secrets, he is a very bad man?—I think he is.

And how came you to disclose this secret?—I would not have disclosed this, if I had not been obliged to do it; and the reason which obliged me to do it, was, my lord's filing a bill in the Exchequer to disclose what business I had done for him; when I was obliged to answer the interrogatories I am now asked.

You said my lord Anglesea was a very flashy man in his discourse; did not you say so?—Yes.

Is not he a man subject to passion and heat, and hasty and rash in his expressions?—He is.

At the time that he talked to you about giving up these things to Jemmy, was not he chagrined, and in a passion?—He was far from being in a passion, and asked my opinion whether it was proper for him to do it.

Was not the reason he gave this, that he did not value his titles, and should live easier in France?—It was.

Was it a conscientious scruple, or his desire of ease?—I believe it was both. The reason of it was, he was extremely angry with the

Annesleys, because they pulled away money too fast from him.

Was not this said out of the effect of his chagrin at this time, or out of spleen to Charles Annesley?—No, I believe he said it for his own sake, for his own advantage; for the cause then coming on with the present plaintiff made him desirous to be easy.

Was there any intercourse or treaty set on foot between him and Mr. Annesley?—I cannot tell: I have answered that already.

At the time this discourse happened, about the 10th of March 1741, and several other times, can you recollect whether any one was prefent?—None at all, Sir; we were constantly alone; but I heard Mr. Jans several times advise him to leave the three kingdoms.

In your answer to the bill in the Exchequer, did you insert that declaration that my lord made to you?—Sir, I wonder you would ask that question; it has no relation to the bill.

Did you ever tell any person that my lord made that declaration?—Yes, I have sworn it before in London.

Before whom?—Before the Examiner.

Did you mention it at any other time before you were examined?—Yes.

To whom?—Upon having the copy of this bill, the managers of Mr. Annesley came to me to know if I knew any thing of this matter.

What managers?—Mr. Kercher, Mr. Paterson, and two or three more.

Were you served with a subpœna?—I have it here.

Where did you receive it?—Here, Sir. They applied to me to go to Ireland, and said I must go; and said, Will you give us the trouble of sending you a subpœna? and I told them I would not give them the trouble.

Did not you say that you would not have given evidence here, except you had been forced to it?—Why, Sir, is not that a force? If a man applies to me, and says, he will subpœna me, must not I obey that subpœna?

Did you ever hear my lord Anglesea say any thing about the stealing of a silver spoon?—I have heard my lord Anglesea say, that this pretender, as he called him, was transported for stealing a silver spoon.

When did you hear that?—At the time of the first discourse between us.

Did you ever hear it more than once?—Yes, fifty times, I believe.

Can you recollect any one time of those fifty times, and who was present?—I cannot recollect; but it was between the 7th of December 1741, and the 14th of July 1742.

Upon your oath, did you ever, in any conversation between my lord Anglesea and you, hear my lord say, that the plaintiff was a bastard?—I have. I have heard him say, he was his own bastard. I have heard him say, that he was his brother's bastard. I have heard him say, that he got the wench with child, and made her lay it upon his brother, because he was better able to maintain it than himself.

Did you hear him say that as often as you heard him speak of the silver spoon?—That is not possible for me to charge my memory with. I have heard him say both very often. When he said he got him transported, he said he stole the silver spoon.

Was any one present when he said this?—Yes, I will tell you one, who said he was in the bed with her along with my lord, one Rolph.

Was Rolph present?—Rolph was present.

At what place?—I believe in my lord Anglesea's lodgings.

Where?—In London; either there, or at a tavern.

Whom did you hear this from?—I heard Rolph say this.

Was Rolph one of the company at the tavern?—He was.

Did he sit down at table with you?—I believe it was in the morning, at my lord's lodgings in Bury-street, at the time of breakfast now I recollect me of it.

What was it my lord said then?—What do you say to this, says he? Here is Rolph says, he was in the bed at the same time, and knows the pretender is a bastard.

Was this when he mentioned the stealing the silver spoon?—I believe it was at the same time.*

The Evidence closed for the Plaintiff.

Mr. *Attorney General*, (St. George Caulfield, esq.) opens the defendant's evidence:

May it please your lordship, and you gentlemen of the jury; I am counsel for the defendant, the earl of Anglesea. You have heard a great deal of evidence carried on for several days, entirely taken up in the examination of witnesses on the part of the plaintiff.

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* In the "Trial at Bar," &c. (p. 59,) it appears that after the examination of Giffard,

Mr. *Richard Baily* being produced on the table in order to be examined, said,

My lord, I humbly beg leave to inform your lordship, before I am sworn, that I have a lease here in my hand, which I held from the defendant, and which if the plaintiff succeeds, I may lose the benefit of; therefore I submit to your lordships, whether I ought to give my evidence in this cause.

The counsel for the defendant objected to Mr. Baily's being examined, because interested in the event; and the Court being of opinion that he ought not to be examined, where his evidence may prejudice or better his own interest, he was set aside.

[Here the counsel for the lessor of the plaintiff closed their evidence; but said, that if the counsel for the defendant should make it any part of their defence, that the lessor of the plaintiff is the son of Joan Landy, they for the plaintiff hoped they should be admitted to shew what became of that son; which (after some debate of the counsel) the Court declared they should be at liberty to do.]

It is necessary before I mention the nature of our proofs, to take notice of the method observed in producing the evidence that has been already given, in order to attend the gentlemen of the other side in the same method.

Though they were very sensible, that this fact, if true, must admit of the clearest proof in the affirmative, yet, they were pleased to begin, as I thought, at a considerable distance from the point, and took up much time in examining witnesses to shew, that it was probable, or at least not improbable, that my lady Altham might have a child, and gave evidence, such as it was, that my lady Altham had been with child, and had one or two miscarriages before the pretended birth of the plaintiff.

They afterwards came more directly to the question, and called witness to prove the actual birth of the plaintiff; that it was at Dunmaine, in the county of Wexford, in April or May 1715, (though one of their witnesses of the best appearance swore it to be in September 1715, and gave very particular reasons for it) that there were great rejoicings, a public christening, who the sponsors were, the nursing, and bringing home again of the child, when nursed, to the house of Dunmaine, and his stay there with my lord his father, till about three years old; this seems to me a material, and indeed the most material part of the case; the jury will therefore recollect the inconsistencies and contradictions of the witnesses to these facts, and judge of the truth and probability of the evidence, by comparing the nature of the facts testified, with the witnesses produced to prove them, how likely, how possible, that such persons as these, and these alone, should be able to prove a fact of this nature.

They proceeded afterwards to give an account of this child in the several places where my lord Altham had resided after his separation from my lady, at Kinna, at Carrickduffe, and in Dublin, in the several places, where he lodged there, and I think one of the witnesses produced, late last night, gave some account of him during my lord's residence at Inchicore: Whether this evidence has substance and strength in it, or does not rather consist of loose expressions, and the private apprehensions of people, who knew but very little of the family, is a matter that will be observed upon by those gentlemen, whose province it is.

It was judged necessary, in the next place, to shew, how this unfortunate unoffending child came to be forsaken and quite neglected by my lord his father; for they were sensible it would be proved, that my lord considered him only as his bastard, and even doubted, whether he was justly laid to his door; you remember what sort of witnesses were called to give this account, and what the proof was. It is not my business to make observations.

I cannot but think the evidence that ensued was produced, and judged to be necessary, from a consciousness, that all their former proofs were in themselves insufficient to establish this fact; for after positive swearing, and so much of it, what occasion could there be to enter into evidence, that at most could induce but a presumption? But this evidence was, it seems, withal very proper to captivate, and therefore it was they called witnesses to prove, that the defendant, the earl, did (not in any hurry, but about three weeks after his brother's death) employ some bailiffs to seize this boy, then public in town, and at noon-day to carry him by force on ship-board, in order to be transported, and that my lord himself assisted in it. But you, gentlemen, will consider of the whole proof as to this transaction, and judge, whether it does not very plainly contradict and refute itself, and shew, that this person did of himself desire, and in the usual regular way procure an opportunity of going abroad, without the least interposition on the part of the earl. They then called a single witness to shew my lord was so sensible of the plaintiff's right, for this is the turn they give it, that taking advantage of a misfortune that happened to befall him, his killing a man by mere accident, the earl had him indicted and prosecuted for that fact, in order to have him capitally convicted, and so to put him out of the way; and to conclude all with a finishing stroke, this same witness tells you, that the earl conferred the estate, and honours, and all were the plaintiff's right, and that he had a full purpose to strike up a bargain with him. If the earl did at all interpose in this prosecution, it will be shewn to you in proper time, that the inference drawn from such a piece of misconduct is by no means just; and we shall insist that the witness being entirely unsupported as to this fact, had, of his own shewing, too great a share in the transaction, to be capable or deserving of credit, as to this, or any other matter of fact.

This then, in a few words, is the scope and general tendency of their evidence; but how these circumstances and facts have been proved, by whom, with what circumstances of probability, and how just their conclusions, are matters that might well deserve the consideration of the jury, though no evidence was to be offered on our part, by comparing it with what might be expected, and must have been in their power, if the fact really was, as they would now have it thought to be.

We apprehend it will be material to our defence, before we enter into other proofs, to state to your lordship and the jury the pedigree of this family, shortly to open somewhat of the settlements in the family, their prospects and expectations, as well as the circumstances of the fortune in possession at the time of this supposed birth; which will shew that a legitimate son of my lord Altham (supposing there was a desire to conceal it, which is not pretended) must have been a matter of such notoriety, as that the proof of it at this day could not possibly admit of the least difficulty.

Arthur, the first earl of Anglesea, had a considerable family estate, and upon the estab-

ment of the kingdom at the time of the Restoration made great additions to it; his credit at court, and the condition of the times, gave him, as it did to many others, an opportunity so to do: this estate, taken together, does, as I am informed, far exceed any other now in the kingdom: this earl, Arthur, had issue five sons, James, Altham, afterwards created lord Altham, Richard, Arthur, and Charles.

On the marriage of his eldest son James, with a lady of the Rutland family, he settled the greatest part of his estate in the usual manner, with limitations over to his other sons, and their issue, successively, in tail male, and soon after died.

James, his eldest son, also died, leaving issue of this marriage, three sons, James, John and Arthur.

Altham, the second son of Arthur the first earl, died without issue, and his honour devolved

Upon Richard the third son; and this Richard lord Altham had issue, Arthur, late lord Altham, and Richard, the present earl of Anglesea.

Arthur, the fourth son, of the first earl Arthur, died without issue; and

Charles, the fifth son, died, leaving issue Mr. Charles Annesley, whom we all know.

My lord, James, the eldest son of earl James, and grandson to earl Arthur, being in possession of the honours and estate of the family, he levied fines, and suffered recoveries of a great part of this estate, in order to dock the said entail, and being thereby become tenant in fee, he in the year 1701 made several wills and codicils disposing of it. By the first of these wills, dated May 14, 1701, after the limitations to his brothers, on default of issue-male in them, he devised his estate to his uncle Richard, lord Altham, the defendant's father, and the heirs male of his body, and in default of such issue, to his uncle Charles Annesley, and the heirs-male of his body. On the 9th of December following, he made another will, and limited the estate in the same manner; after recollecting that his uncle Richard, lord Altham, died some little time before, he apprehended it would be wrong to let his name stand in his will, and therefore, in the will of December, drew a line across his name, and instead of Richard wrote over it Arthur, and then the limitation stood to Arthur, lord Altham, and the heirs male of his body; by which alteration Richard, the younger brother, the now defendant, stood excluded from the succession. After this he made several codicils, which I have not read, but by some of them, the will of the 14th of May is recited and established, by others the altered will that was in December; but by the last of these codicils, the will of May 14, 1701, is, as we apprehend, clearly set up and established. This we shall shew, if not admitted, from the wills and codicils that are now on the table.

Soon after this, earl James died without issue-male; his brother John also died without issue-male, and Arthur the youngest brother succeeded to the honours and estate. From this confusion in these wills and codicils it remained a matter of great doubt, if the late earl Arthur, and the late lord Altham, should both die without issue-male, of which there was no prospect, who should succeed to the estate, whether the present earl, under the first will of May 1701, or Mr. Charles Annesley, under the altered will in December 1701; but the general opinion was, and it was the apprehension of the late earl himself, that the present earl stood excluded. A son of the late lord Altham would have made this question unnecessary, for clearly he must have succeeded to these great honours, and to this vast estate. Such a son, and such a birth, must therefore be an event, as of great consequence, so of great notoriety; how could it be unknown, or known only to such as you have seen, in a country so peopled, and, as I may say, in the midst of their own estates?

But it will appear further, that the late lord Altham was possessed himself of an estate of about 1,200*l.* a year; the town of New Ross, in the neighbourhood of Dunmaine, was part of it; this estate, on the failure of issue-male in him, was to go, not to his brother the defendant, but to the late lord Anglesea. It will appear, that this estate, on the death of lord Altham, was entered upon and enjoyed by the late earl of Anglesea, until his death.

Is it possible then there could be such a son of lord Altham, and the late earl know nothing of it? Could he be such a stranger to his own family? Nay, though a stranger in other respects, the lord Altham and his family, and his family-affairs, made too much noise in the world to suppose it possible. There is no pretence, that the late earl was concerned in any iniquitous scheme. If he knew of this child, can it be supposed he would do him such an injury? In policy, if from no better principle, sure he would have more regard to his own character.

My lord we shall shew it further in proof, that the late lord Altham, for particular reasons, was desirous to have a son, and would very greatly have found his account in it, being in remainder to the Anglesea estate; as I said, often in distress for money, one method of raising it was by the sales of reversions of parts of this estate; the validity of these sales depended on his surviving the late earl Arthur. Now upon his advising with counsel, touching these intended sales, we shall prove he was advised and informed, that these sales, as matters stood, could produce but little money, because the title depended on the contingency of his surviving the earl, who was judged the better life of the two, as it really fell out. But if he had a son, that something worth while might be expected, because then, by levying a fine, the estate would have stood assured to the purchaser so long as there was issue male of his body. This we shall prove by a gentlemen of undoubted veracity and reputation.

The gentlemen on the other side think, they have great advantage against us, that the proof on our part is in the negative; the observation is partly just, that it is much more easy to prove the affirmative in any question of fact; but they might carry it a little further; for as such proof is more easy, so it ought to be in proportion more clear and satisfactory: But be that as it will, we apprehend this is a fact of such a nature as admits of proof in the negative, and that such as may produce a full and clear conviction; for this purpose, therefore, we shall now proceed to give an account of my lady Altham from the time of her arrival in this kingdom in the year 1713, by a person who attended her ladyship into the kingdom, continued in her service as woman to her all the time of her being here, I think was never a week together from her, went back with her again, and continued in the same service and attendance, till my lady's death. This witness will prove, that my lady Altham was never with child, never had any miscarriage that she knows of; and that it should be, and she not know of it, is, I think, next to impossible. She will prove my lady's expressions of concern upon this head, that she had not the good fortune to bring a child to this family: She will prove to you, that my lady lived some years after her lord, had an account of his death, of the late lord Anglesea's going into possession of her lord's estate, and the present earl's assuming the title of Altham; that she had at this time access to the dutchess of Buckingham, and other persons of quality in England, and was in a lonely, disconsolate way; but as to her ever having had a son, complaining of any injury done to this son, that not one syllable to this purpose was heard to proceed from her.

We shall produce also one Thomas Rolph, who was butler to my lord, and lived with him at the time of this pretended birth; my lord's gentleman likewise, and some other servants of the better sort, who were in the family and service at this time; and they all agree in this, that my lady was not with child; that there was no miscarriage or birth that they ever knew or heard of: and this, we apprehend, will be far better evidence than that of Murphy, Laffan, or Doyle, because these people testify what was properly within their sphere, and must know, if there was such a fact.

We shall produce persons of the best condition in the neighbourhood of Dunmaine, between whom and my lord Altham there passed a constant intercourse of visits, and with some of them you will find the intimacy was very great: they have mentioned Mrs. Lambert as a person extremely intimate with my lady; we shall produce her, and her husband Mr. Aaron Lambert; he had set Dunmaine to my lord, lived himself at Ross; his dealing, as well as neighbourhood and acquaintance, gave him and his lady great opportunities of knowing more of his family than many others.

We will call colonel Palliser, and also his son, who was unfortunately made the pretence of the separation, and from him you will have a full account of that matter; and he will not only swear it, but shew you that what Laffan has testified is false.

That I may not mention all as to this point, we shall call, in the last place, Mrs. Giffard, a woman of an exemplary good life and character; she will not only prove, as others, that there was no child that she ever heard of; but she will prove further, that there being some Pretender's men to be tried at the assizes at Wexford, which were held in the beginning of April 1715, and this being a business of some expectation, my lord, my lady, and several others, went to that assizes; that my lady was at all public places, and was in court at the trials of those people: this was so near the time of the pretended birth, it is plain her being with child, if fact, must be visible and conspicuous to all the world. This therefore will be proved by Mrs. Giffard, and she will be corroborated herein by many others.

We shall also lay before you the frequent declarations and expressions, not only of my lady, but of my lord also, upon this head. They have likewise, on their part, given some evidence of this kind; you will compare together the witnesses, and what they say: we apprehend there is little stress to be laid on this part of their proof, testified at this distance of time, where the omission or addition of a single word might invert the whole sense. We think it strange that these witnesses, if they knew and believed so much, neither said nor did any thing in consequence of it; and we think this conduct can only be accounted for by their not believing, their not laying any stress upon what they had heard; and when we have shewn all this, I can't but think, for my part, that we might safely rest our case here.

But we shall go a great deal further, and give an account of the plaintiff from the moment of his birth. When my lady returned to Ireland, my lord was at Dunmaine; he came to town, they were reconciled, stayed some time, and then they both went to Dunmaine. One Joan Landy was before, and at the time of my lady's coming to Dunmaine, kitchen-maid there; and in a few months she appeared so big with child, that it came to my lady's knowledge; upon which she was turned off, and went to her father's, who lived on the land of Dunmaine, at a very little distance from the house. As my lord, as well as others, had, it seems, given cause, so it was wisely resolved to make him the father of this child. We shall shew the birth, the christening, and manner of keeping this child till the separation of my lady: we shall prove, that, on the separation, the child was suffered into the house, and the schooling of it, while my lord lived at Dunmaine; that the pretence that Landy's child died is false; that there was but this child; that my lord regarded it but little; that it was brought after him to Kinna, Carrickduffe, and Dublin, and as it grew up gained

some ground; but still treated, considered, and reputed as a bastard, and no other. This we shall prove in those several places, not by loose expressions, but by those who knew my lord and family well: we shall prove to you the reputation concerning him, when at those poor schools that have been mentioned: we shall shew the occasion of my lord's neglect of him; that he was untowardly, vicious, and incorrigible; that he rambled down to Ross, my lord's estate, where he and his mother were well known, and was there treated and considered as my lord's bastard by Landy; and shew him after in Dublin, for a great length of time, in a poor condition, yet known and reputed by such as knew any thing at all of him, to be my lord's bastard; that he himself pretended no other; and being asked about his parents, mentioned not only my lord as his father, but Landy also as his mother.

And we shall shew, in the last place, while he was thus neglected, and in this distress, that my lady was in Dublin, knew of his condition, and that her dislike of him was such, that she could not endure to hear him named; and from persons of undoubted character, and with whom she lodged and dieted here, it will appear, that, amidst all her complaints of wrongs and injuries, there never was the least mention of any, with respect to a son or child that she ever had. Her silence upon this head, at this time, and under her circumstances, we apprehend to be great evidence; but much more so after my lord's death, when she saw one assume the estate, and another the honours of the family.

As to Mr. Giffard, the credit that must be given him, considering the light he appeared in, we shall humbly submit to the consideration of the gentlemen of the jury; he does not pretend that any body was present at the conversations he has given an account of, so that we cannot bring any body to contradict him.

The characters of the plaintiff's witnesses, and the contradiction in their evidence, we shall likewise submit to the court and jury.

You observe they don't produce Joan Landy, though in the list of their witnesses, and in their power: we charge her to be the mother, they say the wet-nurse only; can there be a stronger inference than that which must of necessity be drawn from the keeping back this woman?

Gentlemen, I shall trouble you no more, but proceed to prove what I have now stated, and indeed a great deal more which has escaped my memory; and when this is done, as we rest assured that this cause will be tried uninfluenced by any considerations that have not a tendency to prove the matter in issue, and that the purchasers from, and creditors of the family, and those who have a right to succeed to the honours and estate, will receive no prejudice from considerations that do not properly relate to the case, and certainly have no relation to them; so we do not doubt but you will put an end to this strange business, by finding according to our plea, that the defendant is not guilty of the trespass and ejectment in the declaration mentioned.

We shall now, my lord, begin to call our witnesses.

Nicholas Loftus, esq. sworn.

Says, he has lived at Loftus-hall, in the county of Wexford (where he now lives) upwards of 30 years; that Dunmaine is distant from it about eight miles, and deponent knew lord and lady Altham, but deponent or his wife never visited them; says, he never heard that the lady Altham had a child, or that there were any rejoicings at Dunmaine for my lady's having a child. Being asked, if he knows Mr. alderman Barnes, and whether he is not impaired in his memory and understanding; says, he knows him very well, that he was at deponent's house last summer, and is much impaired of late in his health.

[Here the counsel for the plaintiff insisted, that it was improper to ask a witness his opinion of another's understanding, who had been examined, and cross examined in the Court, for that the gentlemen of the jury were the proper judges of it.]

[Cross-examined.]

Being asked, if he remembers where he was in the year 1714, or 1715; says, he remembers he returned from England about the beginning of the year 1713, and that about the beginning of the year 1714, lord Besborough's lady dying, his lordship was fond that deponent should stay with him for some time after my lady's death; so that deponent spent most part of the year 1714 with his lordship, but in the summer 1715, deponent to the best of his remembrance, lived at Loftus-hall.

Thomas Palliser, being first sworn to the Voire Dire, and then in chief.

Says, he was very well acquainted with my lord and lady Altham, and frequently visited them all the time they lived at Dunmaine, from the time of their first coming there, for that deponent lived at a place called the Great Island within three miles of Dunmaine; says, he never heard that my lady Altham had a child, and is positive in his conscience she never had during her continuance in the county of Wexford. Deponent indeed heard my lord had a child by one Joan Landy, but never heard he had one by his lady; says, there was such an intimacy between my lord's family and deponent's, that generally once a fortnight they visited each other; so that he is sure, if my lady had been ill he must have known it; and deponent never directly or indirectly heard that she had a child, or that she was confined to her chamber on account of any indisposition, or ever had any miscarriage, and if she had, deponent believes he should have heard of it sooner than any person in the neighbourhood; says, he frequently saw my lady on Sundays at

the church of Kilmacky, and she never appeared to be with child; says, he knows that lord and lady Altham separated, but cannot recollect the time; believes my lady lived two years and a half at Ross after the separation; says, he never had any discourse with my lord about my lady's having a child, and never heard from man or woman that she ever had; says, Ross is about three miles from Dunmaine, and does not believe it was possible my lady could have a child without deponent's knowing it, for, to the best of his recollection, he was not a month or six weeks together without seeing her; at least he is sure he never was above two months without visiting her; says, he never saw any child at Dunmaine: that he knew Joan Laffan very well, she having lived with deponent as a servant, and says, that she was turned away from deponent's service for whoring, that she is an infamous woman, and deponent would not trust her for the value of a potatoe. Being asked if she is a woman to be believed upon her oath; says, by the virtue of his oath she is not to be believed upon her oath, and that the whole parish has a bad opinion of her.

[Cross-examined.]

Being asked if he can recollect where he lived in the year 1713, or 1714; says, he lived in the year 1713 at the Great Island, that he was building in the barony of Forth in the year 1713 and 1714, and lived backwards and forwards, between the Great Island and barony of Forth in those years, and can't recollect that he was two months together at the barony of Forth whilst he was building there. Being asked if he knows where lady Altham was in the year 1714; says, he cannot be positive where she was at that time. Being asked if he saw lady Altham from September to December 1714; says, he cannot say he did. Being asked how far the barony of Forth is from Dunmaine: says, about 14 miles, that he kept 60 acres of the barony of Forth in his own hands. Being asked, if he would take upon him to swear he was not six weeks together in the barony of Forth; says, he will not take upon him to swear that, but believes, unless he had the gout, he never staid there six weeks together. Being asked if he had not often the gout; says, he was often laid up in the gout. Being asked what time he began to build in the barony of Forth; says, he began to build about the year 1712. Being asked if he ever was two months together in the barony of Forth in the year 1714: says, he was not there two months together in that year as he knows of. Being asked if he knows of any particular circumstance that happened at the time of the separation of my lord and lady Altham at Dunmaine; says, he knows his son was very ill at that time, that he cannot be positive whether he saw lady Altham in May, June, or July 1715. Being asked if he knew one captain Brisco and his lady, and if he ever saw them at Dunmaine; says, he knew captain Brisco, (who was deponent's old friend) but did not know his lady, nor ever saw them at Dunmaine. Being asked whether if they had come there as visitors, deponent would not you have known it; says, he believes he should. Being asked what time deponent went to live at the Great Island; says, he went to live there when the duke of Ormond first sold part of his estate in Ireland; says, he does not know who were lords justices at that time, but remembers lord Gallway very soon after in the government; that he was twice in the government; once a lord justice along with the lord Winchelsea; remembers he lost his hand in queen Anne's wars, and he made deponent a sheriff of the county. Being asked how long ago it is since deponent was sheriff; says, about 49 years ago. Being asked how many years deponent was building in the barony of Forth; says, he can't tell if he was three years building there. Being asked if my lord came to Dunmaine before my lady; says, he did. Being asked if he knew lady Altham before the death of queen Anne; says, he can't tell whether his acquaintance with her began before or after the death of queen Anne, but is positive he knew her from the time she came to live at Dunmaine, until she left it, though he can't tell the year she came; says, he did not know her before he began to build his house in the barony of Forth; knows he visited my lady in a week after she came to Dunmaine. Being asked if he saw his friend captain Brisco when he paid the first visit there; says, he did not. Being asked what time of the year it was when he paid his first visit; says, that, to the best of his memory, it was in summer time. Being asked if my lady came to town in parliament time; says, he is apt to believe she did; remembers he visited her at her lodging at the corner of Dirty-lane in Fleet-street, and remembers the street, because horses are watered very nigh it in the river. Being asked whether he was not two months at a time together in Dublin, when my lord and lady resided in Dunmaine; says, he does not know that he was. Being asked if ever he heard that my lady was sick for a week together whilst she was at Dunmaine; says, she might be sick a week, but not to deponent's knowledge. Being asked what reason he has to believe that Joan Laffan is not a person to be believed upon her oath; says, she is a woman of ill fame that keeps a Shebeen-house,* and led an ill life. Being pressed to declare upon his oath if he was ever present, and did know her to forswear herself, or did ever hear that she did so in any cause whatsoever; says, he never knew, nor heard that she was ever forsworn, but yet deponent would not believe her upon her oath, or otherwise. Says, he knew counsellor Pigott and his lady; that they lived at Tyotera, and deponent believes they used to visit at Dunmaine, for deponent once saw Mr. Pigott there, but cannot recollect if ever he saw either

* A little ale-house.

f them there more than that one time. Being sked if he remembers the Rebellion in Scotand; says, he does; that deponent was then a parliament, and took particular notice of my ord Altham at that time in Dublin, because he ad lately lost one of his eyes. Being asked if e ever saw his lordship at Dunmaine after the oing of his eye; says, he never did. Being sked if he knew one Dennis Redmonds; says, e does; that he was once servant to my lord, nd likewise deponent's servant. Being asked f deponent had any, and what, discourse with im lately; says, he had; that one day when Redmonds was breaking horses for lieutenant Orpheur, deponent said to him, I find you are oing to be a witness between lord Anglesea nd Mr. Annesley, pray, what do you know of hat matter? To which he made answer, All I now is, that I was sent for a midwife from Dunmaine to Ross, and that I brought the midrife from the gate of Dunmaine home, and here I left her. I don't know what became of er afterwards, nor for what purpose she came, or for whom she was sent. Upon which I aid to him, If that be all you have to say, your oing will be of no use: to which Redmonds aid, Then he would not go.

Thus ended the Examination on Wednesday ight, the 16th of November, about 10 of the lock, when by the like consent in writing, as efore, read in open court, and signed by the arties, the Court adjourned to the next morng 9 of the clock.

Thursday, November 17, 1743.

The Court being met about 9 o'clock in the norning according to adjournment, the Jury vere called over, and answered to their names, nd then the counsel for the defendant proceedd to examine their witnesses, as follows:

Mr. *William Wall* sworn to the Voire Dire.

Says, he purchased a lease of some lands in he county of Dublin of the late lord Altham in 724, of which he never got possession, they aving been sold before by his lordship to sir Arthur Langford, on which account he got a ote from lord Altham for 50*l.* that is yet unaid.

[Here the counsel for the plaintiff objected o his competency, as being a person under ias; but the objection was over-ruled.]

Being sworn in chief.

Says, he knew the late lord Altham from the ear 1716, to the time of his death, and was mployed by his lordship in his profession of n attorney in several causes, and on many ther occasions; that he knew both my lord nd lady Altham, who then lodged at Mr. Vice's n Essex-street, soon after my lady came over o this kingdom, and that afterwards my lord nd lady went to Dunmaine in the county of Wexford, and deponent visited them sometimes t Dunmaine. Says, he never heard that lord Altham had a child by his lady, and does not believe he ever had, because deponent was employed by my lord in 1725, to draw a case on his lordship's title, under the wills and codicils of James earl of Anglesea, which deponent carried to counsel, and says, they gave their opinion, that if my lord had a son, and of age, and such son would join with my lord in levying a fine and suffering a recovery, then his lordship might dock the entail, and sell the reversions of such part of the Anglesea estate as he should think fit; that thereupon my lord told deponent, he had no legitimate son, but had one that was illegitimate; and deponent has heard my lord wish that he had a lawful son, because then he could raise money by the sale of his estate, his lordship being commonly in a very needy condition: remembers to have seen a boy in the street at New Ross, opposite an inn kept there by one Brehan, in a poor mean habit, (like some of the common boys) who as somebody told deponent, was a bastard son of lord Altham's by one Joan Landy; and in some time afterwards when deponent saw my lord, he asked his lordship, how he could suffer his bastard son to go about the streets in that poor way like a beggar; and the answer my lord made was, that if he was sure the boy was his own son, he would take care of him, but that, as several had to do with the boy's mother, Joan Landy, he very much doubted whether he was the father of it; but can't say my lord was at Ross when deponent saw the child there. Being asked whether he knew the late Arthur earl of Anglesea, or that there was any difference between him and lord Altham; says, he knew the earl very well, and that there were some disputes between him and lord Altham; and that in a suit in Chancery between them, lord Altham insisted on his privilege, and lord Anglesea could not get a lawyer to speak for him, whereupon his lordship stood up in court and spoke himself. Being asked whether he knows that the lord Altham and the defendant were on good terms; says, they were sometimes on good terms, and sometimes not; that lord Altham wanted the defendant to join with him in selling reversions of the Anglesea estate, and sometimes the defendant would join, and sometimes he refused joining, and on defendant's refusal to join, they disagreed. Being asked if he ever saw my lady at Dunmaine; says, he did; for he was there twice to visit my lord, but does not remember the particular time, only that it was before the separation, and after they lodged at Mr. Vice's; says, he never saw any child in the house of Dunmaine; that deponent dined, but did not lie there; did not observe any signs of my lady's being with child, nor ever heard she had a child by my lord; has heard she had a child in Holland before she came to Ireland, and has heard that the child is dead. Being asked if he ever heard what were the motives of my lord's being reconciled to his lady, and living with her again; says, he never did; says, that the reputation of the country was, that my lord left

no legitimate issue at his death. Being asked how old he believes the child was which he saw at Ross; says, he believes, by his size, he was about 5 or 6 years old.

[Cross-examined.]

Being asked when it was he had that discourse with lord Altham about the child; says, he can't recollect the particular time, but to the best of his remembrance, it was either in the year 1725-6, or 1727; believes it was after deponent took the opinions of counsel on my lord's case. Being asked who was the person that told deponent of the child which he saw at Ross being a bastard of my lord's: says, he believes it was Edward Brehan that told him so, and he said, that he was ashamed that my lord did not take care to clothe the child, or send it to school: deponent says, it was at Ross he spoke to my lord, and not at Dunmaine; that my lord said, his reason for neglecting the boy was, that he did not believe him to be his own, the boy's mother having had dealings with other people. Being asked whether it was before his present majesty's coming to the crown that deponent had the discourse with my lord, or if deponent was then in mourning for the late king; says, he cannot tell. Being asked if my lord and lady lived at Dunmaine when deponent saw the child at Ross; says, my lord was at Dunmaine, but can't tell at this distance of time whether my lady was there or not. Being asked if he was often at Ross; says, to the best of his knowledge he was every year at Ross from 1707 to 1720, for deponent went the circuit to Ross at least once a year during that time. Being asked when he first became concerned for lord Altham; says, he cannot recollect the time, but believes it was before 1720. Being asked if he can say it was before the year 1729; says, he is not sure, but believes it was some time before 1720; is sure he was concerned for his lordship before and after deponent was at Dunmaine. Being asked if he remembers what year it was he saw my lady at Dunmaine; says, he does not remember, but believes it was before he was concerned for my lord; says, that lord Altham was very poor at that time, and believes he might have sold on better terms if he had had a son, because he could then have cut off the entail.

Aaron Lambert, esq. sworn.

Says, he knew the late lord and lady Altham, deponent having let Dunmaine to his lordship, about the year 1711; says, my lady came there in about two years after, and continued there for about two years and a half; that deponent lived at Ross while my lord and lady lived at Dunmaine, and deponent lent his lordship the sum of 500*l.* and some plate, and was frequently at Dunmaine to dunn my lord for the money, and, deponent had some land in the neighbourhood; says, he never heard that my lady had a child during her stay at Dunmaine, nor never observed her to be with child, nor never saw a child about the house; that deponent happened to be taken very ill, and for conveniency of having one Sutton, who was a famous surgeon, and for the benefit of the air, went to Dunmaine, and continued there for two months; that it was in the spring, and lord Altham was then gone to Dublin to sell some reversions, in order to raise money, and never returned back, whereupon deponent set Dunmaine to one Mr. Uniack, who came to live there about the May following; says, that when my lord went away from Dunmaine, Mr. Sutton the surgeon, Mr. Taylor, and Joan Laffan lived there; says, that Sutton and Taylor lived with my lord at Ross, before my lady came over, and deponent heard that Sutton came over from England with my lord, but was turned out of the family for excessive drinking in two or three months after my lady came to Dunmaine; says, that Suttou went to live at Ross, and in some time afterwards my lady sent for him to attend her, and deponent dined with Sutton the day he was sent for, and was in his company when the messenger came, and he sent word to my lady, that he could not go on account of his patients; that the next day he was sent for again, and made the same excuse, and the third day my lord's chariot came to fetch him, and then he went to Dunmaine, and attended my lady there for about a fortnight. Being asked, if deponent could recollect what time it was after Sutton left the house at Dunmaine, that he was sent for; says, about two months after he was turned out of the house; and the reason that Sutton gave for his not going on the two first messages, was, that he was piqued at my lady's usage of him, and he seemed pleased to find that my lady was uneasy for want of him. Being asked, if he ever heard of one Thomas Brooks, a surgeon, that lived at a place called Fareen; says, he never knew of any such a man as Thomas Brooks, to practise surgery in that country, nor does deponent know a place called Fareen, though he was born at Dunmaine, and knows all the country about it; says, there is a family of the name of Brookes, that lives at a place called Fookes-mill, under one Mr. Lee, but deponent does not know him. Being asked, if he believes that Joan Laffan ought to be credited upon her oath; says, he does not believe she ought to be credited on her oath; that she is a woman of an infamous character, and was only an obscure servant in the family when my lord and lady lived at Dunmaine. Being asked, if he ever saw her take care of any child in the house of Dunmaine; says, he never did, nor does deponent believe that she took care of any child; that deponent was at Ross at the time of the separation between my lord and lady, but cannot recollect the year. That he saw my lady coming to Ross that day in a four-wheel carriage, but cannot tell whether it was a chariot or a chair; that it was duskish when she came, but believes candles were not yet lighted; that a great many of the people came out

of their houses to see her pass by, and Mrs. Heath her servant maid was with her, and she put up at one Mrs. Butler's; believes the days were short at that time; says, he heard of the separation before my lady came to Ross. Being asked, as to Joan Landy; says, he knew her and her father, that he came to Dunmaine a cottier, a year or two before my lord came there, and had two daughters, as well as deponent can remember, one of which was called Joan, but whether he had any other children deponent don't know; says, he saw Joan about the house of Dunmaine, in my lord's time, but don't know whether she was a servant there; that the other daughter went to the county of Kildare, and now goes by the name of Dun; says, he never heard my lord speak about Joan Landy. Being asked, if he ever heard my lord or lady say they had a son, or ever heard it reputed in the country, that they had; says, he never heard my lord or lady say they had a son, and it was the general reputation of the country, that my lord had no issue. Being asked, whether lord Altham and his brother the defendant lived in friendship together as brothers; says, that sometimes they were friends, and sometimes not, and my lord would sometimes turn defendant out of doors; that deponent was once in the house, when they disagreed about a dog or a hound. Says, that my lord enjoyed the Ross estate during his life, and that after his death, Arthur earl of Anglesea enjoyed it, and deponent has seen lord Anglesea's receiver collect the rents of it.

[Cross-examined.]

Being asked how often he was at Dunmaine while my lord lived there; says, he might be a month together without being at Dunmaine, but is sure he was never two months away; says, he went into the army, and married the year lady Altham came over. Being asked if he ever lived at Waterford; says, he did, at one Mr. Jones's for three months, but deponent went every fortnight or three weeks to Dunmaine. Being asked how long he was in the army; says, till about 16 years ago; that he bought his commission the year my lord Altham came to Dunmaine; that the first year he was quartered at Ross, and the next year at Dublin: says, that when he had done his duty, he had the liberty of going where he pleased; says, the officers used to do duty for a fortnight, and then go where they liked for a month together; that he was afterwards quartered at Mullingar, where he staid but for a fortnight, and went to Dunmaine. Being asked where he was quartered in 1715; says, he cannot be positive, but believes he might be on Dublin duty in that year; but says, he went to the country several times, and never was three months together at any quarters without seeing Dunmaine: says, he has been paid the greatest part of his 500*l.* which he lent my lord Altham, but some trifle still remains due. Being asked what ailment lady Altham had when Sutton went to visit her; says, he would tell what ailment she had, if leave was given him. Being asked if Sutton was an infirm man: says, he believes he might be confined with the gout about a month at a time. Being asked if he remembers the death of queen Anne: says, he does; and that, at the time of her death, he was in Langston's horse, and remembers the regiment's going into mourning. Being asked where they were quartered then; says, he believes they were quartered in Dublin; says, that sickness has impaired his memory as to time, but not as to facts: says, the defendant lord Anglesea never sent deponent any venison as he did to other people, but yet, where an affair of this sort required his attendance, deponent would for the sake of justice, come to serve him, though he should be forced to come in a horse-litter. Being asked how many places he may have been quartered in since the year 1720; says, he believes he came from Dublin to Mullingar (in the county of Westmeath,) and from Mullingar to Carrignashure. Being asked if he ever saw Paul Keating, and had any, and what discourse with him; says he saw him within this half year, but that being told he was a creature of somebody's that was setting up for the earl of Anglesea's estate, deponent had a bad opinion of him, and therefore was aware of him; that deponent met him one day at a billiard table, when Keating endeavoured to insinuate himself into deponent's acquaintance. Being asked if he thought it was possible for lady Altham to have a child without his hearing of it; says, it was impossible almost for lady Altham to have a child without his knowing it, or at least being told of it by the tenants about Dunmaine, whom he often saw. Being asked if my lord and lady Altham were in Dublin during any one session of parliament; says, he believes lord and lady Altham were one session of parliament in Dublin. Being asked if he knows colonel Dixon, and whether he was not often at his house in the country; says, he knew colonel Dixon, that he lived at Colverstown in the county of Kildare, and deponent was there often for two months together, but that was before deponent was in the army; says, that colonel Dixon was his stepfather, being married to his mother. Being asked if he never was quartered at any other place than those beforementioned; says, he was once quartered at Athy, in the county of Kildare. Being asked if he was always in terms of friendship with lord Altham; says, that lord Altham was inconsistent with himself, for one day he was fond of deponent, and another he was not, and that he had frequent quarrels with him about his money: says, he never had a protection, and never made an affidavit about this affair: says, his memory is as good as ever, (except when disturbed with too many questions, or when facts are perplexed with a great number of circumstances) and then deponent cannot be positive: says, that lord Altham would be out with deponent one moment, and

in with him the next; and deponent remembers that one morning his lordship applied to the government to have deponent broke, and that very day invited deponent to dine with him. Being asked if he ever saw Mrs. Piggot or Mrs. Giffard at Dunmaine; says, he never saw either of them there, but he believes Mrs. Piggot was there several times, and has heard that Mrs. Giffard was there after lady Altham came down to the country. Being asked if he knew Mr. Brisco; says, he does not know him, but has heard that he was collector of Wexford, and was broke there, and went to England to the duke of Buckingham, and on his return to Ireland my lady Altham came over with him.

William Elmes, sworn to the Voire Dire, and then in chief.

Says, he lived at a place called Miltown in the county of Wexford, about a mile, or a mile and a quarter from Dunmaine, about the years 1714, or 1715, and remembers my lord and lady Altham living at Dunmaine, and resorted there to my lord sometimes as a neighbour, and sometimes on business; that deponent lived at Miltown before my lord and lady came to Dunmaine: says, he knew my lady very well, but was never introduced to her. Being asked if he knew any, and which of the servants who lived there; says, he knew Anthony Dyer, (my lord's gentleman) Martin Neife, (the smith) Rolph, the butler, and one Cavanagh, and remembers Mrs. Heath, my lady's gentlewoman; remembers also Joan Laffan, and Joan Landy, who was the kitchen maid, and was with child at the time my lady came first to Dunmaine, and at that time in my lord's service there: says, Joan Landy left the house soon after my lady came, and believes she went away because she was with child; that she had a brother (who lived as a cottier with deponent) and as she used to come to her brother's house sometimes deponent happened to see her: says, that when she left my lord's house, she went to her father's, James Landy, who had a house on the lands of Dunmaine, where she was brought to bed of a boy; that her brother told deponent of her being brought to bed, and deponent went to see her at her father's in about a week or ten days after she was delivered: says, that having a curiosity to know who the father of the child was, deponent asked her the question, to which she answered, it was my lord's child; and deponent saw the child from time to time afterwards when it was about half a year old, and a year old, at Joan Landy's father's house: says, that after the separation of lord and lady Altham, when lady Altham had quitted the house, the child was brought there, being then, as near as deponent could judge, not less than three years old: says, he saw the child at the house of James Landy (his grandfather) when he was about two years old, and that the said house was about a quarter of a mile from Dunmaine. Being asked if there was any coach-road made from my lord's house to Joan Landy's; says, that there was no road made, but only a short way my lord made to go a hunting, that there being a slough there, the same was thrown up on each side to make it passable. Being asked if the child he saw at Dunmaine house was the same he saw at James Landy's the grandfather; says, it was the same child, and that one day as deponent came to Dunmaine, he met my lord at the door, and the child was there at that time, and while deponent stood there, Joan Landy looked in at the gate, and my lord espy'd her, and called out to his servants with an oath to bring out the hounds, and set them at the whore, for that he would not for 500*l.* let the boy know that that whore was his mother. Says, he never saw the child but once after that transaction, which he believes was not above a month; that old James Landy's house was soon after ordered to be thrown down. Says, the child was kept at James Landy's all along in a poor way till he came to Dunmaine house. Says, he never heard that my lady Altham had a child, and that the child he saw was always reputed a bastard, and never was at Dunmaine house during my lady's abode there, but was kept all that time at old Landy's house. Being desired to describe Landy's house, and whether there was any alteration made in it when Joan Landy came to live there; says, it was a shepherd's house, but a very poor one, and had only one chimney in it; that it consisted but of one room, with a partition of sodd and stone; that there was no glass window in it: says, it was not white-washed or plaistered, nor any alteration made in it when Joan Landy came to live there; that there was no furniture in it but a large straw bed, and all the bed-clothes not worth a shilling. Says, he never saw any other boy at Dunmaine house but Landy's child; and that when the child was at old Landy's house, he was clad in rags, with flannel blankets about him, but when he came to Dunmaine house, lord Altham sent for a taylor, and ordered him some clothes. Says, that deponent constantly went to Dunmaine house by Landy's. Says, Joan Landy herself nursed the child; is sure there was no new road made, but that a coach might drive that way, it being a field. Being asked if he knew Joan Laffan; says, he did, and that she was in my lord's service as a laundry-maid, and was there in my lady's time, and for some time afterwards. Being asked if he ever saw a child in the care of Joan Laffan; says, he never did. Being asked if he thought she ought to be believed upon her oath; says, he does not think she ought to be believed.

[Deponent's evidence being a manifest contradiction to Joan Laffan, she was ordered to come upon the table in order to confront this witness.]

Joan Laffan sworn.

Being asked if she knew Mr. William Elmes,

and whether he is an honest man; says, she does know him, and believes he is an honest man.

William Elmes being asked the same question as to Joan Laffan; says, he knew her very well, that she was charged with stealing several goods out of my lord's house, after he had left Dunmaine; says, he was at that time high-constable, and that there being a search made for the said stolen goods, deponent saw a feather-bed, a coop, and an old barrel at Joan Laffan's brother's house, and a pair of buckles in her brother's shoes, but cannot say they were lord Altham's; says, Joan Laffan at that time was at her brother's house, and that all the goods were brought back to Dunmaine house as the property of his lordship. That he often saw Joan Laffan at Dunmaine house, and spoke to her, and is positive she was laundry-maid. Remembers particularly that as deponent one day in passing by was speaking to her, my lord missed deponent, and finding him in conversation with her, his lordship said, Will, you are going to kiss my maid.

Joan Laffan denied that she ever spoke to Elmes at Dunmaine, or ever saw him at Dunmaine house above once, and says, that the feathers (which were in the bed so found in her brother's house) were feathers which were in an old stand at the house at Dunmaine, and had been given her by my lord, with several earthen plates, and other little things not worth removing; but that the ticking in which the feathers were put, was bought by deponent at Waterford. Says, that she never was laundry-maid, but dry-nurse, and attended master James Annesley, my lord and lady Altham's son; described Landy's house, and the road made to it, as she did before. William Elmes contradicted her as to the house, but agreed there was such a road made, and that although they might go that way to captain Giffard's, yet the road was made no farther than to the cabin.

William Elmes, cross-examined.

Being asked as to the time he visited my lord at Dunmaine; says, he believes it was above a year after my lord came there; that he was high-constable in 1717, and collected the public money. Being asked how he came to be so particular as to his seeing Joan Landy there at that time; says, he took particular notice of her, because she was with child when my lady came to the country. Being asked whether when he went to Dunmaine house he used to dine there, and whether he dined with my lord; says, he dined twice or three times at the table with my lord, before my lady came, but afterwards dined with the upper-servants; says, he spoke to Joan Landy at her father's house, and that she did not stay long at Dunmaine after lady Altham came there, and is sure that she was soon after delivered. Being asked the colour of Joan Landy's child's hair, and what time of the year the child was born; says, he was born in the spring, about a year before deponent was high-constable; and that the child's hair was of a bright colour. Being asked if he ever heard that Landy's child died of the small-pox; says, he never did. Being asked if he ever made any affidavit in this cause; says, he never did. Being asked how soon he saw the child at Dunmaine house after my lady went away; says, in a quarter of a year or less, it might be in a month or something more; and that he saw him once on his grandmother's back as she was driving some sheep; says, he never saw lady Altham after he was high-constable; says, that the child when at Dunmaine house was dressed in a yellow silk.

Mrs. *Anne Giffard* sworn.

Says, she was very well acquainted with the late lord and lady Altham, and remembers my lady's first coming to Dunmaine; that deponent at that time lived within a mile and an half of Dunmaine; that it was a little before Christmas, and deponent visited her in the Christmas holy-days, and her ladyship returned the visit, and they visited each other frequently, while her ladyship continued at Dunmaine. Says, that she believed my lady came first to Dunmaine in 1713, and continued there about three years or better; says, she never observed my lady to be with child, nor never heard, nor does deponent believe she was, and believes it was impossible for her ladyship to be with child without deponent's seeing or hearing of it. That deponent was often in my lady's dressing-room, and saw her dress herself, and was never a month without seeing her ladyship, while she was at Dunmaine; says, she never heard my lady say she was with child; on the contrary, remembers that deponent being herself with child, when my lady came to Dunmaine, was one day somewhat melancholy, and complained a little to my lady of the trouble it gave her, upon which her ladyship said, What, do you complain? I wish I was in the same condition; that the child deponent was then big of, was afterwards born, and is since dead, and if he was now alive, would be between 29 and 30 years of age; says, she never saw a child in Dunmaine house since my lady's time, and is sure he was never shewn her there. Being asked if she ever saw Joan Landy; says, she never did but once, to the best of her knowledge; believes she was a kitchen-maid at Dunmaine house; says that lady Altham and deponent went in lady Altham's chariot to the assizes of Wexford to see some men tried there for listing men for the Pretender; that one Mr. Walsh of Monasheen, and one Mr. Masterson his nephew, and one Doyle a clergyman were the persons tried; that my lady and deponent went into court with some other ladies; says, to the best of her recollection, it was in the spring assizes, and my lady staid at Wexford for about a week and then returned to Dunmaine, and deponent and she lodged at one Mr.

Sweeny's at Wexford; says, she was never with my lady at Wexford but once, and believes my lady in about five weeks after went to Dublin. Being asked if my lord and Mrs. Heath went to the assizes; says, they did, and they both rode on horseback. Being asked if she could recollect what men-servants went with my lady; says, she does not remember who they were, but some men servants did go with her ladyship. Being asked if she then heard that my lady had had a child, or if she observed her ladyship at that time to be with child; says, she never heard that my lady had a child, and that her ladyship had no appearance of being with child, at that time. Being asked if she ever heard of there being any rejoicings at Dunmaine upon the birth or christening of any child; says, she never heard of any.

[Cross-examined.]

Being asked how often lady Altham and she went in to the court-house; says, but once; and lord Altham and Cesar Colclough, esq. went into court with them. Being asked if she observed any gentleman of the country there that she knew; says, she remembers none but Cesar Colclough, esq. and he sat by lady Altham and deponent in the court-house. Being asked if she could recollect who were the judges of the assize; says, she cannot tell. Being asked when lady Altham returned to Dublin; says, the latter end of the summer as she believes. Being asked if she saw Mrs. Briscoe in Dunmaine house, or a daughter of her's; says, she saw them there, and that they came to Dunmaine after lady Altham was there; that they staid there a good while, but believes the daughter staid the longest, which was in all about three months, as she believes. Being asked if she heard that my lady was confined to her chamber, at that time, or that she miscarried; says, she frequently visited her ladyship at that time, but never knew her to be confined to her room, nor ever heard she miscarried. Being asked if my lady was in mourning at the assizes; says, she was, but cannot tell whom it was for. Being asked whether Mr. Colclough or the other gentleman she saw at the assizes, were in mourning; says, she cannot tell. Being asked how she came to go to the assizes; says, my lady sent for her to go with her; says, she knew my lady was in Dublin twice, and that my lord went with her both times. Says, that the separation of my lord and lady happened about three years after my lady came to Dunmaine. Being asked if she knew Mr. and Mrs. Piggott; says she did, and that they lived at a place called Tyntern; says, my lord's chariot often came to deponent's house, but knows of no other road from deponent's house to Dunmaine than the road over the bridge.

Mrs. *Catharine Lambert* sworn.

Says, she knew the late lord Altham and his lady, when my lady came to Dunmaine in 1713; that deponent often came from Ross to visit her ladyship, and her ladyship continued at Dunmaine for about three years: says, she never observed my lady to be with child, nor ever heard, nor does deponent believe, that she ever was with child, or had a child while she lived at Dunmaine, or elsewhere, and deponent was very intimate with, and frequently visited her; that deponent was at Waterford at the time of the queen's death, and in the Christmas 1714, and deponent used often to go backwards and forwards between Ross and Waterford, deponent's father living at Waterford, and deponent having lodgings there. Being asked if she remembers the separation of my lord and lady Altham; says, she did, but never heard of a child, nor never saw a child at Dunmaine house, and is sure that no child was ever shewn her in my lady's time; and deponent never was there after the separation; says, she never visited my lady at Ross.

[Cross-examined.]

Being asked if she knew where her husband Mr. Lambert was in the year 1714; says, he was on Dublin duty, remembers that he was ordered up in all haste to proclaim the king. Being asked if she knows Mr. Mathias Reilly; says, she has known him for many years, and that he is an agent for the defendant. Being asked when she saw him last; says, she sees him every day, and has seen him this day. Being asked where she lodges at present; says, she has lodged and dieted with Mr. Reilly three six years past, and pays 16*l.* a year for her board and lodgings. Being asked if she does not live with her husband; says, she has lived separate from him these 16 years, and has a separate maintenance. Being asked whether her husband is a fit man to be believed upon his oath, and if the answer which he put in to a bill exhibited by her was a true answer;

[The said question was objected to by the defendant's counsel, for that it tended to make her give evidence against her husband; that a man's reputation and character is his property, and that a wife in no case, except for high treason, or for some other wicked attempt against the wife herself, can be evidence against her husband;* that it was an insnaring question, because as Mrs. Lambert and her husband were at law together, her answer, if it should prove in the affirmative, would prejudice her right, whereas if she happened to give a bad account of his testimony, she would injure her husband, which the law would not suffer, much less compel, her to do. After some debate, the Court was of opinion that the wife might be examined as to the character of her husband, but not as to his liberty or pro-

* As to this, see Peake's Law of Evidence, ch. 3, s. 4. In Scotland, upon the trial, A. D. 1731, of James Christie for murder, the Court of Justiciary permitted his wife to swear that the pannel found her in the act of adultery with the person slain. See M'Laurin, No. 98.

perty; but the counsel for the plaintiff waved the question. And it being about eight o'clock at night, the Court with the usual consent, in writing signed by the parties (and which was read in open court) adjourned to nine o'clock next morning.]

Friday, November 18, 1743.

The Court having met at nine o'clock according to adjournment, the jury were called over, and answered to their names, and then the counsel for the defendant proceeded in their examination as follows:

John Kerr was sworn to the Voire Dire, and then in chief.

The counsel for the defendant said, That as Mrs. Giffard had in her examination mentioned that lady Altham was at the assizes of Wexford when Mr. Walsh and Mr. Masterson were tried, they called Mr. Kerr to ascertain the time the said assizes were held.

Mr. Kerr said, That lord chief justice Forster was judge of that assize; that deponent was appointed his clerk after the death of queen Anne, and went every circuit with him that he went as judge; says, he remembers the trial of Mr. Walsh and Mr. Masterson at Wexford assizes, for enlisting men for foreign service; that it was the spring circuit in 1715.

[Cross-examined.]

Being asked, if he remembers any woman there that he knew; says, he does not. Being asked, if he remembers any ladies of distinction there; says, he does not.—Says, he has looked into a newspaper published by Mr. Pue, called Pue's Occurrences, wherein the circuits are printed, to know what time those assizes were held, and he found they were held the 16th of April, 1715; that the judges went to Wexford on the Saturday; and says, my lord chief justice Forster attended on the crown side; that the first town they went to, that circuit, was Naas, where Mr. Justice Coot sat on the crown side. Being asked, if he remembers a clergyman to be tried at those assizes; says, he does not remember any such.

Mr. *Thomas Palliser*, jun. sworn.

Says, he was acquainted with my lord and lady Altham when they lived at Dunmaine; that deponent was then very young, but cannot tell what age he was of, only that he went then to school in Ross; that deponent's father and mother then lived at the Great Island, three miles from Dunmaine.—Says, he was frequently between his father and lord Altham's house; believes he was acquainted with my lord when he first came to Dunmaine, and before my lady Altham came, and used to hunt with my lord, and he furnished deponent with horses; and says, his lordship hunted frequently.—Says, he does not believe it was reported that lady Altham was with child; remembers my lady came there some time in 1713; and deponent was frequently there after her ladyship came, and spent more of his time in Dunmaine while my lord and lady lived there than at Ross; and says, that during all that time deponent neither heard or believed that my lady was with child, and is convinced in his conscience she never had a child; and if any such thing had been, he thinks he should have known it, considering his great intimacy and continuance in the family. Says, that four or five days before the separation, as my lord, Mr. Sutton (the surgeon,) Mr. Taylor (my lord's receiver,) and deponent were coming home from Burtown, my lord told deponent he was determined to part with his lady; and upon deponent's asking him his reasons, my lord replied, I find lord Anglesea will not be in friendship with me while I live with this woman; and since I have no child by her, I will part with her. To which deponent made answer, My lord, you may do what you please; but I would not part with my wife to please any body. Believes, that Taylor and Sutton had laid a scheme against deponent, and brought my lord into it; for deponent having a night or two before informed my lady that they used to drink my lord's wine, they heard of it, and were determined to be revenged on deponent; says, that on the Sunday morning my lord came to deponent's bedside, and waked him, and deponent remembers he had dreamed, a little time before, that my lord had put out his eye; and my lord desired deponent to rise, for that he was going to church; upon which deponent offered to go along with his lordship, but he said, deponent must stay at home to keep my lady company; to which deponent replied, that Taylor and Sutton were at home; but my lord said they were not fit company, and insisted on deponent's staying; and told deponent, that as he was to hunt the next morning, if deponent rid his horse that day, he would not be able to carry him, and therefore desired deponent to stay and breakfast with my lady, and then his lordship went down stairs. That deponent accordingly went down into my lady's room, where he had often breakfasted before. That deponent, having been some time with my lady, heard a noise, and presently my lord came into the room with some of the servants, and having a drawn sword in his hand made a thrust at deponent, and one Anthony Dyer, his servant, took the sword out of his hand; deponent being then hurried into another room, one of the servants cut a piece off of deponent's ear. (And deponent took off his wig, to shew in what manner his ear was cut.) That (upon the oath he had taken) he never attempted the virtue of lady Altham in any respect, and that she was intirely innocent with respect to him; and says, that at the time he received that usage there was no child in the room, nor did deponent ever see any child in the house; says, my lady usually breakfasted in bed.

[There being such contradiction between this witness's testimony and Joan Laffan's, who

swore, that at this time she had the child in her hand, and that he pointed to the blood of Mr. Palliser's ear; and it being apprehended that Joan Laffan had said that the ear was cut off; whereas it appeared it was not, and that only a piece of it was cut off: the Court ordered Joan Laffan to be called, and that the respective attornies should go to her immediately, for fear of her being tutored previous to her coming on the table.]

Mr. Palliser was continued to be examined till she appeared, as follows. Being asked, what servants were in the house at this time; says, he remembers Anthony Dyer, and Charles the butler, whose sirname deponent does not recollect, and remembers Mrs. Heath and Joan Laffan there. Being asked, if he saw any child in her arms, or in the arms of any other person in the house; says, he never saw a child in Joan Laffan's arms, or in my lady's arms, or in the arms of any servant of the house. That George Sutton, a surgeon, attended the family while he was there; that he was a gouty man, but does not know if he was reported to bleed well. Being asked, in what station Laffan was employed, and what his opinion of her is; says she used to wash the parlour, and takes her to be a vile woman; and is sure that not a man in the country heard that lady Altham had a child. Being asked, what character Mr. Elms bears; says, he would venture to affirm that there is not one gentleman in the country that would give Mr. Elms a bad character. Being asked, if he ever heard that Mr. Elms ran away with the public money, of which he was appointed collector; says, he never heard any such thing.

[Cross-examined.]

Being asked, whether, when my lord Altham parted from my lady, there was any friendship between him and the late lord Anglesea; says, he knew of no enmity between them. Says, he believes lord Altham called deponent out of bed in order to execute his wicked purpose against my lady, his lordship taking it for granted, that when he was gone from the house deponent would go into my lady's room as he usually did, for the sake of company, and then upon his return finding him there, as he expected, made that a pretence for parting with her. Says, it was only a pretence, for that for the most part deponent used to breakfast with her ladyship by my lord's own directions.

[Joan Laffan being come upon the table, a complaint was made by the defendant's agent, that Mr. Annesley's servant was found speaking to her, whereupon the said servant was ordered to be sworn, and called upon to declare what he had said to her. Being accordingly sworn, he only said, that he told her, she was sent for by the Court, and that young Palliser was then examining, and that she answered, I don't care; if I go, they'll get nothing by it.]

Joan Laffan being directed by the Court to repeat the account she had before given of the separation, and the occasion of it, says, that Mr. Palliser behaved very ill to the servants; that he put some horse-jallap into some of their drink, and used to tell my lady lies of them; for which reason he was so little regarded by them that he was forced to wash his own stockings; that my lord laid a plot against him with some of the servants, and made Anthony Dyer and the other servants take an oath of secrecy; that on the Sunday morning there was a fire ordered in my lady's room, and my lord pretended to my lady that he was obliged to go out to dinner; that Mr. Palliser breakfasted with my lord, and they had a bottle of mulled wine for breakfast; that as soon as my lord was gone out, Mr. Palliser went into my lady's room, and the plot having been laid before, a signal was made which brought my lord back; that my lord run up with his sword, and had him brought out of the room, and the groom came to Palliser and said to him, *Is* this the way you keep my lady company? And took out a case-knife in order to cut his nose, but he was ordered only to cut his ear. That deponent was standing by in the room, and she had the child in her hand, and he shewed her the blood out of Palliser's ear; says, it was the soft part of the ear that was cut; and the child pointed at the blood that came out of the ear. Says, that Palliser was found in the room with my lord's silk night-cap on his head, but had his hat and wig on at breakfast. Says, that when her ladyship breakfasted in her room deponent attended her; but when she breakfasted in the parlour some of the other servants did. Says, that no man was ever admitted into her bed-room to breakfast. Being asked, what time she came into the service, and how old the child was at that time; says, she lived with colonel Denn when king George came to the crown, and that she came into my lord's service in 1715, and that the child was then about three months old, and has seen Mr. Palliser often play with him.

Mr. Palliser being asked, if he saw a child in her arms; says, he did not. But Joan Laffan swore he did. And she farther said, it was about harvest time that she came into my lord's service.

[The Court said, that Laffan had sworn nothing contrary to her former testimony; that she had only explained what she meant by the ear's being cut in her first examination: but declared their surprise at the contradiction of the evidence on both sides.]

Mr. *Palliser* continued to be cross-examined.

Being asked, if he believed my lord would have run him through if he had not been prevented; says, perhaps he might have wounded him, for he directed the sword to deponent's person. Being asked, if he ever saw Joan Laffan attend my lady at breakfast; says, he never did; that it was Mrs. Heath, who always attended her; for that my lady was a proud

woman, and did not love to have low servants about her. Being asked, if he ever breakfasted below stairs before with my lady; says, he did, and was frequently desired by my lord so to do. Says, he breakfasted with my lady several times the very week before the separation, and my lord knew it. Being asked if he did not tell my lady of my lord's inclination to part with her, considering how intimate deponent was with her; says, he never did. Being asked if my lord ever applied to deponent to make up the difference between them; says, he never did. Being asked how many days it was before parting that he had that conversation with my lord; says, about four or five days, but does not remember what day; says, that Taylor and Sutton rode before my lord at the time of the conversation, and his lordship seemed melancholy. Being asked if my lord ever talked to him before that time about that affair; says, he never did. Being asked where he breakfasted that morning; says, in Sots-hole, and that Taylor and Sutton breakfasted with them. Being asked what the breakfast was; says, he believes there was mulled wine for breakfast, as the woman (Laffan) said: Says, he generally used every hunting-match to call my lord. Being asked what cap he wore the morning of the separation, and if it was a silk cap; says, he does not know what cap he wore, or if he changed caps, but believes it was not a silk cap he wore. Being asked who used to take care of the linen; believed it might be Joan Laffan. Being asked where my lord used to dress; says, below stairs; says, he knows nothing of a silk night-cap, nor what night-cap my lord wore; knows not the laundry-maid; but believes Joan Laffan assisted her. Says, Taylor and Sutton used to drink late, but my lord did not. Says, that he often breakfasted with my lady when my lord was not with her. Says, my lady generally was in bed with nothing on but a loose gown or wrapper; but the maid was generally backward and forward in the room, and knows not but it was by directions of my lord. Being asked again what sort of cap he wore that morning; says, he is not certain, but believes it was a linen cap, but is positive there was no child there. Being asked if he knew one Mr. Briscoe, or his daughters; says, he does not, but remembers to have heard of one miss Briscoe. Being asked what steps he took to resent the usage he had met with from my lord Altham; says, he sent him a challenge the next morning, and posted his lordship for not meeting him; and that his father likewise challenged my lord to fight him, if his lordship thought deponent too young an antagonist. Says, my lord went out of the country soon after, and deponent pursued him out of town with pistols. Being asked what time my lord left the country; says, he does not know, but thinks he left it in 1717. Being asked whether he did not receive several blows the morning of the separation; says, he did, and fell down and was stunned with the blows. Says, it was Anthony Dyer that took the sword out of my lord's hands. Being asked whether he ever saw Mr. Pigott of Tintern at Dunmaine; says, he never did to his knowledge, but remembers to have seen him at his father's house. Says, that when my lord came up to deponent that morning, he told deponent he was going to Totnam Green, but that deponent should not go with him. Being asked how he came to tell my lord, that there was Taylor and Sutton at home to keep my lady company; says, that Taylor and Sutton used to dine with my lady, and that Taylor was a kind of receiver. Says, the occasion of his going into his lady's room that morning, was to carry her a lap-dog she was fond of, and swears he did not go with any criminal intent.

Thomas Rolph sworn to the Voire Dire, and then in chief.

Says, that he was very well acquainted with my lord and lady Altham; that he knew my lord first in England, before he came to Ireland; that my lord came to Ireland before my lady, that they came to Dunmaine a little before Christmas 1713, and deponent was in the service before that time as butler, and continued there till the latter end of 1715, and was about a year and a half servant there. Says, he never heard that my lady was with child; that deponent waited upon her twice a-day, at dinner and supper, and never saw a child at Dunmaine, nor ever saw any signs of my lady being with child, nor ever heard any discourse like it, but has heard both my lord and lady wish they had a child. Being called upon to name those who were servants with my lord in deponent's time; says, there was John Weeden, the coachman, Burk, the postillion, Michael Forster, the cook, one Arthur, the gardener, Martin, the smith, one Anthony Dyer my lord's gentleman, who used to attend my lord except of hunting days; that there was Smutty, the dog-boy, but he was very ugly; one Joan Landy, the kitchen wench, little black Nell, a weeding wench under Arthur the gardener, one Mary Hays, dairy maid, and my lady sent over one Mrs. Settright to be housekeeper; that there likewise was one Mary Waters, chamber-maid, and Betty Doyle, a laundry maid, and Mrs. Heath, my lady's woman; that after Mary Waters went away, Nelly Thomas came in her place, and she used to carry the tea-kettle to my lady's chamber. Being asked if he is sure he would remember Betty Doyle; says, he is sure he should remember her. Being asked if he ever knew one Joan Laffan to live in the service; says, he never did; but says, he left my lord's service in 1715, between Michaelmas and Christmas. Being asked if there were any new servants came into the family while deponent was there; says, that when Waters went, Nelly Thomas came in her place, but remembers no other servant's coming there. Being asked if he knows any thing about Joan Landy; says, Joan Landy was turned away for being with

child, and after her leaving Dunmaine house, she went to a cottage, or hut of her father's at the sheep walk, and there she was brought to bed; that it was about a furlong and a half from Dunmaine house. Says, he came to England from the service, and rode in the third troop of guards. Says, that in two or three days after Joan Landy was brought to bed, deponent went to the house where she was, because it was reported my lord Altham was the father of her child, and deponent took the child in his arms, to see if he could find out who it was like, and asked her who she laid it to, upon which she said, to my lord; deponent told her she was in the right of it, for that nobody was better able to maintain it; and says, the reason of his looking so at the child to find who he was like, was, that he knew others had lain with the child's mother. Says, he has seen the child after this fifty times, and used to give it broken victuals. Being asked what kind of hut it was that Joan Landy lived in; says, it was a little hut, and she lay where her father, mother, and brother, on some straw, all together, and there were stakes drove into the ground to keep the straw up; that it was all one room, and there was a fire-place on the left-hand, but cannot tell if there was a chimney in it. Says, there was no partition, but a hurdle fixed to the ground to keep up the straw; and as long as deponent lived at Dunmaine, the child lived there with his mother. Says, the hurdle was about four or five foot high. Says, that when he came into the room, he had a full view of the house, and that there was no window to it, and neither chairs nor tables. Says, the cabbin was in the same condition when deponent first went there, as it was when deponent left Ireland, and is sure there was no alteration made in it, for if there had, deponent should have seen it. Being asked how the child was dressed; says, he was dressed in a blanket; that deponent never saw the child at Dunmaine house, for it was never suffered to come there. That lady Altham had forbid Joan Landy to come near the house, as he supposes, because of the report of its being my lord's child. Being asked if lady Altham ever went to Landy's cabbin or hut; says, she never did, for that she was too proud to go to such a poor place. Being asked who built the said cabbin; says, it was built by one Shea, a year before the child was born. Being asked when it was deponent came to Dunmaine; says, he came to Dunmaine sometime in 1711. Being asked if there was a road from Dunmaine house to Landy's cabbin; says there was a coach-road down the avenue. Being asked if the said coach-road was made on purpose to go from Dunmaine house to the cabbin; says, the coach road was made a year before the cabbin was built, on purpose to go to church, to the mill, to Mr. Palliser's, and Mr. Giffard's, and deponent overlooked the making of part of the road. That Mr. Giffard visited my lord before my lady came to Dunmaine. That Mr. M'Kercher came to deponent, to his house, in Mary le Bon in England, and sent a dinner there, and invited deponent to dine with him, and asked him several questions, whether lady Altham had a child, and what servants were in the house in deponent's time, and asked deponent if he would accept of a lieutenancy: says, there were two gentlemen with Mr. M'Kercher, one of whom they called sir Thomas; that Mr. M'Kercher came there a second time, and asked deponent if he had said any thing to him about a lieutenancy; and deponent named the persons, who, he said, were in company when Mr. M'Kercher came there the second time, Being asked what business he follows; says, he is a gardener and victualler, and lets out part of his garden to some gentlemen for pleasure to plant flowers. Being asked if he remembers lord and lady Altham going to Wexford assizes at any time; says, my lord and lady, Mrs. Giffard, Mrs. Heath and deponent went there; that Anthony Dyer was not there, (because he was sick;) that it was at the Spring assizes in 1714, or 1715, when the Pretender's men were tried; that it was so remarkable a thing, that he remembers it perfectly well. Says, Mrs. Heath rode single, and so did deponent, and Mrs. Giffard went with my lady in the coach. Being asked, how he came to leave my lord's service; says, that having some disputes with the gardener, about turning water into the garden, deponent beat him; upon which he went to Dublin, (where my lord then was) and complained to him, and my lord sent a letter to Dunmaine, threatening to send deponent to Wexford gaol, and thereupon deponent quitted the service, and went to England; says, my lord went to Dublin in May, 1715, and that my lord and lady were in Dublin when the queen died. Being asked, what time of the year it was he beat the gardener; says, about Michaelmas; that the lord and lady were in Dublin before the beating but deponent did not stay for their coming down. Being asked, who christened Joan Landy's child; says, he has heard he was christened by one Downs a priest, at a village called Nash, and that he was called James. Being asked, how soon after his birth he was christened; says, he cannot tell, for deponent was not at the christening; but the child was always called James, and deponent never heard him called by any other name.

[Cross-examined.]

Being asked when it was he went into the army; says, immediately after deponent went to England, and deponent was encamped in Hyde-Park. Being asked when he went into my lord's service; says, in 1711, or 1712, and continued there for a year and a half after my lady came to Dunmaine. Being asked, if the child was reputed to be his, as he was so curious to know who he was like; says, it never was, but believes it was the present earl of Anglesea's, and that lord Altham knew it was only fathered on him. [The Court observed

that this dirt would do the defendant's cause no service.] Being asked if there was not a coach-road made to the house where the child was; says, the coach-road led to Mr. Palliser's and Mr. Giffard's. Being asked if Mrs. Giffard used to come by that house to Dunmaine; says, she most constantly came by that house, and that it was her nearest road, and that she never came round by the bridge; and says, that that same road was the shortest way to Mr. Palliser's, and the usual road; says, the bridge going to Ross was built before deponent went there; says, Mrs. Briscoe and her daughter did not come to Dunmaine with my lady, but some time after. Being asked how many horses there were to the chariot in which my lady went to Wexford assizes; says, there were six horses. Being asked what coloured horse deponent rid; says, it was a bay-horse. Being asked, if he knew one Redmonds; says, he did not. Being asked, what coloured horse my lord rid; says, it was a brown horse. Being asked, if he went into the court-house at the assizes; says, he did not. Being asked, what day of the week the assizes were held at Wexford; says, he cannot tell the day of the week or month; but that he staid there two or three days. Being asked, where my lord and lady lodged; says, he cannot tell where they lodged; that he was not at their lodging all the time of the assizes, but himself lodged at the post-office. Being asked, if my lord and lady were in mourning; says, he cannot tell. Being asked, if he wore a livery; says, he never did. Being asked, where he landed when he went to England; says, at Bristol. Being asked, what servants went with my lord to Wexford; says, the running footman, Edward M'Cormuck, the coachman, the postillion, and my lord's gentleman being sick at Dunmaine, deponent went in his place. Being asked, if he did not attend my lord during his stay at Wexford; says, he did not. Being asked, if he ever saw the Spaw Wells near Wexford; says, he never did, but has heard of them; says, my lady was ill for about a fortnight, while deponent was in the service, and did not keep her room above a day or two; says, he was my lord's clerk,* and his business at Wexford was to carry examinations from him to the clerk of the peace; but does not know where he lived. Being asked, how he came into my lord's service; says, he had lived about three years a house-keeper in Chelsea, and lord Altham owing him some money, he came over here to seek for it. Being asked, what agreement he made with my lord when he came into the service; says, he made no agreement, but my lord told him, that if he would live with him, as his butler, he should be paid; says, my lord had little to pay out of, and therefore deponent never demanded any wages; says, my lord owed him near twenty pounds. Being asked, if my lord used to hunt; says, he hunted often, that he had six or seven horses for his own riding. Being asked, what coloured horse my lord used to ride a hunting; says, he had a black mare, which he used to ride. Being asked, if Anthony Dyer used to go a hunting with my lord; says, he did, that he used to ride a horse called Forrest, and sometimes my lord used to ride the brown gelding, because it was the better horse. Being asked his age; says, he is sixty years next July: that my lord came first from Wexford to Dunmaine, and afterwards went to Dublin, but deponent never travelled with him to Dublin: says, he does not remember Charles Meagher to be a servant with my lord. Being asked, if he ever told any body that the Pretender's men were tried at the assizes at Wexford; says, he has spoke of it many times. Being asked, on what occasion he mentioned it; says, he told it to his comrades by way of conversation. Being asked, if he told it to my lord Anglesea; says, he does not remember that he ever did. Being asked, if he ever told it to Mr. Jans, or Mr. Burroughs; says, he cannot remember that he did, or to any of my lord's managers. Being asked, how many came over with deponent on ship-board; says, he believes about forty. Being asked, if he told it to any of them; says, he does not know of any of them that he told it to. Being asked, when it was he last saw Mrs. Giffard, and if he had any discourse with her about that affair; says, he saw her yesterday, but had no discourse with her; nor does he know what she has been examined to.

Owen Cavanagh sworn to the Voire Dire, and then in chief.

Says, the defendant owed him 13*l.* 15*s.* which was lately paid him by Mr. Derinsay; says, he served lord Altham in Dublin, and afterwards at Dunmaine, and was in his service before and after my lady came there; says, that having been at his father's after a fit of sickness, he went to lord Altham to ask for his wages, when my lord prevailed on him to hire again; that some time after he fell out with the cook, and my lord threatened to send deponent to Wexford gaol, and thereupon deponent parted with him. Being asked, if he was servant to his lordship after the separation; says, he was not. Being asked, how long he continued in the service after my lord and lady came to Dunmaine; says, about a year. Being asked, if he remembers the death of king George the First; says, he remembers being in mourning for him, and deponent was then a house-keeper in Thomas-street. Being asked, if he remembers sir Constantine Phipps in the government; says, he does not, nor can tell where deponent was at the time of Queen Anne's death, but believes he was in service at Dunmaine; says, he was in Dublin when my lord received my lady at Mrs. Briscoe's. Being asked, if he continued in the service till the time they returned to Dublin from Dunmaine; says, he does not remember that he

* Lord Altham was a justice of the peace.

did. Being asked, if he ever heard of my lady Altham's being with child, or that she had a child; says, he never did, till the late rumour. Being asked, who were the servants in his time; says, he remembers my lord had a big fat steward (one Taylor) and had a cook that used to drink and sing. Being asked, who was the butler; says, one Rolph, and my lord had a page (one Anthony Dwyer,) and one Mrs. Heath was my lady's maid; remembers Joan Landy, a chair-woman. Being asked, if she washed the dishes; says, he cannot tell; says, she had a big belly, and was supposed to be with child; and after my lady came down, some busy body (as deponent believes) told her ladyship she was with child by my lord, and thereupon she was turned off: Says, he saw her afterwards, when he used to air the horses, and saw a child with her who was called James, and deponent believes it was the child he saw her big of. Being asked, if he ever was in the house she lived in; says, he has been within side of it, that it was a cabbin built near the sheep-walk, and James Landy, her father, was the shepherd. Being asked, what rooms there were in the said house; says, he believes there was no room but one, and there were two straw-beds in it, and deponent remembers the building of it. Being asked, if he believes the lady Altham would have been glad to have had a son and heir; says, he believes she would to disappoint the present Earl, who was always quarrelling with her. Being asked, if he believes that if lady Altham had had a child (while deponent was there) he should have known it; says, he believes he should; says, he saw a child at Inchicore, but cannot tell whether it was the same child he saw with Joan Landy; says, he asked my lord why he did not send that child to a trade, and that his lordship answered, that he was a great idler, and he could get no good of him. Being asked, if he knows of any child's being at Kinnay; says, he does not.

[Cross-examined.]

Being asked, when he was married; says, in 1719; that he shewed the certificate of his marriage lately to his wife; says, there was great rejoicing among the servants, when lord and lady Altham were reconciled at captain Briscoe's.

Anthony Dwyer sworn to the Voire Dire and then in chief.

Says, he waited on lord Altham 5 or 6 years, and his lordship lived at Dunmaine when deponent came to him; can't tell when my lady came to Dunmaine, but deponent was in my lord's service before her coming, and after her going away. Being asked, if he is sure he was at Dunmaine when my lady came there; says, he is sure he was, and that he lived there 2 or 3 years after her leaving Dunmaine, and was in the service when she parted from my lord; says, he attended my lord when he came to Dublin, and never was absent from his lordship above a fortnight at most. Being asked, if he ever knew my lady was with child, or had a child; says, he never did, till within this year. Being asked, if he remembers the names of any of the servants; says, he remembers the names of some of them: John Wheedon was coachman, Mrs. Heath was my lady's woman, and Joan Landy was kitchen-maid under the cook, and continued there for two months, till she was turned away; that she was with child when my lady came to Dunmaine, and it being reported that she was with child by my lord, she was turned out of the house, and went to her father's, who lived in a cabbin near the lands; and deponent saw the child in about a fortnight after her delivery, and the child she was delivered of was called James Landy; and her father lived in that cabbin after the child was born. Being asked, what sort of a cabbin it was; says, it was a very poor one; that it was all one room, and no glass window in it; that there was a bush which was pulled in and out, instead of a door; that there were stakes drove in the ground in the cabbin, and straw beds. Says, he went on purpose to see the child, and that it was clad in a poor habit. Says, he never saw lady Altham have a child or handle a child; but Joan Landy used to come by stealth the back-way to the stables and bring her child in order to get some subsistance from the butler. She used to say, she was always afraid, because of her having fathered the child on my lord. Says, he lived with my lord Altham after the separation, and parted from him in Dublin. Says, he came to Dublin the first parliament after my lord and lady parted. Says, Joan Laffan was a servant in the family when deponent was there; but says, she could not have the care of a child without deponent's knowledge, and deponent never saw a child in her arms. Says, she lived 3 or 4 months in the service, to the best of deponent's knowledge. Says, he never saw a christening at Dunmaine house, or any bonfires there on any such occasion. Says, he has seen Mr. Lloyd, my lord's chaplain; but never saw him christen a child, or heard him say he had. Says, he never heard that Landy's house was repaired, or a road made to it from Dunmaine house; but says, there was a road made for a short-cut through the land. Says, he knew Rolph the butler; and that he was succeeded by one Charles, who was hired in town. Being asked, if my lord made deponent take any oath about Mr. Tom Palliser; says, he never did; nor was any oath tendered to him. Being asked, if Tom Palliser misbehaved to the servants; says, he never found he did. Being asked, if he ever heard that Mr. Palliser washed his own stockings; says, he never did; that the better sort of servants were respectful to him. Says, he has seen my lady breakfast in her room, but never saw her breakfast in bed.

[Cross-examined.]

Being asked, if he was not a gaol-keeper of

Cork; says, he is; says, he never saw a child in the house of Dunmaine; that he continued with my lord after the separation, and came with him afterwards to parliament; and that my lord staid three quarters of a year at Dunmaine after the separation. Being asked his age; says, he is between 40 and 50; believes about 45. Being asked, if Joan Laffan was in the house after the separation; says, he cannot positively say, but to the best of his knowledge believes she was, but cannot tell what became of her after the separation; says, my lord came to Dublin in parliament time, but can't tell whether it was parliament winter or not when they parted. Says, he could not tell what time my lord came to Dublin after the separation, but believes it was summer time. Says, he was sick when my lord and lady went to Wexford assizes. Being asked, if he has been in company with Rolph since he came last to town; says, he has, and that Rolph came to see him; and that deponent lay at Mr. Jans's the first and second night after he came to town; says, he has often eat and drank with Rolph, and that they conned over their old jokes and merriments; but not a word was said of the boy, or of the Wexford assizes, nor did deponent ever tell any body what he had to say in this affair, except that he told Rolph, and Rolph told him my lady never had a child; says, he has seen colonel Palliser, and several others of the defendant's witnesses since his coming to Dublin. Being asked if he ever heard of Harry the cook; says, he never did. Being asked if the cabbin where Joan Landy lived was built indeponent's time; says, that it was, and that my lord had 3 or 400 sheep on the sheep-walk. Being asked, how old Juggy Landy's child was when he saw him last; says, he cannot tell, but saw him in a month after his birth; and says, Juggy Landy used to leave him with some of the helpers at the stable when she went into the house for subsistance.

Mrs. *Mary Heath* sworn to the Voir Dire.

Q. Do you know the plaintiff, Mr. James Annesley?—Mrs. *Heath.* No.

Has he any law-suit with you?—He filed a bill against me for the effects of lady Altham. I had a subpœna given me in England.

At whose suit?—At Mr. James Annesley's.

Have you any of the effects of lady Altham in your hands?

The question is objected to by the defendant's counsel, who say, that the administrator will have the right to recover them, let this cause go which way it will; and the effects are no way relative to the real estate which is now in dispute.*

The Witness sworn in chief.

Q. Did you know Arthur late lord Altham and his lady?—Mrs. *Heath.* Yes, very well.

What time did you first become acquainted with the one or other of them?—I have known them a great many years.

Were you in any service in that family?—Never till the time of my coming to Ireland.

When was that?—In the year 1713.

At what time?—In October I came over with my lady as her woman.

How long did you live with my lady after she came over?—I lived with her to the day of her death.

When was the day of her death?—I can't justly tell; it was some time in October, 1729.

During that whole course of time, was you ever out of her service?—Never out of her service.

Did you constantly reside with her as her woman?—I was one week from her in Ireland.

What time was that?—When I come on further, I can tell you.

Do you not remember that you were longer absent from her?—Not in Ireland, nor one day, except she was out a-visiting. I was never from her a night but that week.

Do you know a place called Dunmaine in this kingdom?—Yes, I do.

Do you remember who lived at Dunmaine? Did my lord and lady Altham live there?—Yes, we went down there.

At what time, madam?—We got down to Dunmaine the Christmas-Eve after we came over.

How long did my lord and lady reside together at Dunmaine?—My lord did come up,

* Of this objection, the following is the account given in the "Trial at Bar," &c.:

"The counsel for the plaintiff said, it appeared that the lessor of the plaintiff was out of the kingdom when lady Altham died; that it likewise appeared by Heath's confession, that there being nobody entitled to take out administration, she had possessed herself of my lady's effects; that Mr. Annesley having since his return obtained the administration, had filed a bill against Heath, for an account of those effects; to which, although served with a subpœna, she had never yet thought fit to put in her answer; so that it was plain she was interested in the event of the present question; and therefore they hoped, as she was under such a bias, she should not be admitted an evidence in this cause. But the counsel for the plaintiff being called upon to produce the letters of administration, and the same not being produced, the counsel for the defendant insisted, that the plaintiff having failed in proving the grant of the administration, which was the foundation of his right to the effects, and consequently the very basis of his objection to the competency of the witness, his objection must fall to the ground. That if the filing a bill against a witness, who was intended to be examined, would destroy that witness's competency, it would be in the power of any party to hinder the witnesses against him from being examined, at the expence only of a bill in Chancery full of the allegations of an ingenious counsel."

but I can't tell justly whether it was in May or June following; but I know he was there in April: he came to Dublin himself, and left my lady and I at Dunmaine. Upon St. George's day I know he was at Dunmaine, I am sure of that.

How long in the whole did they live together at Dunmaine?—About three years and two months, to the best of my remembrance.

Do you remember in what month they parted?—In February.

In what year?—I call it 1716-17.

Had my lady a child at Dunmaine?—A child! never had, nor never was with child; I never had reason to think she was with child all the while I lived with her.

Who dressed and undressed my lady?—I always did, except the week I was absent; while she was at Dunmaine I always put her to bed, and attended her at her rising in the morning; for she was such a woman, she would not permit any body else to do it.

Could she then ever be with child, or have a big belly, unknown to you?—No, never.

Were not you at Dunmaine at the time of the separation?—Yes, to be sure.

To what place did she go when they parted?—We went to one capt. Butler's, in Ross.

Did you go with her?—Yes, I went with her in a four-wheeled chaise and a pair of horses.

Did you get to Ross the same day?—Yes, at night, dark night; for my lady made it as late as she could; for she had no mind to be seen coming in.

Can you remember the particular day this happened?—To the best of my remembrance, it was on the 3d of February; but it was on a Sunday, I am positive.

Did you live any time there, and how long?—We lived about four years in Ross, to the best of my remembrance.

Did my lord and lady come together again within that period of time?—No, never. I don't know whether she ever saw him.

Will you recollect yourself, who were the servants of the house when you came down to Dunmaine?—It is very hard for me to do so at this distance of time, there were so many. There was Mr. Rolph as the butler, and there was Mr. Anthony Dyer, my lord's gentleman; there was one (I believe Rolph went down with us) Settwright, the house-keeper, and there was Michael, but what his sirname was, I can't tell, but he was cook, and there was Juggy Landy that was the kitchen-maid, big with child.

At what time?—When we came down, my lord, a kind of scullion under the cook.

Did you observe her to be with child?—When we went down first, I went up to the room to my lady, and soon after I came down to speak to the house-keeper; and I turned about and saw this woman with child; What, says I to the house-keeper, you have got a maid big with child here! Yes, says she, an officer was here some time ago, and his servant got to bed to her, and got her with child. This was what I heard that day; and the next it was buzzed about that it was my lord that got the child, and some said my lord's brother, and some the dog-boy, and several of the servants had to do with her. This is what they told me, it was the talk about the family.

Give an account what became of this Joan Landy afterwards.—She staid two or three months, till the house-keeper was afraid to keep her any longer, till we were afraid she would cry out; and then she went to her father's, and I never saw her there; but I knew he lived upon the land.

Did she go of her own accord, or was she turned out?—I can't tell.

Did you know of any child this woman was delivered of?—I saw the child.

Give an account of that.—I spoke to the coachman's wife to bid her bring it up to the gate that I might see it; and accordingly she did, and it was in blankets then.

Who brought the child?—Juggy Landy herself brought it.

About what age might the child be at that time?—I can't really tell, whether six weeks or two months old when I saw it, I can't tell justly.

Had this child any tolerable clothes on it?—The neckcloth it had on was what I gave it, it was a cambric one, and a very fine one; I brought it from England among my own things, and the child was in a clean blanket, and I gave her several other things.

How came it to pass, that you did not rather direct that the child should be brought to Dunmaine-house, than to that gate?—I would not bring it to the house.

What was your reason for that?—Because I would not have my lord or lady know any thing of it.

What was your reason for seeing the child?—To know who it was like.

How far was that gate you mentioned from the house?—A little distance.

What was your reason for seeing it there?—I did not care my lady should know any thing about it. My lady would not care the child should be brought into the house.

Was there ever a child either christened or living at that house while you were at Dunmaine?—No, never.

Did my lady ever talk to you any thing of her being with child, or having had a child during that time?—No, never a word.

Ladies sometimes talk to women in your situation; had you any discourse ever with my lady about having children, and what was that discourse?—Yes, Sir, my lady often wished she had a child, on account of a quarrel she had with Mr. Annesley.

Pray, give an account of that quarrel.—I don't know how the quarrel began; but she came up one day after dinner, and was crying. I asked her, what was the matter with her ladyship? She said, That brute below, meaning the defendant, had said, he wished she might

never have a child; and my lady said, she wished she might but have a child to inherit, and she did not care if she was to die the next hour.

You said, you had been an entire week absent from my lady, and no more; give an account of that week's absence, and the occasion of it; was it while you lived at Dunmaine?—My lady was in Dublin the week I was from her; I left my lady in Dublin, and went to Dunmaine; I was never a night from her in Dunmaine.

Do you recollect how long that quarrel was after you went to Dunmaine?—Not very long.

Was it before they came to Dublin?—Yes, it was; this quarrel was some little time after our going down, and Mr. Annesley upon it left the house, and went to Dublin.

Do you remember, during your service, that ever you were at the town of Wexford?—Yes.

Give an account at what time, and on what occasion you went there.—My lady went there to hear the trials at the assizes, and it was about the Pretender's men, as they were called; and my lady told me that there was one Walsh tried, and how handsomely he pleaded his own cause, and the defence he made; and there was one Mr. Masterson who was picked up in the Court at that time, and tried.

Can you recollect yourself the time of the year?—I know we came to Dublin the May after; and what I remember it for is, that it was king George the 1st's birth-day, that we were in Dublin in May; and I remember it for this reason, that there were fire-works in the Custom-house yard, and this present lord Anglesea, that was Mr. Annesley then, had lodgings just opposite to it, and we went to his lodgings to see the fire-works.

Did my lady go to Mr. Annesley's lodgings?—She did, my lord, and my lord and I.

Do you know what day of that month was the birth-day of king George the 1st?—I can't tell whether it is the 28th or 30th; I know there is the Restoration next to it; but I don't know which it is, the day before or after.

Recollect how long a time before your going to Dublin was it that you were at Wexford?—It was not long indeed. I can't recollect: I know we were in Dublin some time before the birth-day; I don't know, about a fortnight.

But what time from your return from Wexford assizes, did you go to Dublin?—I can't tell what time the assizes were, not I, for I don't remember the month.

Do you remember the season of the year?—Yes, I know it was the spring, and I know it was a little before we came to Dublin that the assizes were.

Recollect who was the company that went at that time to Wexford with your family.—Mrs. Giffard went in the chariot with my lady, my lord went on horseback, and I went on horseback, and Rolph went on horseback, and Mrs. Giffard's sister on horseback, but what her name was I cannot tell; but what other servants went I cannot tell; and there were several more which I don't know.

Do you remember any other servants that went?—No, except the coachman, one Weedon, and the postillion, one Burke.

You say, you lived at Dunmaine at the time of this unfortunate separation?—I did.

Give an account of the occasion of that separation.—On Saturday night, my lord said, he would go out somewhere to dine the next day, but I don't know where, indeed; but my lady begged of him not to go, for she hated he should be out on a Sunday; but he said, he would go; and accordingly on Sunday morning he did go from the house; and I heard a noise, and was going down stairs to see what was the matter, and I met my lord coming up with his sword in his hand, and he said, Heath, I have found Tom Palliser in bed with my wife. I said, It was impossible, and that he was set upon by a set of villains; upon that, my lord said, She should go out of the house; and upon that, he sent for one Mr. Welman from Ross, and he came and advised my lord, I believe, to turn my lady out; but she begged, he would let her have one room in the house, and he needed not come near her, till she wrote to my lord duke; but he would not hear her; but he hauled her out of bed, and I advised her to come out: upon which we packed up some things, and went into the four wheeled chaise, and I believe it was duskish when we went out, and it was night when we got into Ross.

Was there any thing happened to you when you went away?—Mr. Taylor handed my lady into the chaise.

Was there any child brought to take leave of my lady?—O no! no child, indeed.

Who was in the chaise with her?—I was, my lord; she got in first, and I after her directly.

Did you know Joan Laffan?—Yes, I did.

During your residence at Mr. Butler's in Ross, was there any child that my lady received in that house as her child?—No, no such thing.

How long did you live at Mr. Butler's?—We were not long at captain Butler's.

Was he and his family at home when you went there?—There was nobody at home but the servants: Mrs. Butler and captain Butler were out of town; there was one Mr. Watsal that was clerk to the captain, and he sent a man and horse to let Mrs. Butler know that we were there, and she came home the next day; but captain Butler did not come home for three or four days after.

Recollect the several places in which my lady lodged at Ross?—I believe she stayed two months or more at captain Butler's, and then we went to one Mr. Wright's, and then we went to one Mr. Croft's, and there we staid till we came to Dublin.

During this time was there any child brought to my lady as her child?—No, never was; she had no child. I can say no more, if they racked me to death.

Did you know one Joan Laffan?—Yes, I did.

What was she?—She was what we call house-maid.

Was it her business to clean the rooms?—Yes, to wash the rooms, and make the beds.

What time did she come to live at Dunmaine?—Three or four months before my lord and lady parted.

During the time that you lived at Dunmaine, had she any other employment in the family?—No other, except she went to the laundry, when the business was done in the house, and helped the laundry-maid to wash.

Who was laundry-maid at this time? I cannot tell, we had several.

Did she dry-nurse any child before the separation?—No, we had no child for her to dry-nurse.

Did you ever see a child in the hands or care of Joan Laffan while she was at Dunmaine house?—No, never, for we had no child.

Did you know one Edward Lutwyche, a shoe-maker at Ross?—No, I don't know any thing of him.

Who made your lady's shoes at Ross?—I don't know, indeed.

Do you know of her buying any shoes whilst she lived there?—I don't remember she did.

What sort of shoes did her ladyship usually wear?—She wore braided shoes.

Of what colour?—Several colours, and several pair of shoes, I cannot tell what.

Do you remember her ever bespeaking a pair of shoes for a little boy?—That I am sure she never did.

Had she a pair of white damask shoes at Ross?—She never had, while I lived with her.

Can you recollect what persons were present when you saw my lord come up stairs with his sword in his hand?—Indeed, I don't know any.

Where did you remove to from Ross?—We came to one Mr. Cavenagh's, in a place called Stable-yard, I think they call it so, in Mary's-lane.

There you came to a lodging?—Yes, and boarded there.

How long did you stay at that house?—I really cannot tell; but from thence we went to one Mr. King's.

What was he?—An apothecary in Charles-street.

Did you lodge and board there?—Both.

How long might you stay there?—I cannot tell; from thence we went to one Mrs. Mac Mullen's, I don't know what the street is, I think it is Tash's-square in Mountrath-street, it turns up by Mr. King's, and there we were a little while, two months or more, before we went over to England.

Can you recollect in what year you went to England?—Yes, I can, in the year 1724.

In what month?—I believe about September.

Before lady Altham went to Mr. King's, the apothecary, had you, or any other person, looked out for other lodgings?—Yes, I went somewhere upon the Quay, but I don't know whose house it was.

Did you see the owner of that house?—Yes, it was a woman.

Do you recollect her name?—No.

Did you come to any agreement?—Yes, I gave her a pistole in earnest; but afterwards we did not like the place, and I went and told her so, that the doctor did not like my lady should live upon the Quay, and she gave me the pistole again.

Did you ever see that woman afterwards?—Never, to my knowledge.

Did my lady ever tell you, that she saw that person?—My lady never did see her in her life, for my lady never knew any thing of her, and never did speak to her, to my knowledge.

During your lady's residence either at Cavenagh's, or King's, or Mrs. Mac Mullen's, did any boy visit or wait upon her, as her child?—No, never, nor they could not.

Did any other person go with you, when you went to see this gentlewoman about the lodgings?—One Mr. Mac Mullen went with me.

What was he?—He dealt in linens.

Did any servant of lady Altham's go with you?—No.

Did you ever hear or know any thing of this same boy, that you say was Joan Landy's child, from the time you left Dunmaine?—No, I never troubled my head after him.

Did you ever hear that he was in Dublin?—I had heard that my lord had took him; but I know nothing of him.

Do you know whether my lord Altham was alive when you went to England?—I heard he was alive.

Had you any account afterwards of his death?—I had a letter from Mrs. Mac Mullen, giving me an account that he did die.

What was the purport of that letter?—I have the letter in my pocket.*

Did you communicate that account to your lady?—I went directly and shewed her the letter.

How soon after you received this letter was it that you gave her the account?—I went directly and shewed the letter to her.

What happened upon that? Did my lady make any reflections upon that affair?—She said nothing at all.

Had your lady any fortune come to her upon the death of her husband?—No, the estate went to the late lord Anglesea, she not having a jointure settled upon her; had she a child, the Altham estate would have come to it.

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* According to the 'Trial at Bar', &c. "the witness produced the letter and offered to read it, but plaintiff's counsel objected to the reading it, as improper evidence, and deponent was only admitted to read the date of it in order to refresh her memory as to the time. It was dated at Dublin, December 18th, 1727."

Did my lady know that this estate went to the earl of Anglesea?—My lady told it me, or else I should not have known it; I had all my knowledge of it from her, otherwise I should not have known it.

When was it you had that discourse; before, or after, my lord's death?—Both before the account of his death came, and after.

Did you acquaint my lady Altham of the purport of that letter?—I directly went up stairs, and shewed her the letter as soon as I had read it.

When did my lady Altham die?—She died in October, 1739; she has been dead fourteen years last October.

Had my lady any account how, and where my lord was buried, and any circumstances relating to it?—No more than what is in this letter.

Did she go into mourning?—No, she made no mourning, she was in mourning at that time.

What sort of mourning?—A Norwich crape that she had had for my lord duke, and which she made a night-gown of when king George the first died.

Were there any further particulars in the letter?—She told in the letter, that my lord died, and was miserably poor.

Did you communicate the whole contents of that letter to lady Altham?—Yes, I did.

Had she any discourse with you, or did she make any observations touching any part of the contents of that letter?—I do not know any thing that she said: she took no notice of it, but she read the letter as well as I.

Was there any conversation between you about any other person mentioned in that letter besides my lord her husband?—No, she made no reflection upon it, nor said any thing.

Had my lady any maintainance or allowance from my lord after their separation?—No, my lord never sent her a farthing.

Who supported her then?—My lord duke.

What allowance did he give her?—There was 1,200*l.* remainder of her fortune in the duke's hands, for which he allowed her 80*l.* a year, gave her 20*l.* a year more, and when he died left her 100*l.* a year.

Do you know a gentleman whose name is Mac Kercher?—He was once with me.

Should you know him now if you should see him? Look about.—That is the gentleman I am sure (pointing to Mr. Mac Kercher); he told me his name was so.

Had you any acquaintance with him, and when did that acquaintance commence?—He came to my house, I live in St. Andrew's court, Holborn, and he came there; there is the directions he gave me to find a gentlewoman, and I put the day of the month upon it that he was with me. It was the 13th of April, 1742, for he said, one of captain Brisco's daughters was in town, and told me her name; and he wrote his name upon it, that I should not forget it.

Are you certain he wrote it?—He wrote it, and I saw him write it.

What passed between you at that visit?—When he first came in, he was a stranger to me, begged my pardon, and said he came to ask me some questions about my lady Altham, Whether she had ever a child?—I told him, She never had one while I lived with her, I could take my oath. Then he told me how this Mr. Annesley was recommended to him by two lieutenants, one of their names was lieutenant Simpson, but the other I do not know; and then he told me how he came to him, and that he, Mac Kercher, gave him ten guineas; and then Mr. Annesley told him he had no lodging, and did not know where to get one. He said his house was small, but if he would lodge with him he might, he should be welcome, and took him in. He then shewed me a list of the servants names, and my name was crowded in at the top, and I laughed at it. There were several names, some that I did know, and others that I did not; there was Martin Nieff, and Charles Magher the butler after Rolph went away, and there was Juggy Laffan; and with that I said: What can she know of this affair? Why, says he, Madam, she says, that she saw old parson Lloyd christen it; I suppose you know him, madam? Aye, says I, I knew him very well, but I cannot think how she can know any thing. Why, says he, she says she came to Dunmaine about a quarter of a year after my lord and lady came from Dublin. So she did, says I, but that was the last time we came down from Dublin. He then thanked me very kindly, said, he was very well satisfied with what I had told him, that he would go home and wash his hands of them, and turn them all out of doors, and would not for a thousand pounds that he had not seen me; for, says he, if you were dead, my lord Anglesea would lose his estate and title, as sure as you are alive, there would be such bloody swearing. Says I, Sir, I am sorry you have been so imposed on, for I assure you my lady had not a child. He said, Madam, for what I have been at the charge of, I do not value. And I told him farther, Do you suppose, Sir, if my lord and lady had had a child born to such an estate, that they would not have him registered? He said, That they lived in a country parish where no register is kept, and could not have it done. But I told him again, could he suppose if they had had a child born heir to such an estate, that they would not have had his birth registered?*

* It appears from "The Trial at Bar," &c. that

Mr. *Harward*, counsel for the plaintiff, objected to Mrs. Heath's evidence, with respect to Mr. M'Kercher's declaration, that it was not proved he made those declarations by Mr. Annesley's order; and though it was admitted Mr. M'Kercher was now an agent for him, yet the opinion of an agent was no evidence against the principal; which the Court admitted, and said, the jury were not to take notice of those declarations as evidence. Mr. Harward de-

Did you acquaint Mr. M'Kercher at the time of this discourse, or offer to shew him this letter of Mrs. M'Mullen's?—Yes; and he told me, that Juggy Landy did not deny that she had a child by my lord, but that it died young.

Did Mr. M'Kercher make any application in relation to your giving evidence?—There was not any.

Did he promise you any thing?—No, he did not; for he said, he would have nothing farther to say to them.

When you returned to Dublin, after the assizes at Wexford, where did lady Altham lodge in this town?—At Mrs. Vice's.

Where was that?—In Essex street.

Did you know one Mr. Maurice Annesley?—Yes.

What family had he?—There were three daughters that used to come to visit my lady.

Name them.—One was named Cherry, one was named Sarah, and the other Dorothy.

Did you hear of Mrs. Cherry's being married to any one since?—Yes.

To whom?—I did not hear to whom.

Was not her name Blake?—I don't know, I never saw her after.

Did they visit as relations?—They did, and were relations to my lord.

What condition was your lady in when she lodged at Mrs. Vice's, was she with child?—No, she was not.

Did you ever hear of any miscarriage at that time?—Never while I lived with her.

Did your lady at any time keep her bed at Mrs. Vice's?—I do not know; she might lie a-bed a day or so.

Did you ever tell any body that she miscarried?—No, I never did.

Or that she was with child?—No, never.

Had she any particular kind of shoes or slippers made when she was there?—None particular.

Was there any woman-servant in the house of the name of Mac Cormack?—Yes, Mrs. Vice's maid, one Catharine.

Did you ever tell her that your lady miscarried?—Never; I never had any conversation with her in my life.

Did you ever tell her any thing relating to your lady as a piece of good news?—No, never.

Did you know one Alice Bates, a servant of Mrs. Briscoe?—There was one Ally, that waited on Mrs. Briscoe's mother, but what her name was I cannot tell.

Had you any discourse with her of my lady's being with child?—No, never, for we were not so long in Briscoe's house.

Had she access to my lady Altham, did she use to visit her?—Visit my lady! I never saw her out of captain Briscoe's house.

Did you never see her put her hand upon my lady's belly?—No, I never did.

Do you remember Alice Bates's going at any time in a sedan-chair to see my lady at Vice's?—No, nor I do not know that ever I saw her at Mrs. Vice's.

Did you ever hear my lord Altham call his lady by any remarkable, familiar appellation?—He used to call her Molly.

Did he ever use to call her Moll Sheffield, in good humour?—No, I never heard him say so.

You are positive you never told any thing to Alice Bates as a piece of good news?—I am positive as to that, I never did.

Do you remember at any time, during Mrs. Briscoe's and her daughters being at Dunmaine, that you called Mrs. Briscoe out of her bed?—No, never.

Do you remember any fright my lady received during the time they were there?—No, I never did.

Do you remember any particular china in the house of Dunmaine, or any thing concerning them?—I remember, when we came to Dunmaine, that there were some cups and saucers that had very ugly, nasty figures on them, indecent figures, and my lady never cared to have them used; but one day the house-keeper had got some of the saucers to put the desert on, and there happened some words at the table, and my lord threw them on the ground, as I was told.

Did that cause any fright in my lady?—No, none at all.

Did you ever call Mrs. Briscoe and her daughter out of bed, and tell them that my lady was very ill?—No, I never did.

Do you remember one Mary Doyle in the family?—No; Betty Doyle, I did.

Was my lady in any sort out of order the night that the saucers were broke?—No, she was not at all.

Were you in my lady's room the next morning?—Yes.

Were there many servants there?—No, not at all; the house-maid might be there, that used to come and light the fire.

Was miss Briscoe in my lady's room the next morning?—I cannot tell but she might.

Did you see her there?—She might be there, for my lady always breakfasted in her chamber, and she breakfasted with her.

Do you remember Mr. Sutton the surgeon?—Yes.

Do you remember any quarrel that happe-

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sired leave to observe, that it appeared however from Mrs. Heath's account, that although Mr. M'Kercher had with great humanity taken Mr. Annesley into his protection, yet his friendship did not hinder him from acting in all this affair with the caution becoming a man of sense. And as she says, that upon the account she gave him, he declared his resolution to drop the pursuit of Mr. Annesley's pretensions; so the presumption is, that he did not change that resolution but upon good grounds; and that it likewise appeared from Mrs. Heath's evidence to the honour of Mr. M'Kercher, that he did not attempt by any corrupt motives to persuade her either to give false evidence, or suppress the truth.

ed about him?—Yes, my lady never liked him, and he went from the house, and was away some time.

Do you recollect any occasion of sending for Sutton from Ross to my lady?—I cannot tell whether there was or no.

Do you remember any such occasion as required a surgeon?—I remember once she had an inflammation as we thought in her leg, and I do not know whether my lord sent for him then; and once her arm was cut, but Sutton was then in the house.

Could he attend her in any disorder of any continuance without your knowing it?—No, I think not.

Did he attend her in any disorder after that quarrel?—I do not remember any thing ailed her after that quarrel.

Was there any confinement for about a fortnight that required the attendance of a surgeon?—No, not that I know of.

Did Sutton ever refuse to come when sent for?—I do not know that he ever refused to come.

Do you remember the chariot to be sent for him?—I do not know; he generally had a horse.

Did you know Mrs. Shiels a midwife?—I knew her at Ross.

Did you ever see her at Dunmaine?—I never saw Mrs. Shiels at Dunmaine in my life.

Do you remember the name of Dennis Redmonds?—No, not that I remember.

Did you ever send that man to Ross for Mrs. Shiels?—I never gave any directions to him or any servant to fetch Mrs. Shiels to my lord's house.

Did any thing particular happen after breaking of the saucers?—No, nothing particular.

Did not you go to Mrs. Briscoe's room, to tell her my lady was ill?—I did not.

Do you remember the name of one Thomas Brooks?—I do not remember any such name.

Do you remember whether my lady was, or was not, let blood at that time?—I cannot be positive whether ever she was let blood.

Do you remember any particular person being sent for that afternoon that the saucers were broke?—No, I do not remember that any person was sent for.

Recollect if you know Dennis Redmonds.—I do not remember any such name.

Was there a huntsman in my lord's family?—Not a particular one, there was the groom and other servants.

Do you remember any thing particular to be done at the time of the separation by any of my lord's servants to any gentleman in the house?—They said that they had cut off Mr. Palliser's ear; but I cannot tell any thing of it, not being present; I was waked with the noise, and came down stairs.

Had you ever any discourse with any to this purpose, That if my lady was to be affrighted at this rate, she would never go on with a child?—No.

Did you ever expostulate with my lord about giving my lady ill usage?—No, I never did about any such thing as a miscarriage.

Can you say that my lady kept her bed one day or more during the time of Mrs. Briscoe's being at Dunmaine?—No, I do not know that ever she kept her bed a day, or more, while they were there.

Did you ever call Mrs. Briscoe out of bed at any time earlier than usual?—No, I did not indeed.

Do you remember, whether my lady took any offence at my lord's breaking the saucers?—No, I heard no more than what the servants told me, I was not in the parlour.

Did you hear her express herself in any manner concerning it?—No, not at all concerning those saucers, she never liked them.

Consider whether the night of that day Mrs. Briscoe was called up by you?—No, I never called her up at all. I am sure of it.

Recollect whether Sutton the surgeon, after he quitted the family, came and stayed any particular time?—Often after he was turned out; he went away because my lady did not use him as pleased him.

Did he come again and stay any time?—Often, may be a fortnight, sometimes more, and sometimes less.

Was he resident in the house?—He was only backwards and forwards.

Recollect yourself, whether Sutton, about the time of the saucers being broke, came and lived there any time?—I do not remember that.

Did he come and attend my lady as a surgeon?—Indeed I cannot say he did.

Who was it first told you of that unfortunate affair of Mr. Palliser's?—My lord Altham himself.

Do you recollect, whether Joan Laffan called you down to rescue Mr. Palliser from being murdered?—No, I am sure she did not; because my lord came up, before I could get down on the noise, and told me of it.

Had you any conversation with her that day concerning that accident?—No, for I was in too great a fret to talk to her about it.

Can you recollect how soon after my lady came first to Dunmaine that Sutton quitted the family?—I cannot tell indeed how long.

How long was it after she first came that this accident of the saucers happened?—It was whilst Mrs. Briscoe was in the house, and that was not long.

Were you in the room during any part of the dining time?—No, I was not.

Were you ever in the dining-room during the stay of Mrs. Briscoe there whilst they were at dinner?—No, I cannot say I was, I had no business there at dinner time, but went in with the tea-things soon after dinner.

What was the age of miss Briscoe?—I cannot tell.

[Cross-examination.]

You say, madam, you came over with lady Altham, and she lodged at captain Briscoe's?—Yes, we did.

Was not lord Altham brought to that house and reconciled?—Yes, he was.

Did not they stay some few days after there?—Yes.

Did not they go from thence, after four or five day's stay, and lodge at Vice's in Essex-street?—No, they went directly down to Dunmaine.

How many day's stay did you make at captain Briscoe's?—My lord and lady met the 4th and 5th of December, and we got to Dunmaine on Christmas-eve.

Did my lady stay there all the time till she went to Dunmaine?—My lady did not lodge out of captain Briscoe's house at the first meeting.

How soon, after the first time that you went to Dunmaine, did my lady come next to Dublin?—I know Mrs. Briscoe and her daughter were at our house at Dunmaine on St. George's day; afterwards my lord came up to Dublin, I do not know in what month, but she desired my lord to make use of her house while he staid in Dublin; for Mrs. Briscoe did not go to Dublin, but to some other acquaintance. My lord was at her house for some little time, and after went to Mrs. Vice's; and when we were at Dunmaine, we heard a great many quarrels that my lord was in; and my lady, when she heard of such doings, came up. He sent down a running footman, who came when all were in bed but me and Mr. Rolph; he knocked at the door and alarmed us, for we were afraid he was come with some ill news about my lord. I went down, and asked how my lord did; he said, Very well; and he brought some green tea for my lady. I carried the tea to my lady, the man was to go to Ross the next day, and so return to Dublin; there was one captain Najack and his lady at our house, and they persuaded my lady to go up to Dublin.

When was that?—In violent hot weather, whether in July I cannot tell; but it was a little while before the queen died, for I saw king George proclaimed at the castle.

Did not you lodge then at Mrs. Vice's in Essex-street?—Yes, we did.

Were my lady Altham and you ever before at Vice's?—My lady Altham was one day, but not to lodge there; she was there the day after my lord and she met, which was on a Saturday; my lord took her out on a Sunday, and shewed her where she was to lodge.

Did not you continue in the lodgings at Mrs. Vice's till the Christmas following?—No.

How long then?—A little after the news of the queen's death my lady got mourning, and we stayed three weeks, or a month, or five weeks, I cannot guess the time, after my lady went into mourning; and then we returned to Dunmaine.

How long then were you at Dunmaine, after my lady's return, and after the queen's death, before you came to town again?—Till the May following, that was the first birth-day of king George 1.; may be a fortnight or three weeks, or thereabouts, in May.

You named the daughters of one Mr. Maurice Annesley?—I did.

Now, recollect yourself very well, did they visit lady Altham when she was at Vice's, in the month of August, after the queen's death, the first time she lodged there?—I cannot recollect that, whether they did the first time, or not.

Where did you lodge the second time?—At Mrs. Vice's again in May 1715.

Did any, and which, of Mr. Maurice Annesley's daughters visit lady Altham at Vice's in 1715, or at any time after?—In May 1715 they all did.

Now name them.—Cherry, Sarah, and Dolly. I know Cherry was the eldest; but which of the other was elder, I cannot tell.

How long did you stay then in Dublin?—We stayed above a year in town, from May 1715, and better.

Did my lord and lady leave town during that time?—My lord went down, but my lady did not.

Did you know Mrs. Charity Annesley?—I did very well.

Was my lady visited by Mrs. Charity Annesley, after she came to Vice's in Essex-street, in May 1715?—She was visited by her then, I am sure.

You mention, madam, that there were instances of ill usage from my lord to my lady; when he behaved in that manner, I suppose, you did not always escape; had you ever any quarrel with my lord at Vice's, or any where else?—I cannot say I had at Mrs. Vice's. I know one night he was making a great noise with a chair, and I went to take away the chair, and he took hold of my head-clothes.

Which of the times you lodged there did this happen?—I cannot tell.

Was it in the year 1714, or 1715?—I cannot tell.

Did he make a great noise?—Yes, and I went to take the chair from him, that he might not disturb the family.

Did my lady Altham scream out upon that occasion?—No, I do not believe she did; for she would rather have been killed, than any one should have heard it.

Did you know any one that was called Lucas?—I had no knowledge of any such.

Did you ever hear any person, in that family of Mrs. Vice's, name the name of Lucas?—I remember some quarrel there was, that I heard my lord make use of the name of Lucas.

My lord and lady were both in bed at that time, you say?—Whether they were or not, I cannot say.

Did either of them get out of bed?—I cannot tell.

Suppose either of them should have opened the window, and called out of the window, must not you have heard it?—I cannot tell; I remember one night my lord was going towards the window, and my lady held him.

Was it that night that you took the chair from him?—I don't know whether it was;

but I believe not. My lord said, That he would send for one Mrs. Lucas, to see whether my lady was with child; for if she was not, he would turn her off, and would not live with her; but he would know whether she was with child before he turned her away.

Can you be positive, whether, immediately after this, my lady was confined to her chamber?—I do not remember that she was confined to her chamber; she was out of order with a cold or so.

Was there any discourse the next morning about a miscarriage?—I am sure there was not; for I am certain there was no miscarriage, and therefore there could be no discourse of it.

You are sure you heard the name of Lucas mentioned?—Yes, I did by my lord.

You mentioned your having gone to take a house upon the Quay?—Yes, when we went from Mr. Cavenagh's.

And you gave a pistole in earnest?—Yes, which the gentlewoman returned.

You say this woman never saw your lady that you know of?—No.

Might not she have seen her without your your knowledge, in the house of Mr. King?—No, never that I know of; she might have gone there when I was out of the way.

Was there any conversation with lady Altham and you, about the returning of that pistole?—Not that I know of.

Did she ever tell you that she had seen the woman?—She never did; and I believe if she had, she would have told me of it.

Did you ever tell any body that that pistole was returned?—I spoke of it; I made it no secret.

Did you ever hear of that pistole being returned?—One M'Mullen went and received it, and not I.

And whom did M'Mullen give it to?—He gave it either to me or my lady.

Did M'Mullen go with you both times to the lodgings you took on the Quay? Did not you say, you went and told the woman that the doctor said the air of the Quay was not fit for my lady?—Really I do not know whether I went with M'Mullen or no; I do not believe I was with him.

Was it you that made the excuse to the woman?—Indeed I do not know whether I did or no, I believe it was he that went.

Where did Mr. Annesley, now lord Anglesea, live in 1715?—Opposite the Custom-house I think; it was so that I could see the fireworks.

How far was that lodging from Essex-bridge?—Indeed I cannot tell how far.

Do you know whose house it was in?—No indeed.

Did you know the house where sir Alexander Cairnes and Mr. Henry lived?—I do not know where any of them lived.

What kind of an apartment was there for lord and lady Altham to be entertained in?—There was a dining-room and a bed-chamber, the supper was in the bed-chamber set out.

Did not you go over Essex-bridge to go to these lodgings?—We did.

Did you turn on the right hand or the left?—On my right hand.

How far did you drive on the Quay?—I went in a chair.

How far did you go then?—I cannot tell.

Was it up one or two pair of stairs?—One pair.

Was that Mr. Annesley's lodging?—It was.

Was it a very handsome apartment?—Indeed I cannot tell.

You mentioned in your going to Wexford a sister of Mrs. Giffard?—Yes.

Did she ride behind any body?—No, she rode single.

What was her name?—I cannot tell.

Was she a maiden, or a married woman?—She was unmarried.

Was she part of lady Altham's company?—She was when she came there.

Did she lodge with lady Altham?—Yes.

At whose house did lady Altham live?—At captain Sweeny's.

Did my lady go there to visit Mrs. Sweeny?—I cannot tell whether she did or no.

Was it not to hear the trial of the Pretender's men?—I cannot tell, for I did not know of any particular trial.

Was there any particular trial expected?—My lord and lady might know it, but I did not know it.

What clothes did my lady wear at Wexford?—Indeed I cannot tell you what clothes.

Had not my lady a silver silk?—No, not then; she did not wear it at Wexford, because she was in mourning for the queen.

Pray, what servants attended my lord at that time?—I cannot tell what servants, but his own servant Anthony Dyer was ill.

But you are sure Rolph went there?—Yes.

What colour was the horse he rode?—Indeed I cannot tell, nor what coloured horse I rode myself.

Did Rolph lodge in the same house with my lord?—No, he did not.

Did he come to my lord at Mrs. Sweeny's?—I cannot tell, for my lord was a justice of peace, and Rolph had some informations to deliver.

Did he attend him as a servant?—I do not know but he might, for my lord never dressed in my lady's room, and I cannot tell who attended him.

Was it the day after you came down that you mentioned Juggy Landy's being with child?—The very night. It was said that night that it was an officer's servant's, and the next day that it was my lord's, or his brother's, or the dog-boy's, or some else of the servants.

How long did this woman continue in the house after?—I cannot tell.

And pray, Madam, could your righteous spirit bear that this woman should stay so long in the house?—Indeed I did not concern myself about her.

Do you know the lady Blessington?—I do

not know lady Blessington; what lady Blessington do you mean? There was one capt. Boyle, I have seen his lady.

She is the lady I mean; did you ever see her visit lady Altham?—I am sure I have never seen her.

Do you remember one Mrs. Piggot?—Yes.

Did she visit lady Altham?—Yes, she did.

Was there an intimacy in the family?—She visited us more in Ross than at Dunmaine.

Did she visit my lady at Dunmaine frequently?—She did, but not often.

Where did you dine the day of Palliser's affair?—No where.

Did you get any thing to eat when you came into Ross?—I know we had some tea there, I cannot tell whether we had any thing else.

Did you eat nothing else that day?—I cannot tell, for there were none but the servants there.

Did not crowds gather about to see my lady come into Ross?—There was a crowd of people, but it was so dark, I could not see who they were.

Was it dark when you left Dunmaine?—It was duskish when we left Dunmaine, but it was dark when we came into Ross.

What happened upon the quarrel between my lady and captain Annesley, did he leave the house upon it?—Not immediately, but he never came up to dine with my lady after.

Did they never come into company at Dunmaine after?—They never did; my lady sent for him the next day to come up to dinner, but he would not; she then sent to know if he would have something sent down, and he would not.

Did he ever come to dinner after at Dunmaine?—Not up stairs into the parlour.

Did he ever come to Dunmaine after he left it while my lady was there?—He never did.

When was it they first met after this quarrel?—When we came to Dublin afterwards; when we came, my lady took a chair to Mrs. Vice's, and she met Mr. Annesley in Essex-street: he said, Your servant, my lady; your ladyship is welcome to town; and after that he came to Mrs. Vice's.

Do you recollect what month that was in?—It was violent hot weather, I believe in July, for it could not be a month before the queen died.

Do you know one Mr. Hussey?—I do know him.

Did you see him at your house in London?—I did.

Did you ever discourse with him relating to this affair?—Yes; and told him several times that my lady had not a child.

What Mr. Hussey is this?—I know nothing but that he was an acquaintance of an acquaintance of mine that brought him to my house.

Did not you tell Mr. Hussey that the plaintiff was greatly wronged, and that you knew more of that affair than any body?—No, by the virtue of my oath, I never did.

Did not you see Mr. Hussey at your house, when the report was that this Mr. Annesley was on board the fleet with admiral Vernon?—Indeed I do not know what time.

Pray recollect yourself. I ask you, was not this immediately after that Mr. Annesley was on board Vernon's fleet?—I do not know what time.

Was it a month after you heard the report?—I do not know indeed.

When was it you first heard that report?—The first time I heard of it, I believe, will be three years next January.

Who first informed you of it?—The duchess of Buckingham sent her woman for me; I could not think what she could want, and I said nothing to her woman, but went with her, and when I came, and went up stairs, and sat down, her woman was the first that told me of it.

Was it not immediately after that, that Mr. John Hussey came to your lodgings?—I cannot tell what time he came.

Is it three years ago since he came to visit you?—I believe it is three years and more, I cannot tell what time.

Was it not two years ago?—I have seen him several times within these two years; he has had the discourse about this plaintiff several times.

Was it two years since you saw him last?—Yes, it will be two years——I cannot recollect.

Was it before the duchess of Buckingham sent for you?—No, I knew nothing of it till the duchess sent for me.

What state of health was lady Altham in when she came to Dublin from Ross?—She was lame.

Was not she troubled with a dead palsy?—I cannot call it a dead palsy.

Did not that disorder deprive her of her limbs?—She lost her limbs by that disorder, it came by degrees; but when she came from Ross, she could go about with holding by the hand.

When she went to London, what state was she in?—She had lost the use of her limbs; she could not stand; when I first went to London, with one hand I could lead her about the room, and then with both hands, and then not at all; I was forced to put her in a chair and wheel her about.

How did she come by that disorder?—Indeed I cannot tell.

Did not that disorder come on her after there was a report that she had a child?—A child! The disorder began at Ross.

Was there any report, that you know, of my lady's being with child?—Yes there was a report before I lived with her; I heard of such a thing.

Was there any such report after you came to live with her?—No, I do not know, Sir, that there was at any time after I came to live with her.

Was not she bed-ridden of this disorder before her death?—No, she never was.

Was not she impaired in her senses?—No, she never was; she was well in her chair the night before her death, and she took a fit, and we put her to bed, and she died the next night, but till that time she had her senses as perfect as any body in the court, and could manage all her affairs, for I never kept any account for her.

Was not that 100*l.* a year left her by the duke to cease upon the death of my lord Altham?—Yes, it was.

How was she supported then to her death?—Because my lady duchess gave her 100*l.* a year, for the interest of the 1,200*l.* after the duke's death.

Where have you lived since the death of lady Altham?—In the house I now live in.

What business do you follow?—I take in plain-work, and I have some money at interest.

Are not you a washer-woman?—No, I am not.

What time did the duke of Buckingham die?—I do not know, he was dead before my lady and I went to England, he was dead before we left Ross.

What is your present way of living?—I have the interest of some money left me, and I take in plain-work, and clear-starching; my daughter and I live together, and we have the interest of about 70*l.* between us, but the greater part of it is my daughter's.

[It being about eight o'clock at night, the Court by the like consent as usual, signed by the parties and read in open court, adjourned to the next morning at ten of the clock.]

Saturday, November 19, 1748.

The Court being met at ten o'clock in the morning, according to adjournment, the jury were called, and answered to their names, and then the counsel for the defendant proceeded to examine their witnesses as follows.

Mr. *Robert King*, one of the Aldermen of the City of Dublin, sworn.

Says, he knew the late lady Altham; that she came to lodge at deponent's house in June 1723; that she had a woman and a footman to attend her, and that one Mrs. Heath was her woman; says, she lodged and dieted with deponent; says, he never heard her say she had a son; that she was almost every day at deponent's table, and deponent frequently heard her lament her misfortunes, but never heard her talk of a son. Being asked if it was reputed that she had a son; says, he cannot tell, if it was reputed that she had a son, but believes that if she had had one she would have mentioned it; and as deponent never heard her talk of her having one, is induced to believe she never had. Says, Mrs. Heath behaved very well while in deponent's house; that she eat at the same table with my lady, and lay in the same bed; and believes she was a discreet, honest woman. Being asked if my lady was a sickly woman, and if she seemed to be impaired in her understanding; says, she had a paralytic disorder, but that it did not affect her understanding. Being asked if he ever saw a child visit her while at his house; says, he never did, nor did he see any body visit her but one Mrs. Mears.

[The counsel for the defendant having asked those for the plaintiff, whether they would cross-examine Mr. Alderman King; Mr. Harward answered, That if they were as well acquainted with all the defendant's witnesses as they were with Mr. Alderman, they should not cross-examine any of them. The Lord Chief Baron observed, that the counsel on both sides were very polite gentlemen this morning, and wished this understanding might continue.]

Elizabeth Doyle, otherwise *Molloy*, sworn to the Voire Dire, and then in chief.

Says, her maiden name was Doyle, but is now Molloy; says, she knows Dunmaine very well; that she was hired in Dublin as a servant to my lord and lady, and lived with them there about thirty years ago, to the best of her knowledge; that my lady came to Dunmaine on the Christmas-eve, in 1713, and deponent was there the night before; says, she continued in the service about a year, and was laundry-maid; that she married out of the family, and lived eleven years at Dunmaine after my lord and lady left it; says, that my lord came to deponent's cabbin one day (after she had left the service) as he was hunting, and asked deponent if she would dry-nurse Juggy Landy's child; that she told my lord she would dry-nurse a child for his lordship, but not for Juggy Landy; says, that this discourse was after my lady came to Dunmaine; says, she saw the child when he was about a year old; that Juggy Landy was with child when deponent was in the service, and she was brought to-bed about May, after deponent came; says, my lady lived at Dunmaine about three years, till she and my lord parted; that this was a good while after deponent left the service; says, deponent was to have taken the child into her own house, to dry-nurse it. Being asked how old the child was when my lord applied to deponent; says, she cannot tell. Being asked what she means by dry-nursing; says, she means to take care of a child after it comes home from the nurse; that sometimes a child of six years old is dry-nursed. Being asked if she ever knew of my lady's being delivered of a child, while she was in the service; says, she never knew nor ever heard it; that if my lady had had a child, she would not have concealed it, for that she would have been proud of it, for deponent has heard her say, she wished to have a son or daughter. Being asked if she remembers any christening at Dunmaine house, or any rejoicings on that occasion while she was there; says, she does not remember any christening, nor ever

heard of any rejoicings there on any such occasion.

[Cross-examined.]

Being asked if she is sure she heard lady Altham say she would be proud of having, or wished to have a child; says, she never did hear her say so, but knows she would have been proud of having a child. Being asked if she ever heard lady Altham say, she had a child; says, she never did. Being asked when it was my lord applied to her to dry-nurse the child; says, she cannot tell, but says she has dry-nursed children at ten years old. Being asked if she knows Mr. Jans, and Mr. Reily; says, she knows Mr. Jans, but not Mr. Reily. Being asked if she knows one David Howlet; says, she does not. Being asked if she never had any discourse with any one about my lady's having a child, and that if she did not say that my lady had a child; says, she does not know of any such discourse, or that she ever said my lady had a child. Being asked if she ever saw lady Altham after she left Dunmaine; says, she saw her at Ross and in Dublin. Being asked if she was never married before she married Molley; says, she was married to one Byrn. Being asked how long it was after her marriage that my lord applied to her to dry-nurse the child; says, she cannot tell: says, my lord was on horse-back when he spoke to her; says, she has forgot the servants' names that lived in the family when she was there; says, her husband was a farmer and joiner, and paid 15 or 16 pounds a year rent.

Martin Neife sworn.

Says, he knew my lord and lady Altham very well, and knows Dunmaine in the county of Wexford very well, that he lived there a year before my lady came; that he was smith and farrier to my lord, and he bought tools for deponent, and built him a forge. Says, he eat and drank in the house, and slept up-stairs, and lived there all my lady's time, but was sick three months, and was then at Ross, and in Thomas-town. Being asked what time of the year he was sick; says, he cannot tell, that he is no scholar, and could not keep an account of it; says, my lady was near a year in the house before he fell sick. Being asked if he remembers the day my lady Altham departed from Dunmaine; says, he does, for that he went with her to Ross. Being asked how long it was after his sickness that my lady Altham went to Ross; says, he cannot tell. Being asked what time of the year it was he came home after his sickness; believes it was about the beginning of winter, but before my lady went away. Being asked how long my lady continued at Dunmaine; says, my lady came to Dunmaine a day or two before Christmas-day, and staid there till about Christmas three years after, and to the Candlemas following. Being asked if he did ever see a child at the house of Dunmaine; says, he never saw a child there, but a bastard son of Joan Landy's, who was brought thither a about two months after my lord and lady parted, and that he saw him with my lord three years after the separation; that in a little time after my lady went away, the child was taken into the house. Being asked who were the servants there in his time; says, Mr. Taylor was the head man, Anthony Dyer attended my lord, and was gentleman to him when deponent came to the house. Being asked who was my lord's gentleman at the time of taking the child into the house; says, there was one Kennedy, who also attended on my lord, but deponent was not positive whether Kennedy or Dyer was then my lord's gentleman, but one of them was gentleman to him at that time. Being asked who was gentleman after Dyer to my lord; says, he believed Kennedy was. Being asked if he ever saw Joan Landy, when she was with child; says, he did, and saw her child twenty times in her arms, when she used to come about the house of Dunmaine, and especially when my lord was abroad, she used to come; for she used to ask, Is my lord abroad? He often saw her come in the back part of the house, where his forge was, to get something to eat and drink, and she received meat and drink from the butler, called Thomas Rolph. Being asked if she ever nursed a child; says, she never nursed a child except her own, while the deponent was in the country. Being asked who attended the child when it was brought into the house; says, the dairy-woman who was called Black Kate, and the child was afterwards brought to Kinnay, in the county of Kildare, when my lord went to live there, and the deponent saw him there with my lord, and it was the same child that was at Dunmaine, that the deponent saw at Kinnay. Being asked if he ever saw that same child in Dublin; says, he did, that he saw that same child at College Green, playing among the boys; most of the boys were shoe-boys; that he was neither well clad, nor had shoes on, and deponent believed my lord lived at that time in Proper-lane. Being asked whether it was the same boy he saw in Kinnay, that he saw in College Green; says, it was the same boy. Being asked whether he saw the same boy at Carrickduff; says, he does not know Carrickduff. Being asked how old the boy was when he saw him at Kinnay; says, between four and five years to the best of his knowledge. Says, he never saw the boy since he saw him at College Green; that he does not think he could know him now. Says, he believes my lord staid at Dunmaine two years. Being asked whose child was the boy reputed to be at Kinnay; says, he was then reputed, by every one of the servants, a bastard son of Joan Landy's, and whenever he did amiss my lord would have him whipped; and deponent heard my lord once say, Damn the bastard, he will never be good, because he had Juggy Landy's blood in him; says, my lord whipped the boy several times, and used to say the same thing; and

call him a bastard; and my lord desired the dogs to be let at the mother, if she called at Kinnay. Being asked how was Joan Landy employed when she was in the service; says, she was kitchen-maid under Forster (the cook), and she left the house because she was with child. Being asked if he ever heard of any child being christened in Dunmaine house while my lady was there; says, he never did. Being asked who was my lady's woman; says, one Mrs. Heath, and nobody (as deponent knows) attended my lady but she, and he was at Dunmaine when my lady came there, and before it; but can't tell who came with her ladyship to Dunmaine. Being asked if he was in the house the day of the separation of my lord and lady; says, he was there at that time; that it was on a Sunday. Being asked if he could tell the occasion of it; says, my lord called him, and all the men servants in the house up; that my lord appointed to dine at one Bennet's, but he did not leave the land of the town before he returned; that the deponent met his lordship going up stairs with a drawn sword in his hand, and asked him where he was going; and my lord ordered the deponent to go along with him, and presently the deponent heard the hue and cry in the room; and afterwards the deponent went with my lady to Ross at night-fall; my lady desired it might be late going into Ross; says, that nobody was with her, but Mrs. Heath; that the deponent was by when my lady went into a chair, and it was a four-wheeled chair, to the best of his remembrance. Being asked if there was any child brought to my lady to the chair to take leave of, as she was going away; says, there was no child brought to her to take leave of, and the deponent saw never a child there; the child called Jemmy Landy was with his nurse that day. Being asked who was his nurse; says, Juggy Landy his mother was. And being asked why he called her his nurse; says, because he saw her nurse him, and if he did not call it right it was because he was no scholar. Being asked what child was brought to Dunmaine house; says, Juggy Landy's bastard by lord Altham was brought to the house. Being asked if he knew Joan Laffan; says, he did: she was in the house before my lord and lady parted, and was in the house after; she was there in the station of a laundry-maid or chamber-maid. Being asked who visited my lady at Dunmaine; says, capt. Giffard and his lady, capt. Giffard's brother and his lady, and one Mr. Elmes, who used to come there often, and hunt with my lord; says, he believes his name was William Elmes. Being asked did he ever know Joan Laffan attend any child there; says, he never knew her to attend any child at Dunmaine; he knew the child used to sleep with black Kate, while Joan Laffan was in the house.

[Cross-examined.]

Being asked if he lived with my lord all the time he was at Kinnay; says, he did not live with my lord at Kinnay all the time he was there; he staid there for some little time, from thence he went to live at Kildare. Being asked how long he lived in Kildare; says, he could not exactly tell, but believes he lived there 20 or 21 years. Says, he removed with my lord to Kinnay; they were a year at Ballysax before they went to Kinnay; my lord went to Dublin after the separation, and can't tell how long after he came thither; but he went after to Dunmaine. Being asked when was the child taken into the house; says, he was taken into the house of Dunmaine before my lord left the country, that the child was very ill dressed then, that his clothes were not worth six-pence; he thinks they were some old things that were made into clothes for him; believes it was silk, but can't tell the colour of it. Being asked how long was my lord in Kinnay after deponent parted with him; says, he believes about a year, but that he never saw his lordship after deponent left him at Kinnay, but in Dublin. Being asked how old was the child in Kinnay, when he left it; says, about five years old, rather over than under. The child was in the beginning but badly dressed, and in very indifferent clothes, while deponent was in Kinnay; but my lord after bespoke clothes for him. He had a habit and a little petticoat, and he went to school to one Johny Mahony's, who kept school near the Curragh of Kildare. Being asked what colour the habit was of; says, he believes it was made of a slate-coloured frize. The clothes the child had at Dunmaine were made of an old night-gown; and the first clothes he had at Kinnay were worse than the first clothes he had at Dunmaine. Being asked if he saw him in his first coat and breeches; says, he saw him dressed in the first coat and breeches at Dunmaine, and that they were red, and the servants used to say Jemmy would foul his breeches, being the first time. Being asked if he heard my lord give directions to have him whipped; says, he heard my lord give directions to have him whipped, and that he was whipped when he wore the slate-coloured clothes; and the deponent heard my lord say he would break any servant's head that would let Joan Landy see the child: my lord spoke to Rice, who was coachman, to whip the boy, and said he would never be good, he had so much of the blood of Juggy Landy in him, and deponent understood he was Juggy's son; for my lord used the words his mother, Juggy Landy. Being asked how old the boy then was; says, about five years old; says, that he never saw my lord fond of the boy; that he was used to see the boy running in and out; that he frequently saw my lord at dinner and supper, but did not attend at table, being only my lord's smith; but that he was as free with my lord as any servant could be with his master; that he never saw a child at my lord's table: that he was used to see my lord as deponent went through the passage upon several occasions; and often

went into the parlour to see him, and to get money to buy iron, and had access to him at any time. Being asked if Anthony Dyer lived with my lord at Ballysax; says, he did not; says, he knows Mr. Lawrence Misset, but, to the best of his remembrance, never saw him at Kinnay; that he had no knowledge of him whilst he lived at Kinnay, but it was possible he might have been there without deponent's knowing it; says, he does not know that Mr. Misset hunted with my lord. Being asked how old the boy was when he saw him at College-green; says, about seven or eight years old, and that deponent lived about two years at Kildare before he saw him in Dublin. Being asked if he could know him then; says, he should then have known him among five thousand: he knew he had white hair. Being asked if he knew John Fitzgerald; says, he knows two of that name. Being asked if he had any discourse with any John Fitzgerald about the plaintiff or defendant, or that he was to get any clothes from Mr. Jans, or money from any one; says, that the day before he bought a halfpenny-worth of tobacco from long John Fitzgerald, who lives in St. Thomas-street, and never told him he was to get any clothes from Mr. Jans, or that lady Altham had a child; says, that he never got any money from any man to appear in court; and the way he came to appear was, that he happened to be shooing a horse for a man in Kildare, who came from the county of Wexford, and happening to talk of this affair, the deponent desired him to tell lord Anglesea that he was alive, and that he would tell what he knew of the matter; and desired he might be sent for, if occasion required, to give his testimony; and desired the man, whose horse he was shoeing, to tell Mr. Darenzy that he was willing to give his testimony. Being asked when he was in the county of Wexford; says, he has not been in the county of Wexford these twenty years, except at Gowry. Being asked how long it was since he saw the man in Kildare; says, above a twelvemonth ago. The man mentioned the affair to him as he was shoeing his horse; his name was King, to the best of the deponent's knowledge; and, as he thinks, it was mentioned in discourse, that the man said that he heard that the right heir to lord Anglesea was come over. Deponent said, if he heard he was the right heir, it was from those who knew nothing of it; for that deponent knew my lord had no son, but by Juggy Landy; and hearing it talked of in the county of Kildare, he said it was Jemmy Landy that was come over. The deponent said little care he saw Joan Laffan take of any child. Being asked if the child had ever a scarlet habit, or a feather in his cap at Dunmaine; says, he never had; that my lord came to Ballysax, and he lived there for about a twelvemonth; that he kept his hounds and horses at Ballyshannon, when he lived at Ballysax himself. Being asked what servants my lord had there; says, Harry Askin was his groom, and —— Rice was his coachman, and deponent named one or two other servants; says, they were at Kinnay for about two months before the child came there; that he cannot tell whether Juggy Landy was ever there, but that he saw Joan Laffan there, and my lord would have ordered her to be ducked, but that something happened to prevent him; says, he cannot tell whether my lord sent for the child, or who brought the child.

It being mentioned to the deponent, that perhaps he might be mistaken, it was cambiet, and not frize, the child had in his habit; the deponent said, he knew what camblet was, that he could not mistake camblet for frize. Being asked if he knows Mulhall a taylor; says, he believes he lived at Kilcullen-bridge; but does not know whether he saw a taylor at Kinnay or not: he saw a coat and breeches on the child at Kinnay; but is not sure whether it was camblet or not, but he was sure it was red. Being asked to whom did he go to school at Kinnay; says, to one Johny Mahony, and the schoolhouse was a little cabbin near the Curragh; that he did not lodge or diet there, for there was not a bit of victuals to be had there, but he dieted and lodged at my lord's. Being asked if he knew one Connor a schoolmaster there; says, he did, but he did not know the child to go to any other school but Mahony's. Being asked what sort of a boy he was; says, he was a clean faced boy with flaxen hair; and the deponent often heard my lord say he was a bastard-son of Juggy Landy's; and in presence of the servants it was said, he had too much of the blood of the mother in him. Being asked how was the child treated among the gentlemen; says, he does not say the boy was treated as a bastard among the gentlemen, for that he never knew any gentlemen concern themselves about him; but he was treated by the servants as a bastard-son of Joan Landy. Being asked whether he was introduced to any gentlemen as my lord's lawful son; says, he was not introduced to any gentleman as my lord's lawful son, as God was his judge; says, he never saw the child dine with my lord, but that he eat with his servants; that he never saw him ride abroad with my lord, and that he was not able to ride abroad then; that he remembers he was very mischievous: If the cook was dressing victuals, he used to disturb him, and put things wrong. Being asked whereabouts it was that my lord gave directions to Rice (the coachman) about whipping the boy; says, that it was at the kitchen-door my lord gave directions to Rice about whipping the boy. Says, that he never saw col. Paul at Kinnay, nor did he ever know that my lord visited Mrs. Annesley at Ballyshannon, nor did he ever see the child in company with any gentlemen at Kinnay. Being asked who was present when my lord directed the hounds to be set at Joan Landy; says, that William Elmes was present, and it was said in the deponent's hearing; and he heard my lord say, that he would not wish for 500*l.* that Juggy Landy

was the mother of the child, and that he would give 500*l.* more that he had got the child by an Englishwoman; and the child was called in all the house Jemmy Landy; but sometimes the servants called him Jemmy Annesley, but believes it was because my lord got the child; but the deponent never heard him called young lord Altham.

Ann Caulfield sworn.

Says, she knew the late lord Altham, and saw my lady at Dunmaine, when she lived at a place called A-Clare, about a mile from Dunmaine; that she was bred and born there, and lived there before my lady came to Dunmaine, and after she had left it. Being asked if she ever heard of my lady's having a child at Dunmaine, or observed her being with child; says, she never heard of her having a child till of late, and that she sometimes went to Dunmaine house about some business, and never saw any signs of her being with child. Being asked if she knew any of the servants of the house; says, she was acquainted with Elizabeth Molloy, and with Mr. Rolph, and with Anthony Dyer, and knew Joan Landy the kitchen maid, and remembered Juggy Landy one St. George's day, and that she observed her big bellied, as she was dancing, and all the company noticed it, and wondered how she could dance so well in that condition: my lord appointed that day to be kept a day of sport, and deponent heard she was soon after brought to bed, and saw her the summer after at deponent's father's cabbin, where he used to make his turf, and there was some discourse about her son. Says, it was the common report it was my lord's son; and afterwards she saw the child at school at one Patrick Furlong's, at a place called Terry-rash, and he went to school part of the time from my lord's house. Says, that my lord Altham, in some time after the separation, came to Furlong's, where the boy was at school, and asked Furlong, Where is Jemmy? and that my lord said, he would horse-whip Furlong, if he would let that bastard go near Jugg Landy, for he would be so cross if he saw her; and deponent heard my lord say it when she called to see two of her sisters who went to that school, but she never saw the boy at Dunmaine.

[Cross-examined.]

Being asked how old she was; says, she is forty three or forty four years old; that she never went to school to Furlong's, but that she called there to see her sisters, who continued the summer at school, and were very young; says, she saw the child at the mother's breast; says, she never heard till within these two years that Juggy Landy's child was dead, but that she heard that Juggy Landy had a child by her husband. Says she was present when my lord spoke to Furlong. Being asked whether she can take upon her to say it was the same child she saw at the mother's breast that she saw at Furlong's; says, she would not for the world take upon her to say it was the same child that she saw at nurse that she saw at Furlong's. Says, she knows father Downs and saw him that very day of her examination. Says, she is a Roman Catholic. Being asked by virtue of her oath, whether father Downs did promise to give her absolution for what she was to swear in court; says, by virtue of her oath, he never promised to give her absolution, and never mentioned any such thing to her. Being asked what day is St. George's day; says, some time in April.

William Rowls sworn.

Says, he knew my lord and lady Altham at Dunmaine; he lived at a place called Ballycamore within a mile of Dunmaine, and was acquainted with my lord's family, at my lord's house, till after my lord and lady separated. Says, he never heard lady Altham had a child, or was with child. Says, he is a farmer, and used to go hunt with my lord, and that my lord stood godfather to one of his children. Being asked if my lord had any conversation with him at any time about a child; says, my lord told him several times he had a child by Juggy Landy; says, she was brought to bed in a little cabbin near the lands of Dunmaine. Being asked if he heard my lord say he had any issue by his lady; says, he heard my lord say he never had issue by his lady, and he never expected to have any; and if my lord had any child by his lady, the deponent must have known it, for he was as free with my lord as if he had been my lord's equal. Says, that after the separation the child was brought home, and one day my lord was standing in the kitchen, and the deponent heard it said Landy did not belie him, for the child was like him by his eyes. When the child was brought home, my lord named it himself James Landy.

[Cross-examined.]

Being asked what age the child was at that time; says, between 3 and 4 years old, and could not speak English. Being asked what coloured eyes my lord had; says, that to the best of his knowledge my lord Altham's eyebrows were very black, and his eyes were grey. The deponent said, that if my lord and the child were face to face, he could know if they were the same colour, but cannot remember particularly the colour of my lord's eyes; says, the child had a white linen cap on, and therefore the deponent could not tell the colour of his eyes. Being asked how he came to converse so familiarly with my lord; says, because my lord gave him liberty to talk to him; and said, before my lord came to Dunmaine, deponent in discourse told my lord, that Joan Landy told deponent that she was big with child by my lord. Being asked where Joan Landy lived when this discourse happened; says, in my lord's house.

Mr. *Michael Downes* sworn.

Says, he knew the late lord and lady Altham at Dunmaine, in the parish of Tinthorn, and

county of Wexford. He knew my lord first, and was there about a year and a half before my lady came to Dunmaine, and my lady lived there about three years and three weeks. Says, he then lived at a place called Buckstown, on colonel Loftus's estate, and still lives there. That my lord and lady came to see him, and that he used to go often to see my lord, either once in a fortnight or three weeks, and then he used to dine and sup at Dunmaine house with my lord and lady, at their own table. Being asked what was his profession; says, he is a registered priest, and lived in the parish of Tinthorn 42 years past. Says, he lives within a mile of Dunmaine; that he never heard lady Altham had a child; that the common reputation of the country was, that she never had a child; that he believed if she had a child he should have heard of it, for Dunmaine is part of his parish. Being asked what reason he had to believe he should have heard it, if she had a child; says, the reason was because my lord used to call at his house after hunting very often, used to take a cup of his drink, and the deponent heard my lord wish he had a child by his wife, and if she had had a child, it could not be without the deponent's knowledge, because that he was so well acquainted in the family, and was treated by my lord with great civility. Says, he kept a register, but did not register Protestant children. Being asked when it was that my lord said he wished to have a child; says, it was when my lord lived at Dunmaine, and that my lord said, he wished to have a son by his wife. Being asked if he knew any of the servants of the family; says, he was acquainted with Mrs. Heath, with Rolph and with Anthony Dyer; but did not much care to be acquainted with any of the rest. Being asked if Martin Niefe the smith went to mass; says, he did; but he never saw Joan Laffan at mass. Being asked if he knew Joan Landy; says, he saw Joan Landy; she was kitchen maid for some time in Dunmaine, when my lady first came there—it seems she proved with child, and my lord had a ball, and she danced at it, and was discovered to be with child, and thereupon soon after she was turned out of the house; she went afterwards to a cabbin, where her father lived, and was there brought to-bed in the latter end of April 1714. Says, he was applied to, to christen the child, but as my lord and he were upon good terms, he was loth to christen the child where it was, lest it might offend my lord; but the mother (and an old woman) brought it to one David Baron's house at Nash, when the child was about a fortnight old, and there he christened it; but he first enquired who was the father of the child, and was told that lord Altham was: that he afterwards told my lord, that he had made a Christian of the child, but had not received any retribution for it; that my lord said it was well done,—laughed, and said, he would requite me hereafter; and then my lord added, It seems they put the child upon me. Says, he named the child James, by directions of his grandmother (Joan Landy) who said my lord directed him to be called so. Says, he did not christen the child by two names; says, an old blind man (whose name was James Baron) was the godfather, and Joan Landy's mother (the child's grandmother) stood as godmother; she was the wife of James Landy. Says, that Joan Landy was unmarried at the time of getting the child. Being asked if he afterwards saw the child at Dunmaine; says, he did; that he went one day to see my lord at Dunmaine, and he remembers as he was going up stairs, my lord said to the child as he was sitting in a chair, You son of a whore, why don't you make a bow to him that made you a Christian? He also saw the child going to school to one Pat. Furlong's. Says, he used to register legitimate children, but did not register natural children; but that, had my lord desired it, he would have registered the child. Says, he was also used to keep a register of burials; that such registers were kept in all Christian countries; that the inhabitants of that parish generally bury their dead at a place called Nash; that if the child had been buried there, he believed he must have known it; and that he never heard what became of the child after he left Dunmaine. Says, he believes Joan Landy's mother's maiden name was Ma Grath, but was not sure of it.

[Cross-examined.]

Being asked whether he might not see Dunmaine without seeing my lady; says, he might go thither and not see my lady. Being asked if he could recollect what time of the year it was the separation of my lord and lady happened; says, the separation happened about Candlemas; and being asked whether he eat his Michaelmas goose with my lord and lady at Dunmaine; says, that he is not sure my lord and lady were at Dunmaine the Michaelmas-day; says, that lady Altham came first to Dunmaine a day or two before Christmas-day; but cannot tell where lady Altham was the Christmas after, but knows she was one Christmas in Dublin. Being asked if he remembered the time the Pretender's men were tried at the assizes of Wexford; says, he did, and that he was in some trouble then; and says, it was in April assizes, and that he came from home the day before the day of the great eclipse, which was the 22d of April, and my lord and lady came to Dunmaine in a few days after, and they went afterwards to Dublin, and my lady continued in Dublin, and my lord returned to Dunmaine, and that the deponent feasted with my lord there. Says, Dunmaine is the estate of Mr. Cæsar Colclough, but Aaron Lambert has a lease of it. Being asked who brought the child to him to be christened; says, the grandmother brought the child, and she said my lord would have it christened by a parson, and it was delayed about a fortnight before it was christened. Says, she did not say she was directed by my lord to bring the child to the deponent to be christened; she only said, my

lord was his father, and his directions were, that the child should be called James; whereupon the deponent said, You say the lord is the child's father, and he should be called Jemmy Annesley of course. Says, he did not desire any security when he found it was my lord's child; though it was his custom upon such occasions to get security, that the child should not be a burthen to the parish; Says, it was about July he saw the child the day he went up stairs. Says, the first time he saw the child he had a long coat without breeches, and a cloak over it, and a laced-hat; he was sure it was not silk; it was of a whitish colour, to the best of his knowledge. Says, that when he went into the house that day, the child was sitting in the parlour above-stairs, and he made a bow, and does not remember that the child said any thing. Says, that the child was then between three and four years old. Being asked what he said to the child; says, he desired God to bless him; that my lord desired him to rise up, and that he did rise up, and sat down in a little time after. Being asked if the child could speak plain at that time; says, he did not speak plain to be understood, but yet he believes the child went to school at that time. Being asked if he saw Joan Landy at the ball he mentioned; says, he did not see her at the ball, but those who saw her, told him of it, not long after the ball, and believes it was on St. George's day the ball was. Being asked if he did register the children of Protestants; says, he did not know what children they had. Being asked if he did ever hear that Joan Landy had a child that died of the small-pox; says, he heard such a report, but did not mind it; says, he did not bury any child of Joan Landy's. Says, he married Joan Landy to one M'Cormuck, but was never desired to bury any child; says, it was about twenty years ago that he first heard the report of the death of Joan Landy's child, and that he was told of it afterwards; says, he could not swear it was like lord Altham; says, he does not remember the colour of his hair, but believes it was black, but cannot be positive, it is so long ago. Says, he cannot be positive at what time my lord said it was his child, nor whether it was before or after the eclipse. Being asked what was his business at Wexford assizes; says, he was bound over to appear there. He was charged with giving meat and drink to the Pretender's men, who were tried there. Says, that he thinks Mr. Thomas Edwards was sheriff. Being asked if he did apply to Mr. Cæsar Colclough or any body else as a friend; says, he did not—the high-sheriff first secured him, and took his own word as bail. He was bound to appear at the next assizes on his word to the sheriff, and lord Altham offered to be bound for him, after he was acquainted with the affair. Says, he does not remember he had any conversation about money to be given to him, nor did he consult or ask any other priest to give him absolution; says, my lord stayed at Dunmaine about a year after the separation. Being asked if it is not common with people of his religion to send for persons of his function when their children die; says, that commonly they do; but sometimes the poor people don't; but if a child dies under seven years old, they seldom are sent for, because it is supposed a child under that age cannot commit mortal sin. Says, he never made an affidavit in this cause. Says, he did not apply to lord Altham when he was to appear at Wexford assizes, for he was under no fear, but he remembers my lord voluntarily offered his friendship. Says, that after the christening of Joan Landy's child, she was married, and that he christened all Joan Landy's children after that time, but does not remember the names of the children he christened; says, that he heard the report of the death of Joan Landy's child of the small-pox from one David Baron two or three days after the separation.

Pat Furlong sworn.

Says, he knew the late lord Altham at Dunmaine, but cannot remember the date of the year. Says, he had no employment under my lord. Says he was a fowler for five or six years; that he had a little farm, and kept a little school by the bounds of Dunmaine on the lands of Rathclaman. Being asked if he remembers the name of any one that went to school to him; says, he remembers the names of two young women that went to school to him, and their names were Mary Croke and Nancy Croke, and two brothers whose names were Hanlons. Says, he had a son of Joan Landy's called Jemmy; that lord Altham sent him to school to him, and he remained with him five or six months, that he was about two or three years of age when he came to school; and that deponent went every morning for the child. Being asked if he knew that my lord and lady separated; says, he knew that they separated, and it was about two months after the separation that the boy was put to school to him. Says, my lord called several times, as he was hunting, and desired the deponent at his peril, that Joan Landy the mother should not see the child, and my lord gave the deponent the same directions at his own house when deponent came to Dunmaine. Being asked when he last saw Joan Landy; says, at a baker's in Ross, about a year ago, and he saw her about seven years ago in Ross. Says, when the child was at school with him, he had a habit of a dark colour and wore a cap. Says, the habit was not silk; says, the child was deemed lord Altham's son by Joan Landy. Being asked if he knows one Henderson, a Quaker, says, he met not long ago a gentleman called Henderson, and was told he was a Quaker; says, he remembers lady Altham's coming to Dunmaine, but never heard she had a child. Being asked if he ever saw the boy after he left the school; says, he saw him at Ross, when he was about four or five years old, and believes it was the same boy.

[Cross-examined.]

Being asked if he remembers the separation; says, he does, and that about a month or two after the separation, the child was put to school to him: says, the child was then about two years and a half, or three years old; that he was very smart, spoke Irish, the language his grandfather and grandmother spoke; that he sometimes walked to school, sometimes the deponent brought him, and sometimes the other boys brought him; says, he was not of a black complexion, but had brown hair; says, he saw him at Ross, at Mr. Ely's shop; says, the boy he saw at Ross was the same that had been at his school; says, the winter coming on, the boy was taken from his school, and had made no great progress whilst he was at it; says, deponent soon after left off keeping the school, that he afterwards saw the boy at Dunmaine, and my lord gave the deponent a crown.

Arthur Herd sworn to the Voire Dire.

Says, he never had any reward for appearing and giving his testimony, but has received two guineas and a pistole to bear his charges to town, from the county of Wexford, where he lives; says, he is a perriwig-maker by trade. Being sworn in chief, says, he knew lord Altham very well, and lived with him as a servant, and came into his service about twenty or twenty-one years ago; says, my lord happened to come to the shop, where the deponent was an apprentice in Ross, and hearing deponent's name mentioned, my lord said, You are my countryman, if you come to live with me, you shall never want a shilling in your pocket, a gun to fowl, a horse to ride, or a whore. Says, he went to live with my lord, when my lord lived at Carrickduff; that one Mr. Thomas Gregory was then with my lord, and that he remembered one Weeden to live with my lord as coachman or groom, and that there was a child there reputed to be my lord's son by Joan Landy; that the child was treated as my lord's natural son, that he eat sometimes at my lord's table; that there was one Strahen, a harper, who used to draw pictures and fancies, and taught Jemmy Annesley to spell; that the child had a scarlet coat and a laced-hat; that my lord was visited by Mr. Warren and major Dunbar; says, the child was accused of pilfering, and deponent saw my lord correct him very severely, in Proper-lane. Says, there was a hurling in the country, between lord Altham and Mr. Burn, and that my lord went to the New-inn in Michaelmas 1724, and went after to Cross-lane, and that one Catharine Caulfield, married to Neil o'Neil the footman, took care of the child; that my lord stayed at the New-inn till towards Christmas, and lodged afterwards at Cross-lane; and stayed there till the 25th of March; that deponent gave captain Simpson a three shillings and four-pence piece earnest, for taking captain Simpson's house in Proper-lane; that Mrs. Gregory and a servant maid lived with my lord; that the boy was kept worse in Proper-lane, than any where else; that he went to school to one Carty's, who kept school in Plunket's-yard in Proper-lane; that my lord went from Proper-lane to Inchicore, and that there the boy was corrected most severely, and that my lord said he had the thieving blood of the Landy's in him, who used to steal corn and sheep: that my lord finding he could get no good of the boy, sent him to one Cooper's in Ship-street, to lodge; and the deponent never saw him since, till the 15th of November last; says, that my lord lived at Inchicore in the year 1724.

Being called upon to give an account of his meeting the lessor of the plaintiff, and what happened thereon; says, that on the 15th of November, in the year 1742, on Monday morning, he was sent for to Enniscorthy, in the great snow, by one Whelan, who told him, If he said two words cunningly, his fortune was made; whereupon the deponent went to the Bear-inn, asked for the gentleman, and was shewn into a room, where Mr. Mackercher was writing; that Mr. Mackercher asked him whether he had lived with my lord Altham, and spoke about Mr. Annesley. That he answered, he had lived with my lord, and cut Mr. Annesley's hair, and believed he should know him again by the particular form of his face; that the deponent used to make him fiddles and play-things; says, that when Mr. Annesley came into the room, he kissed the deponent, and that the deponent could guess at his face, but was not positive it was he till he gave some marks and tokens; that Mr. Annesley said to him, Your name is Herd; that the deponent was told he should be called upon as a witness; and that he said, that for the Anglesea estate he would not tell a lie. That Mr. Mackercher asked him, who was Mr. Annesley's mother; and that deponent said, his answering that question would be of no service to him; that Juggy Landy was his mother. Then Mr. Mackercher asked, if Mr. Annesley had not some likeness of my lady Altham; to which the deponent answer'd, that he did not see a feature in his face, that was like lady Altham; that then Mr. Mackercher took the paper he was writing, and tore it, and threw it into the fire; and then one Neil o'Neil, the footman, clapped the deponent on the shoulder, and said, Dr. Arthur, you shall be no longer in this place; this was in presence of Mr. Annesley, Mr. Mackercher, and captain Liviston; that the deponent then looked at his coat, and frowned at the fellow, imagining he spoke in that manner, on account of the meanness of deponent's dress. Being asked if the rest of the gentlemen heard it; says, he can't say they did. Being asked, did he believe it was the same person that was with my lord; says, he believ'd it was the same person. Says, my lord bought his time, before he went to live with his lordship. Being asked, how he was employed in my lord's service; says, he was employed in shaving my lord, and used to

copy his letters, and was employed in other affairs. Deponent remembers as he was copying out some denominations of lands, to be sold in reversion to Mr. Onesiphorus Gamble, of the county of Cork, that there was some talk, to whom the great estate would fall: my lord said it would go to Mr. Charles Annesley, but he would endeavour to get an act of parliament to settle it on his brother; and my lord was so free with the deponent, that he cut deponent's hair; and when deponent had a great cold, my lord brought him a copper of mulled claret to drink for his cold; says, that my lord asked him once in presence of Mr. Annesley, Arthur, is your mother a Protestant or a Papist? that deponent answered, his mother was a Protestant; and thereupon my lord said, I'd rather than one hundred pounds that boy's mother was so. Says, he told Mr. Mackercher in Enniscorthy, that Mr. Annesley sent several duties by him to his mother, and that he brought blessings from his mother Joan Landy to him; and that he remember'd to have once brought a pair of stockings to him from her; that thereupon Mr. Mackercher said, it was common for Irish women to call one that they nursed, their own child; says, that Mr. Mackercher bid the deponent think better on't; that Mr. Annesley shook his head on this, and looked pale, and said, it was strange the deponent would not say as all the other servants said; to which deponent answered, You know, Sir, I had a better opportunity of knowing than the other servants, and I was nearer to you than they; says, he meant by that, his shaving my lord and copying his letters; says, that when he had mentioned the pair of stockings that he brought to Mr. Annesley, Mr. Mackercher said, that such trifles as those were common from nurses to those they nursed. And the deponent pointed to Mr. Mackercher in court as one of the company.

[Cross-examined.]

Being asked if he saw my lord correct the child; says, he saw my lord correct the child several times, because he had him on his back; says, that in Proper-lane my lord corrected him very severely; that he was accused of pilfering, and he owned it himself; it was my lord missed the things. Being asked what were the things he was accused of pilfering; says, a jockey belt, and some pigeons, which he confessed; says, he never knew of any complaints made by miss Gregory to my lord about him; says, when he was an apprentice at Ross, he saw my lady going to church; that my lord was angry that the boy was dull. Being asked about his own age; says, that he saw in a book that he was born in 1703; but that he heard on his marriage, his father made him two years younger. Says, that when the boy had his scarlet coat at Carrickduff, my lord said, By G—d I keep him in his scarlet, because his mother wore a red petticoat. Says, he can't tell whether my lord ever dined at Mr. Byrn's or at Mr. Cavenagh's, whilst he was at Carrickduff; that he saw Mr. Owens, Mr. Stone, and some others visit there. Says, he was employed by my lord in several stations; says, he never saw the plaintiff ride out with my lord; says, he never saw a feather in his hat there, and believes it could not be a silk coat he wore; says, the plaintiff sometimes dined at table with my lord at Carrickduff, but when people of rank dined with my lord, he did not; says, he told captain Leviston, that he used to cut Mr. Annesley's hair, but did not use to attend him; says, he told them that Catharine O'Neil had some care of him, and that one Paddy (who he supposed to be a Papist and a cousin of his mother's) taught him; and that he spoke Irish like, for he used to say Dampier's Woyages, volume the third; that master James and Paddy used to call one another cousins; says, he heard the plaintiff went to one Cooper's, and that he heard my lord say, he was a son of Joan Landy's.

The counsel for the plaintiff asked, if he ever said that my lord debauched Miss Gregory?

The counsel for the defendant objected to that question, because it would subject the witness to an action for slander; therefore he was not obliged to answer: they said, that lady was one of the witnesses to be examined by the defendant, and ought not to be discredited by anticipation, and as she was not present to clear it up, no imputation ought not to be thrown on her.

They insisted, that no witness was to be discredited by particular facts, but by general character; that particular facts might introduce dirt in all causes, therefore the question was not proper.

Mr. *Tisdall*, of counsel for the defendant. When a witness is examined to a conversation, it is proper to examine him to all parts of it, to have the whole before the Court, because the Court and jury cannot distinguish the conversation properly, unless they have all parts of it before them. The witness may demur to what may criminate himself, but cannot demur as to another.

Mr. *Walsh*, for the plaintiff. The point is, whether the question is proper; if it be, the consequence is not to be considered; your lordships and the jury can't judge of a conversation, without knowing the whole of it.

Lord Chief Baron. There is a wide difference between what is said in presence of the plaintiff, and what is not said in his presence. Whatever is said in presence of the plaintiff, is evidence against the plaintiff. If gentlemen will enquire what influence Miss Gregory had over lord Altham, it may be proper to be examined into; but no man is obliged to answer a question, that may subject him to an action; but he may answer the question if he pleases voluntarily.* If a question be relative to a mat-

* If Miss Gregory had been examined as a witness in the cause, evidence to shew that

ter in issue, it may be answered, if it does not criminate the person himself.

Mr. Baron *Mounteney.* A witness can't be examined to a question, if he be liable to an action thereon.

Mr. *Harward*, for the plaintiff. No man can be subject to an action for what he says in a court of justice.

The Court allowed the objection.

The deponent was asked, if he ever said that Miss Gregory miscarried?

Mr. *Prime Serjeant* objected to the question, because it might lay an imputation on her, as it does not appear whether she was married.

That objection allowed.

Then the deponent was asked, if he ever heard that Miss Gregory was married to lord Altham?

Counsel for the defendant objected to that question, as it tends to defame Miss Gregory, because lady Altham was then living.

Being then asked if he told the company that Miss Gregory did not use the child well; says, he believed he might tell them so, but did not know that he ever saw her use him ill. Being asked if he told them that Miss Gregory's mother had a great falling-out with my lord; says, he believes he did. Says, he does not remember that Miss Gregory was called lady Altham, but that he heard at Ross that she was called lady Altham.

The plaintiff's counsel observed, that the witness used some subterfuges, in not answering the questions properly.

And then they asked him, whether what he told Mr. M'Kercher at that time was true or false?

The Court was of opinion, that a question in that way was improper, because it would introduce what he then said, not only as evidence against the credit of the witness, but as evidence against the defendant.

The deponent being asked what was the opinion of the people of Proper-lane about the lessor of the plaintiff being the son of lord Altham; says, it was the opinion of all those he spoke to, that he was lord Altham's natural son. Says, he believes my lord would do any thing to please Miss Gregory, and that he believed she was not very fond of Mr. Annesley.

[Herd's examination being finished about 8 o'clock on Saturday night the 19th of November, the Court, by the like consent as usual, which was read in open Court, adjourned to 9 o'clock the next Monday morning.]

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she was not deserving of credit might certainly have been received; but what the Lord Chief Baron is here represented to have said, tends to the monstrous and intolerable doctrine that the trial of an action between any two persons may be made the instrument of defamation against a third person, not appearing in such trial, and not interested in the event of it.

Monday, November 21.

The Court met on Monday morning according to adjournment, and the jury being called over, answered to their names respectively.

Henry Brown, sworn to the Voire Dire, and then in chief.

Says, he went to school to one Carty's in Proper-lane; that he remembers one Strong went to school with him, and a boy went to school there under the name of lord Altham's son; that to the best of deponent's remembrance, he was reputed to be my lord's bastard son, but cannot remember what was his particular name, or how long it is ago, but, to the best of his knowledge, he saw the same boy last summer in Ann-street. Being asked how old he is; says, about 33 years old, and was about thirteen or fourteen years old when he went to Mr. Carty's school. Says, that most of the boys who went to that school were the sons of people in low circumstances.

Thomas Strong sworn.

Says, he remembers Daniel Carty to keep school in Plunkett's yard in Proper-lane, and that the deponent went to his school there; that he remembers one Annesley, a boy, to go to school there, who was reputed lord Altham's bastard son; that Annesley was a month at school there, to the best of the deponent's remembrance; that he saw the same boy afterwards in Ormond-market, but never called him lord. Says, that the boys who went to that school were mostly tradesmen's children; that he remembers one Harry Brown was there at the same time, and that the price of the school was a crown the quarter.

[Cross-examined.]

Says, it was the common report of the school, that the boy was not my lord Altham's lawful son. Says, he knows Patrick Plunkett, and is sure he is acquainted with him; believes he is a very honest man, and that he would not say a false thing upon his oath.

Thomas Barret sworn to the Voire Dire.

Says, he knew a boy at Ross in the year 1724, who went under the name of James Landy: Says, the boy lived in his house eight weeks, and in the deponent's brother's house four months that year, and that the deponent had no consideration for maintaining him. Says, he was reputed to be lord Altham's son by Joan Landy; that he came to Ross, as having no body to take care of him, and that the town of Ross belonged to his supposed father; that he came to Ross after lord Altham left Carrickduff; that one Mr. Weldman, my lord's receiver, desired the deponent's brother to take care of him. Says, he saw him in Ross with his mother Joan Landy, before he lived in the deponent's house, when he was about five years old or thereabouts. Says, that he was

about 11 years old when he came to Ross the second time; and the reason the boy came to the deponent was, because one Cormuck, his mother's husband, would not encourage him. Says, Joan Landy married Cormuck at Ross; says, he heard the boy went to Dublin after leaving his mother; says, Joan Landy never came to see him, while he was with the deponent; says, he was sometimes called Jemmy Annesley, and sometimes Jemmy Landy; says, he never saw him before his mother brought him to Ross, and the first time he was at Ross, he was about five years old, and the second time he came there he was about 11 years old; says, he cannot tell where the boy spent his time between the age of 5 and 11 years: says, he saw him about a month ago in Ross, and also about twelve months ago, and that he was then called James Annesley; says, he is sure he is the same person that had formerly lived with him, and that the deponent knew his face; says, that the plaintiff rode with about twelve men into Ross, and that the deponent knew him among them, and that was the first time the deponent saw him since he lived with the deponent at Ross.

[Cross-examined.]

Says, he lived in Ross before Joan Landy was married, but can't tell how long; says, the boy was about 5 years old the first time the deponent saw him, as near as he could judge; says, he did not ask whose son he was, because it was in every body's mouth that he was Joan Landy's son; says, that Joan Landy lived in Ross till within these three years. Says, he cannot exactly say what clothes the boy had on the first time he saw him; that his clothes were of so little value, that they were not worth observing; it was some sort of a gown, but the deponent never took notice of it. Says, he never took notice of his having the small-pox the first time, nor did he observe any impressions of the small-pox the second time; says, he saw him at Carrickduff some time before he came to live with the deponent, and then he was between nine and ten years old; says, he never had any discourse with his step mother.

William Knapper sworn to the Voire Dire, and then in chief.

Says, he came for the sake of truth and justice. Being asked how long he had lived in Ross; says, he has lived in Ross about 50 years, (except about a year and a half.) Says, he has seen a boy at Ross, shewn by Thomas Barret to him, and never saw him after, to the best of his knowledge, except with a gentleman who is called Mr. M'Kercher, as deponent is informed. Being asked if he ever heard that lady Altham had a child; says, he never did, and believes it is impossible she should have a child without his knowing it; and that he has heard a hundred times, that she never had a child; that he was well acquainted with her ladyship when she lived at Dunmaine, and it was the reputation of the country, that she never had a child in Dunmaine or in Ireland. Says, he was very well acquainted with the late lord Anglesea; that he was often to visit my lord Anglesea with many gentlemen, and never heard any child made mention of, and believes if there was any such, it would have been talked of; says, my lord had some suspicion of some English affair, but not of this sort. Says, he is married to a niece of counsellor Annesley's in England, and that when he visisted lord Anglesea, lord Altham would never be pleased at it. Being asked if he saw lord Anglesea soon after the death of lord Altham; says, he paid his compliment to my lord Anglesea after my lord Altham's death, and he never heard of any son of my lord Altham's. Says, that lord Anglesea came into possession of the lord Altham's estate, and enjoyed it ten years; and the deponent had a letter of attorney from the late lord Anglesea, and gave minutes of it to the tenants, and no person framed a notion of a son of lord Altham's, nor ever made any objection on account of it. Says, the town of Ross is almost entirely the Altham estate, and if lord Altham had a son, he believes there must have been some whispers, and it would have run from one to another, and would have been no secret; there would have been rejoicings in Ross, and it would have been talked of by the whole country, and would have been known in every county, nay, he believes the whole kingdom, and all England would have heard it: But says, the reputation of the country was, that lord Altham had a son by Joan Landy.

[Cross-examined.]

Says, he has seen earl James. Being asked if he knew Joan Landy's child; says, he did not know the person, but he was shewn to him by one Barret. Remembers earl Arthur at Dromolan. Believes one Higgison was concerned as agent for lord Anglesea. Says, he cannot recollect when he was first acquainted with earl Arthur; and says, that after the time that lord Altham took to his lady again, earl Arthur never cared for lord Altham.

George Brehan, one of the attornies of his majesty's Court of Exchequer sworn to the Voire Dire, and then sworn in chief.

Says, he was 28 years old last April; believes he knows the lessor of the plaintiff, Mr. Annesley; says, the first place he saw him was in Ross; he was then called Jemmy Altham; and the deponent did not know him then by any other name, but does not remember the year. Says, he remembers the death of king George the first, and that the guide to his memory was the election for Ross; says, he remembers that his father was served with an ejectment, for giving his vote to Mr. Lee and Mr. Totnam. Says, he saw the lessor of the plaintiff at the deponent's father's house, and he was in a miserable condition; and as he was reputed

lord Altham's natural son, the deponent gave him bread, and supported him, and took him to his father's stable, lest he should lie in the street; says, he also saw him at the house of Francis Barret, who was an ale-seller, next door to the deponent's father's house: says, the boy used to run of errands, and the deponent remembers to have heard he misbehaved. [Deponent was going to give an account of a conversation he had at the Walsh's-head tavern, but was prevented, as it was matter of hearsay.) Being asked, if he saw the same person afterwards; says, he believes he saw the same person afterwards. His reason for it is: about the time of the report of the taking of Carthagena, there was a rumour, that there was a person in the West Indies who claimed the estate of the earl of Anglesea; and in November last, as the deponent intended to come to Dublin, he heard that Mr. Annesley was coming to Ross, and waited to see him, and when he was riding into Ross the deponent saw him with many others, and observed his face, and says, he pointed to him, for he remembered he had a high nose; and the deponent believed it was the same face he formerly knew, and which he described to one Mr. Millbank before he saw him. Says, he believes he is the same person he formerly knew, and that his face is every day more and more familiar to him since he saw him. Says, he was reputed to be the son of lord Altham by Joan Landy (a woman who sold bread in Ross.)

[Cross-examined.]

Says, he can't tell how long it was before the election of Ross, that he saw the boy, or whether it was two or three years. Says, he believes the boy was the older of the two, because he was then bigger than the deponent; says, he believes the boy was then 10 or 11 years old; says, he does not know how long the boy continued at Ross, and that he took no notice of the time; knows his father had a lease dated in 1721, and that in 1727 he quitted the house about Christmas. Says, he believes it was near the time of the election of parliament that he saw the boy; says, he remembers more particularly his father's removing, because it was more remarkable to him; says, he believes Joan Landy lived in Ross when the boy was there, for the boys used to say, there is Jemmy Altham's mother. Says, he can't tell how long the lessor of the plaintiff was in Ross, but knows he lodged him in his father's hay-loft; and when the lessor of the plaintiff came into Barret's house he was little provided for. Being asked what school he went to; says, he went first to one Cullen to learn to read and write, and after to one Piggot, who taught Latin; that he left that school, and returned to it again; that he was at Piggot's school when he knew the boy. Says, he was about eight or nine years old when he went to Piggot; that he was at Piggot's school for about four or five years; that he went to one Buckley's school to learn to write, but cannot remember how long he was there. Says, that Francis Barret lived next door to the deponent's mother, and above him one Thomas Barret; says, that the boy was just come to Ross when he saw him, and that his mother was not able to maintain him; says, he never knew one Edward Lutwich, nor any of that name.

Elizabeth M'Mullen sworn.

Says, she knew lady Altham when she lived in Dunmaine, and the deponent then lived in Ross, and visited her ladyship once at Dunmaine; she believes it was about three quarters of a year after her coming thither, but cannot be exact as to the time. Says, she was well acquainted with my lady after she left Dunmaine. Says, she saw her at captain Butler's at Ross, and remained in Ross for three or four years, and very often visited my lady at Ross; she believes twice a week for two years. Says, my lady went from Ross to live in Dublin: that the first place she lodged at (when she came to Dublin) was, at one Cavenagh's in Stable-lane, near Mary's-lane; and that the deponent seldom missed a week without seeing my lady, while she lived in Stable-lane. Says, she left Ross in 1719, and came to Dublin, and lived in Bride-street for a while, but cannot exactly tell when my lady came to Dublin; but deponent knows she went in a coach with Mr. Cavenagh, to the stage-coach inn in George's-lane, to bring my lady to Cavenagh's lodgings. Says, she visited my lady, when she removed her lodging to alderman King's, where she was put into stupes; and one Dr. Irwin was her physician; and that the deponent used to see her very frequently. Says, her ladyship lodged at Mr. King's for about a year, and after that came to lodge with deponent at her house in Tashe's-square in Montrath-street, where she continued for about eight or nine weeks, and from thence she went to England. Being asked if she discoursed very familiarly with my lady; says, she did; and had heard her very often wish she had a child. Being asked what she understood by that; says, she understood my lady meant an heir to my lord's estate. Being asked if she ever heard my lady had a child by my lord Altham; says, she never heard my lady had a child, and it was the general reputation she never had a child. Says, she never saw a child with my lord at Dunmaine or Ross: that Mrs. Heath, her woman, and the deponent put her on ship-board. Says, she remembers she was with my lady one night, after supper, as she was preparing to sail, and her ladyship requested the deponent to send her the first account of my lord's death; and she took the deponent by the hand to make her a promise of it; and said, that the deponent was a faithful Irishwoman; and the deponent promised she would write to Mrs. Heath. Says, that in some time after when she heard of my lord's death, she waited for his funeral, and observed who were the bearers, and what coaches there were, and sent over an account of it. Says, she saw a boy at the funeral, crying,

My father! my father! that she turned him about, to see who he was; and asked him, Who are you, and who is your mother? that he answered, and said, Joan Landy is my mother, and lord Altham is my father. Says, she wrote an account to Mrs. Heath, directed to her brother's in London, that John Weedon the coachman, and his wife, and Joan Landy's son, were the only weepers at the funeral: says, she heard at Ross, and it was the general reputation, that Joan Landy had a son by lord Altham. Being asked in what condition was the boy at the funeral; says, he looked like a blackguard boy; and that she was surprised to hear the boy call father, because she never heard that my lord had a child, except by Joan Landy; says, she never saw him since.

[Cross-examined.]

Says, she lived in Ross with her father, who kept a great inn there, and my lord and lady used to visit and dine there, before the separation. Says, she never heard that my lord brought any young gentleman thither; says, she never visited my lady at Dunmaine but once; says, she cannot tell how long my lord and lady lived at Dunmaine, but believes above two years; says, she remembers my lady came to Ross late at night, candles were just begun to be light, but does not remember the day; says, that shortly after she was acquainted with my lady; says, she lived near the Cross, and her father's name was Israel Boucher. Being asked if my lady was a proud woman; says, she was; but that she dined very often at the deponent's father's, up towards the hill, when he kept a house of entertainment. Says, the deponent did not attend the tap at her father's house; says, she left Ross in the year 1719; that she was married in January, and went to settle in Bride-street, and after in Tashe's-square. Says, she cannot recollect the time my lady came to Cavenagh's in Dublin; says, my lady had lodgings at one Smith's in Dublin; says, she does not know Mrs. Hogers; says, she heard that her own husband took lodgings for my lady, but don't know the name of the person at whose house the lodgings were taken. Being asked if my lady could walk when she lodged at the deponent's house; says, that she was not able to walk, but as a woman had her in her arms. Being asked if she heard of any person's losing their limbs by child-bearing; says, she never did. Being asked if she ever heard the cause of my lady's losing her limbs, or did my lady ever tell her she lost them by a cold she got in her lying-in; says, she never heard the cause of her losing her limbs, and my lady never told her the cause of it; and that she never asked her the cause of her disorder. Says, my lady was sick at Ross; that when she was in Ross, she came to church in a chair, and walked from the chair to the pew; that she was in a great deal of grief, and walked but indifferently; says, she apprehended a disorder in her ladyship's limbs at Mr. Butler's in Ross, but she never discoursed with her about it; says, she believes it proceeded from her grief; that the deponent saw her several days crying for grief. Says, she never knew any such person as Edward Lutwitch a shoe-maker in Ross; says, that one Allen was the best shoe-maker in Ross. Being asked if my lady lodged at any other place in Ross, but at Mr. Butler's; says, she lodged at one Wright's in Ross, and that the deponent visited her there, and was then unmarried. Being asked to whom did she promise to write, concerning lord Altham's death; says, she said she would write to my lady's woman, Mrs. Heath, because my lady was sickly: and because in all probability Mrs. Heath was likely to live longer. Says, she heard of my lord's death in the news, and in the elegy that was cried about. Says, she believes it was curiosity led my lady, when she desired the letter to be written. Says, she watched the funeral at the corner of Christ-church-yard, and followed it; that it was about 10 at night; that she did not see the choir attend the burial, nor Mr. Hawkins, king at arms; that she does not know who were the bearers or mourners, nor whether she gave any account of them in her letter, nor whether the scarfs were black or white; but knows that whatever she writ in her letter was true, but has not read the letter since. Says, she saw but one clergyman, and the virger of Christ church attend the funeral, and that she remembers the boy stood at the opening of the vault. Being asked if she told any person, within these two years, that she saw the boy at the funeral; says, she can't recollect that she did. Being asked if she got directions where to write to England; says, Mrs. Heath desired the letter to be directed to her brother; and that the deponent gave directions where to write to herself. Says, the boy did wear his own hair: that two of the flambeaus remained with him, and some others went away. Says, she never heard that my lady miscarried, or that she was with child; says, that she knows Mrs. Lenox, but never told her that my lady miscarried. Being asked if she told one Reily, a servant to my lord Montjoy, or his wife, that the plaintiff had a right to the estate; says, she lived with my lord Montjoy as a servant, and with squire Hamilton, and that she now lives with Mr. Le[illegible], and that she never said to my lord Montjoy, that the plaintiff was the right heir; nor does she recollect that she told Reily or his wife, that the plaintiff had, or had not a right to the estate. Says, she heard a rumour that my lady had a child in England. Being asked what was her reason for turning the boy about at the funeral; says, because he said he was Joan Landy's child.

Matthew Darensy, sworn to the Voire Dire.

The witness was asked by the counsel, whether he was not bound in several sums for the defendant, or whether the defendant owes him any money, which defendant will be disabled from paying, if he loses his estate in question?

Court. These questions may be asked on cross-examining, but not on Voire Dire.

The witness was asked whether he is not receiver for lord Anglesea, which he will lose if the plaintiff prevails?

Counsel for the Defendant. A man may examine his receiver, because he has no certain interest, and especially if not receiver of the lands in question, because then he is not immediately, but consequentially interested. For the same reason a tenant at will of lands, not immediately in question, may be examined. A man may examine his son and heir. The heir at law was produced at Waterford before my lord chief justice Whitshed, and it was determined that he might be examined, because he had only a possibility, and no estate vested in him. And an heir has a more certain tenure than a servant.

Court. The question is proper on cross-examination, but not on Voire Dire.

The witness was asked again whether he will suffer if the defendant loses.

The witness said, he accepted some of the defendant's bills drawn upon him (something less than a thousand pounds) and that he has not settled accounts, but is sure he has the greatest part of the money in his hands, and does not apprehend that 300*l.* are due to him; and says, that the earl of Anglesea dealt with him as honourably as any man could do with another.

Court. When the particular questions are asked regularly, the general question cannot be asked; but nevertheless it may be asked on Voire Dire. A person's being a servant, is an objection to his being a juror, but it cannot be an objection to his being a witness.

Mr. *Darensy*, sworn in chief.

Says, he knew the late lord Altham at Carrickduff, and continued his acquaintance with him till my lord's death. Says, he never heard my lord Altham say any thing of a child of his; says, he saw a boy at Carrickduff at a hurling, and that he was clad in red; but that he had no discourse with my lord about the boy; says, that he heard that the boy which he saw at Carrickduff was a bastard; and that he never heard my lady Altham had a child. Says, the first of his acquaintance with my lord was, when my lord lived at Carrickduff; that he dined with my lord at Carrickduff, and that he did not see any boy dine with him. Says, he lived at his mother's house within three miles of Carrickduff, and never heard a word of my lord's having a child.

James Medlicot, esq. sworn.

Says, he knew the late lord Altham in Kinnay, in the county of Kildare; that he kept a pack of hounds, and that sometimes the deponent used to go a hunting with him; that he dined sometimes with my lord at Kinnay, and sometimes at Mr. Annesley's at Ballysax. Being asked if he at any time had any conversation with my lord Altham about the Anglesea estate; says, he remembers at one of these places the conversation turned on the Anglesea title and estate; and that my lord said, he had reason to expect he should be lord Anglesea, and then added, When I shall die, as I have no son of my own, I don't care what will become of the estate, or if the d——l should have it. Deponent says, my lord made use of these words, or to that effect or purpose. Says, he never saw any boy at Kinnay, nor heard of any boy being there.

[Cross-examined.]

Being asked if he can remember where that discourse happened; says, he cannot recollect where the discourse happened, nor who was in company then. Says, he had no acquaintance with my lord till he came to live at Kinnay. Being asked if he ever told any one of this conversation within these two years past; says, he never remembered it till this dispute; says, he fell into some discourse at the last Curragh race, which brought the conversation of my lord Altham to his memory; that he remembers my lord made use of these words, As I have no son of my own: at least as near as the deponent can recollect, that was the meaning and sense of the words. Says, he had no conversation with him about his lady; and that Mr. John Annesley was my lord's relation.

Colonel *William Becket* sworn.

Says, he knew the late lord Altham about 20 years ago; that he first knew him when my lord lodged in Essex-street, and that he knew him in Inchicore; that he conversed with him several times, and remembered there were some animosities between my lord and his brother, and that my lord said, he wished his natural son had been a legitimate son, to cut the scoundrel his brother out of the Anglesea estate; that he never heard till of late, that my lord had a legitimate son, but it was always reputed in the country, he had a natural son, and no other.

[Cross-examined.]

Being asked where he was first acquainted with my lord; says, he was first acquainted with my lord in Essex-street, and that their acquaintance never broke off; that he saw him at his lodgings, and dined with him there; and that he saw him at Inchicore; that he was sure he was not a whole year without seeing my lord Altham, and that he dined with my lord in the summer-house at Vice's, where he lodged in Essex-street; that he had not seen my lord from the time he saw him at Vice's, until he saw him at Inchicore. Being asked how long it was from the time my lord lodged at Vice's, to the time that he lodged at Inchicore; says, he believes it might not be a year. Says, that at the time my lord Altham mentioned his wishing to have a son to cut the

brother out, his son and one Cavenagh were present; that it was at night before supper, and in the parlour; that there was a bottle of wine and a bowl of punch on the table, and that the deponent stayed till three o'clock next morning. Being asked, whether miss Gregory was there; says, he was told that miss Gregory, a relation of my lord, was in the house, but she was not present.

Wentworth Harman, esq. sworn.

Says, he was very well acquainted with the late lord Altham, from the year 1714 or 1715, and knew him when he lived at Kinnay; that he very often heard my lord at his own house lament he never had a child by his wife; that he heard him very often speak of a bastard child, which my lord said, he could not tell whether it was his own child, or his brother's, or his footman's; and when my lord would dwell much on the subject, that the deponent sometimes said, Why do you pester me, in speaking about your bastard son? Why don't you go to your wife, and get a child by her? That my lord answered, Plague on the b—ch, she can't bear one, and that the deponent heard my lord frequently speak to that purpose.

[Cross-examined.]

Says, he does not know when my lady came to the kingdom; that he became acquainted with my lord Altham immediately after he came to this kingdom; that he cannot recollect he ever had any discourse with Mr. Medlicot, about this affair; that he never saw my lord Altham with his lady, nor does he know where my lord Altham lived at the queen's death; says, that at the queen's death the deponent lived in Dawson's-street, and that he had the first conversation with my lord when my lord lived at Kinnay, near the Curragh. Says, he never saw the boy, and believes it was after the queen's death, that lord Altham had the conversation about him. Says, he heard that my lord had a bastard, and never heard till lately about Palliser.

Christopher Stone, sworn to the Voire Dire, and afterwards sworn in chief.

Being asked if he knew John Purcell the butcher; says, he knows John Purcell the butcher, and his son, and that John Purcell is the deponent's tenant. Says, that Purcell, the father, mentioned to him that he was summoned to give evidence, and asked, what could this be; and that the father related the transaction about a boy, and said, he happened to be in Smithfield, and saw a boy there with a thumb rope about his middle, who said he was a son of lord Altham's; and that Purcell then mentioned, he would speak to lord Altham to take care of him; and that he would have taken him as an apprentice, but said, he hoped the boy was born to better fortune. Says, that he said to Purcell, one thing you told me, which your son did not tell me, about seeing a ship from Essex-bridge. Says, he could not charge his memory, that the father said any thing about the variations of his evidence.

[Cross-examined.]

Being asked if he believes Purcell to be an honest man; says, he believes he is.

Mrs. *Hannah Shaw*, sworn.

Being asked if she knew one Catharine M'Cormuck; says, she knew one Catharine M'Cormuck that papers rooms; that she came to the deponent about a year before to paper a room; that she then said, she had a comical discourse with a young man, who used to go about to get evidences for Mr. Annesley; and that she told him, lady Altham never was with child, nor had a child, but that women used to quack with her with herbs. Says, that M'Cormuck farther mentioned, that she desired him not to call upon her as a witness, for that my lady never had a child; and she could not do them any service by her evidence, but that she would make against them.

Plaintiff called upon to reply.

But Mr. *Daly* first offered to give in evidence, a record between the earl of Anglesea and Graham on a special verdict, which found, that Arthur lord Altham died without issue, and relied upon Hardress 472, that a remainder man shall take advantage of a verdict for the particular tenant.

Mr. *Broadstreet*. The notion in the family, that lord Altham had no son, is material.

Court. This record is no evidence against the lessor of the plaintiff, who is no party thereto.

Serjeant *Marshall*. My lord, the gentlemen have by their defence, made it necessary for us to give some new evidence. It has been insisted on by them, and they have endeavoured to prove, that lady Altham was at the spring assizes 1715, at Wexford, without any apparent sign of pregnancy; that being a new point, your lordship will give us leave to controvert, because the credit of the lessor of the plaintiff's birth may, in some measure, depend upon it. They have gone a step farther, and have attempted to impeach the credit of Joan Laffan; we apprehend it will be material to defend the character of that witness, and to shew that some of the witnesses produced on their part, have been prepared for this trial.

Cæsar Colclough, esq., sworn to the Voire Dire and then in chief.

Says, he has seen the lady Altham, and knows Mrs. Giffard. Says, he remembers the trial of Mr. Masterson, and Mr. Walsh, for he was at the trial at Wexford assizes. Says, they were indicted for enlisting men for the Pretender, and they came off with honour, and shame to their prosecutors. Says, he took as much care as he could to see justice done them. Says, that colonel Toplady was high-sheriff. Says, he does not remember to have seen lady Altham at that assizes; and that she

could not attend that trial, and sit near him, but he must have seen her; and believes if she attended the trial, he should have known it. Says, that he would not have sat by any lady at that trial, he was so solicitous for Mr. Masterson, who was his relation; and if any women of distinction had been there, he believes he should have heard it. Says, he heard she was at the assizes of Wexford in 1716, when Mr. Doyle was tried. Says, he thinks Mr. Jeremy Sims was high-sheriff in the year 1716, and thinks it was the first time deponent was on a grand jury. Being asked if it was usual for ladies of distinction to go to an assizes on such trials; says, he never saw a lady at such trials. Being asked who was sheriff the year before Mr. Toplady; says, he looked in the office at the castle, and found Mr. Edwards was sheriff the year before Mr. Toplady.

[Cross-examined.]

Being asked if Mr. Walsh and Mr. Masterson were related to one another; says, one was uncle, and the other was his nephew. Being asked if gentlewomen do not sometimes go to the assizes; says, some gentlewomen do go sometimes. Being asked what was Mrs. Giffard's husband; says, he was a justice of the peace, but a poor man; says, he would have taken notice of lady Altham if she had been in court. Being asked if he believes Mrs. Giffard can be believed on her oath; says, he cannot form a belief whether she can be believed; as circumstances happen persons may change, and that Mrs. Giffard is very poor.

John Hussey, confronted with Mrs. Heath.

Q. Do you know Mrs. Heath?—*J. Hussey.* I do, Sir.

Had you any conversation with her about the plaintiff being, or not being the son of lady Altham?—I had.

How long ago is it since you had the conversation with Mrs. Heath?—I think about two years and a half ago.

Give an account of what passed between you?—About two years and a half ago, I went with a gentlewoman to Mrs. Heath's to drink tea in Holborn, within 30 or 40 yards of St. Andrew's church, and as Mr. Annesley was the common conversation of the coffee-houses then, we began to talk about him; I do not know whether she or I introduced the discourse, but she said, to the best of my memory, Nobody knows that young man's affairs better than I, because I long lived with his mother the lady Altham; and she expressed a great deal of concern for him, and the circumstances he was in; she told me withal, That the duchess of Buckingham sent for her three times, and that she was in private with her. And I have no more to say, my lord.

Did she tell you the import of the conversation between her and the duchess of Buckingham?—I do not remember she did, nor I never asked her.

Did she say concerning whom, or what the duchess sent for her?—To the best of my remembrance, she did about Mr. Annesley.

I ask you again, and recollect and consider very well before you give an answer, are you sure that Mrs. Heath said that lady Altham was the mother of this young man; or was it only this, That I have long lived with lady Altham?—She said, my lord, that she had lived a long while with his mother, lady Altham.

Are you sure she called her his mother?—Yes, I am, my lord.

Recollect whether you heard Mrs. Heath say any thing concerning any person's being much wronged or injured?—She did say, That the young gentleman was very much injured, and that nobody knew better than her, because she had lived long with the lady Altham his mother.

Pray, Sir, had this Mrs. Heath any discourse concerning her coming to Ireland, or that she expected any thing?—She said she believed she should come into Ireland, but I do not remember that she said she expected any thing; it would have been very imprudent of her to tell me so, if she did.*

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* According to the "Genuine Trial," &c. Mr. Hussey, upon cross-examination, says,

"He came to Ireland the latter end of July, and lives at a place called Painstown, near Rath-Coffee, in the county of Kildare; says, he saw Mrs. Heath several times; that his first acquaintance with her was about five years ago; says, that he told several times of that conversation; that he spoke of it to his sister in Smithfield; that he spoke of it in his own house; that he believes he mentioned it now and then since his coming to town; and that he told it to some gentlemen in London in the coffee-houses. Says, he never saw Mr. Mac Kercher till last year in the Globe coffee-house; says, he lodged in Orange-court, near St. James's, in London; says, he was a servant to one of the yachts, and sometimes dealt in linen. Being asked who was in company when Mrs. Heath spoke to him; says, one Mrs. Simpson, and a young gentlewoman that lodged up one pair of stairs, were in company, and that deponent had seen Mrs. Heath before that in company with Mrs. Simpson; says, that Mrs. Heath then lived in a court about 40 yards from St. Andrew's church in Holborn, and he was to see her last July; that he had letters for Mrs. Simpson, and that he gave them to Mrs. Heath; that he did not stay, but left the letters with Mrs. Heath. Says, that at the last conversation he had with her, she told him, she believed she should come to his country about being a witness for lord Anglesea; says, there was no conversation about the nature of the evidence, she only said that she was to give evidence for lord Anglesea, but that he did not hear what evidence she was to give; says, that he told her, if she went she ought to be well paid; says, he never had any conversation with her since about the affair; says, there was

Mrs. *Mary Heath* sworn.

Q. Mrs. Heath, do you know that gentleman that sits down there?

Mrs. *Heath.* Yes, I have seen him several times.

Do you remember about two years ago, that he drank tea at your house, with one Mrs. Simpson?—He has several times.

Did he drink tea with you after the account came concerning Mr. Annesley?—He has several times.

I ask you then, whether you had ever any conversation with him in relation to the plaintiff, and what was it you said?—I have several times talked about it, and said, What a vile thing it was to take away the earl's right, and that my lady never was with child; and I cannot say no more if you rack me to death.

How long have you known that Mr. Hussey?—Whether three years or how long I can't say.

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some difference between the first conversation and the last conversation, because she seemed concerned for Mr. Annesley the first time the conversation was about Mr. Annesley, therefore he remembered the words, and was positive she mentioned lady Altham his mother. Says, he was employed as a steward in one of the yachts by the Board of Green Cloth. Being asked what religion he was of; says, he was a Roman Catholic.—Says, he heard the affair talked of in common conversation; says, he was introduced to Mr. M——r; says, he heard that his name was made use of in court when Mrs. Heath was examined. Being asked how he heard what the people swore; says, he heard it by a general rumour; says, he was brought into the room where the witnesses were by the person who served him with the subpœna; says, he left the room, and went to Joe's coffee-house, and left word where he was.—Hussey being asked whether he knew before last Thursday that he was to be examined; says, he did not. Being asked whether he took any notice to Mrs. Heath the second time, when he found she changed her mind; says, he did not take any notice, nor did he mention any thing of it to her. Being asked by defendant's counsel why he would not prevent perjury; says, he did not think farther about it; says, that Mrs. Heath's mentioning to be examined for lord Anglesea, made deponent think she changed her mind. Being asked whether he believed what Heath said on the first conversation to be true; says, he could not say that he believed it to be true at the time of the first conversation, but gave himself no trouble about it. Says, that at the time of the second conversation he did not recollect what was said at the time of the first, and believes it was since the second conversation that he recollected the first conversation; says, he spoke of it before, and therefore recollected; says, he spoke of it several times and refreshed his memory about it."

Can you say any thing of his character?—I can say no more than that some said he was a gentleman's servant, and some said he lived by gaming.

Do you believe him an honest man?—I can say nothing of him; but if he says that I said my lady had a child, I cannot say he is an honest man.

Did you ever say that nobody knew that young man's affairs better than you?—No, my lord, I never did.

Did you ever give it, in his presence, as a reason why you should know the young man's affairs, that you had long lived with lady Altham, his mother?—No, my lord, I never did; and if I was to be torn to pieces, I would say no such thing.

To Mr. *Hussey.*

Q. Repeat the words you heard her say.

Hussey. She told me that the duchess of Buckingham had sent for her herself, and I cannot say who introduced the conversation first; but Mrs. Heath said, Poor gentleman, I am sorry for him from my heart; for no one has reason to know his affairs better than I do; for I lived long with lady Altham his mother.

Mrs. *Heath.* By all that is good and great, I never said any such word; I never thought that you were such a man; I have heard people say that you were a gamester, and lived in an odd way, but I could never believe it till now, but I always took your part, and said you behaved like a gentleman.

Hussey. I am a gentleman, I can bring several people to justify me to be a gentleman, and a man of family; indeed I have heard you say it, and speak it with all the regret and concern imaginable.

To Mrs. *Heath.*

Q. Do you remember the time that lady Altham went to Wexford assizes?

Mrs. *Heath.* Yes.

Was that for the trial of one Doyle?—I do not know any other that was tried but Mr. Walsh; my lady came home and told me how handsomely Mr. Walsh pleaded for himself.

Do you remember what day of the week it was you went to the assizes?—Indeed, my lord, I do not.

Did my lady Altham lodge at Mrs. Vice's more than twice?—No more than twice.

Would you be understood then, that the first time was when she came from Dunmaine, after she went down from Mrs. Briscoe's?—A little before the queen died the first time was, and the second a little before king George's birthday.

What time of the year was it after the king's birth-day that you went into the country?—Some time in the summer.

Did you ever come up to town after the separation?—Not till the time we left Ross.

Were the assizes begun before you went to Wexford, or did they begin after?—I believe they begun after, I don't know.

Do you know one Mr. Higginson, that was receiver to Arthur earl of Anglesea?—No, I do not.

Thomas Higgison, sworn to the Voire Dire, and then in chief.

Says, he knew the late lord and lady Altham, and that he knew Arthur the late earl of Anglesea; says, that he was receiver of the late earl of Anglesea's rents in the county of Wexford from the year 1711, to the year 1716, and that he knew lady Altham in 1715; that he collected rents at a place called Clonimes in 1715; that the Thursday before Easter he went to Clonimes to go to Wexford assizes, and that he went the Tuesday after Easter Sunday to Dunmaine, and met there John Weeden's wife, and one Taylor, and some other servants; says, he enquired if my lord was at home, but was told he was gone abroad; says, my lady came down, and that he saw her at the back-door, and remembers that she was big belly'd, and that she gave him two glasses of white wine, and that he drank to her ladyship's happy delivery. Says, he went to major Rogers's in Enniscorthy, and went from Enniscorthy to one Hayes's, who lived between Enniscorthy and Wexford; and Thursday morning, which was the Thursday after Easter Sunday, he came to Wexford assizes; says, that the spring assizes that year began on Saturday, April the 16th; says, he saw some tenants of my lord Anglesea there, and received some money from them. Being asked if he could remember what dress my lady had on; says, he remembers my lady Altham had on a white apron, a white handkerchief, and a striped gown. Says, he paid money to lord Altham in Wexford, and saw his coachman; says, he was at the Big Inn, and had one pint of white wine there; says, he heard afterwards that Mr. Walsh and Mr. Masterson were tried at Wexford. Says, he paid my lord 28*l.* rent, which deponent's son received at the Nanny-water, in the county of Meath, which is part of my lord Altham's estate. Being asked if he entered all the money he received of my lord Anglesea's rents in his book; says, he did, and made an entry every day in his books of what he received; says, he received 10*l.* from Mrs. Giffard on Thursday going to Clonimes; that he received 4*l.* from Mr. Thomas Houghton; that he received the 28*l.* at Enniscorthy, Wednesday in Easter week from his son (except 14*s.* expences) which the deponent paid my lord in Wexford. Says, as he was going to major Rogers's he met his son.

[Cross-examined.]

Being asked what day of the month was it he came to Clonimes; says, on Thursday before Easter Sunday; that he was backwards and forwards to and from Clonimes for three days; that he lay at Mr. Sutton's every night; that he went to Mr. Houghton's on Monday, and returned to Mr. Sutton's at night; that he went first to Dunmaine, and afterwards went to Enniscorthy; that he had no business at Dunmaine but in order to pay his compliments to my lord, and, if he met him, to tell his lordship, that the deponent's son got the money at the Nanny-water. Says, he cannot tell whether Dunmaine be the nearest road from Clonimes to Enniscorthy; and deponent says, that lord Anglesea said there would be many pretenders to his estate, and desired the deponent to turn tenant to Mr. Charles Annesley.

[Defendant's counsel desired deponent to look over his papers, which he accordingly did; and then mentioned particular times of his receiving some rents: That he received rents from Mr. Thomas Houghton in 1713, and to the best of his memory received 4*l.*]

Mr. *Cæsar Colclough* being in Court, was asked, If he had seen lord Altham at Wexford assizes; says, he does not remember to have seen him there.

Then *Higgison* being again interrogated.

Says, he could not tell the day of the week he received Houghton's rents; says, he received Giffard's, Houghton's and one Sutton's rent within three days time; says, he believes it was after the 21st of May he lay at Ross. That he lay either at one Browning's or Boucher's. Being asked the particular manner of his entering the receipt of the rents; says, he entered the particular day of the month on which he received the money. Says, he very often lay at Dunmaine before the time of his going to the assizes; and lay several nights at Dunmaine before lady Altham came thither. Says, he called at Dunmaine to acquaint my lord that his son would pay that money. Being asked if he made an entry of that money; says, he is sure he made an entry of that money, and took receipts, and has seen that entry, and believes it was the 21st of April. Says, the money was paid about ten in the morning. Says, he believes he was not at Dunmaine for two years before that time, nor was he there afterwards. Says, he did not see my lady at Dunmaine before that time, but saw her at Ross. Says, he received lord Altham's rents a long time in the county of Meath, but did not receive the rents at Ross. Says, he paid some part of the rents towards a chariot; that he was bound for 70*l.* and lost 20*l.* by it. Says, he surveyed lands for earl James, and earl Arthur. Says, that in June or July 1715, it was said in the presence of the late lord Anglesea, that lord Altham had a son, and lord Anglesea wished he had one. Says, he received a subpœna to appear on the trial. Being asked if he believed Mr. William Knapper to be an honest man, or that he would forswear himself; says, he believes Mr. Knapper to be an honest man, and that he believed no honest man would forswear himself.

Colonel *Loftus* was called to support Mrs. Giffard's character, and he was asked by the defendant's counsel, Whether he believed Mrs.

Giffard could be believed upon her oath: col. Loftus answered, that he believes she may be believed upon her oath.—The plaintiff's counsel thereupon asked colonel Loftus,—Whether Mrs. Lambert could be believed upon her oath: He said, he could not take upon him to say how a woman could be believed, that lived in the state she lived in.—And thereupon mentioned something injurious to her character.

Here ends the ninth day's examination of witnesses, in this cause, on Monday the 21st day of November, about eight o'clock at night. And the Court, by the like consent, as usual, which was signed by the parties and their respective attornies, and read in open court, adjourned till nine o'clock the next morning.

Tuesday, November 22.

The Court met according to adjournment, and the jury being called over as before, answered to their names, respectively.

William Stephens, sworn.

Being asked if he knew Arthur Herd, and whether he had any, and what discourse with him; says, he knew Arthur Herd and saw him when Mr. Annesley came to the Bear-inn in Enniscorthy; and that he then asked Herd, what strangers those were; that Herd then said, This is the right heir to the Anglesea estate, if right would take place.

[Cross-examined.]

Being asked whether he said that Herd told him lady Altham had a child; says, Herd did not say that lady Altham had a child; but deponent says, he met Herd in the street, and that Herd told him he (Mr. Annesley) was the young lord. Being asked as to Herd's character; says, he never heard but that he was an honest man, and believes that Herd may be believed on his oath; and deponent said, he did not see the young lord at the time that Herd had this discourse with him, for that he was down at Tom King's at the Bear. Deponent says, he talked of the discourse he had with Herd to one Bartholomew Furlong, who lives under colonel Richards, when Furlong was subpœnaed. Being asked upon what occasion he told it to Furlong; says, because Furlong said Arthur Herd was a material evidence. Being asked what Furlong told him; says, Furlong told him nothing. Being asked what brought him to town; says, his horse brought him to town.

[The defendant's counsel made some remarks on the indecency of the witness's answers on so solemn an examination, and then asked,]

If the horse was his own; he answered, it was not his own but he hired it: And being asked who hired the horse for him; he said he could not tell, he found the horse at the door; he said he was served with a subpœna by one O'Neil, but that he had no discourse with O'Neil about giving his evidence. Being asked what business he followed; he said, he kept a public house and a shop in Enniscorthy.

William Houghton, sworn to the Voire Dire.

Says, he has known Arthur Herd very well these fifteen or sixteen years past; that he happened to go into Arthur Herd's shop about a wig, and had some discourse with him, and heard him say Mr. James Annesley was the true heir to the estate the earl of Anglesea possessed, as he verily believed, and that he knew him from a child at Dunmaine and at Ross.

[Cross-examined.]

Being asked if he made use of these words, That he knew him at Dunmaine and at Ross; says, he did. Being asked where he was born; says, he was born at Ross, and lived at the town of Enniscorthy fifty three years next Candlemas. Being asked how he came to give his evidence here; says, he heard of a letter which went to Ross, and that the letter was the sole thing that occasioned his coming to give his evidence, and that he came of his own accord. Being asked what he said to the letter; says, he said he would do all the justice in his power to Mr. Annesley; says, he had no thoughts of coming, but that his conscience pricked him, hearing that Arthur Herd had given such evidence. Being asked when it was he resolved on coming to give his evidence; says, when he heard it was going hard against Mr. Annesley he had thoughts of coming. Being asked what the substance of the letter was; says, the letter gave an account of the trial; that the letter came to Mrs. Sinnot, and as she was talking of the trial, it was said that Arthur Herd turned tail to Mr. James Annesley, and that that surprized every one. Says, that it being told about that Herd was become an evidence for lord Anglesey, deponent mentioned that Herd had formerly declared otherwise; and deponent said, that hearing of Herd's evidence, he did recollect what Herd had formerly said. Being asked whether he knew that he should come time enough to give his evidence; says, if he did not, he should know the road back again.

John Ryan, sworn.

Being asked if he knew Mr. Downes, and had any conversation with him about Mr. James Annesley the lessor of the plaintiff; says he knows Mr. Downes very well, that Mr. Downes told him in discourse, that lord Altham said to the child, You bastard, get up and salute the man who made you a Christian, and that he should get 900*l.* for giving this evidence. Deponent said, it was on a Sunday in the summer or harvest last was a twelve-month that Mr. Downes said those words; says, that deponent then told Mr. Downes, that he was old, and his memory might be treacherous, whereupon Mr. Downes said, that he would

get a remedy, that he should get absolution from some other gentlemen if his memory was not sufficient to support his oath. Being asked if Mr. Downes made any application to him for a remedy; says, he did not. He was asked if he was a priest.

Plantiff's counsel desired him to refuse answering that question, and the witness refused answering it.

[Cross-examined.]

Being asked if it was in confession Mr. Downes told it him; says, it was not, it was only in common conversation. Being asked if Mr. Downes told it to him as what was really true or not; says, he does not know: and being asked what were his own sentiments of it; he said, whether it was true or false, he thought it bad to receive money for giving his testimony: He said, Mr. Downes is thought to be very unguarded in his expressions, but would not say positively that Mr. Downes would swear to a falsity. Being asked if it is a practice for a man to be absolved before a fact is committed; as suppose a man should say he would swear a false thing, could he be absolved in such a case before he swore; says, he could not be absolved in that case.

Mr. *Downes* was called upon the table to know what he could say to support his own testimony.

He was asked if he had any conversation with Mr. Ryan about his giving his evidence here, or if he told him that he was to get 200*l.* for giving his evidence: Mr. Downes said, he never had any conversation with him about what he was to swear, and never told him that he was to get 200*l.* for giving his evidence; and said, he never received a penny, nor was he to receive a penny for giving this evidence.

Ryan insisted, that Mr. Downes told him he was to receive 200*l.* for giving his evidence.

Then Ryan being asked where he lived, and what persons he knew; he mentioned the places he lived in, and some persons he knew; he said, that he absconded, but was found out, and served with a subpœna to give his testimony here, and he added, that he was not to get a penny for giving his evidence. Being asked, if he told any person what he said Mr. Downes had mentioned to him; says, that happening to be in company with three gentlemen at Ross, and hearing them talk of Mr. Downes, he mentioned the words to them; says, he also mentioned the affair to one Kelly, and supposes that Kelly might talk of it. Being asked where he set up in Dublin; he said, he set up at the White-cross inn in Pill-lane; he said, he did not come to town with a view of giving his evidence, but about other business, and was subpœnaed since his coming to town. Being asked if any witnesses for the plaintiff lodged at the inn at which he set up; he said, he heard there were some of the plaintiff's evidences there. Being asked if he ever set up at that inn before; says, he never did. And being asked who recommended the house to him; says, it was one Kelly who came to town along with him. And being asked if that Kelly was concerned in any respect for the plaintiff; he said, he believed he was.

Colonel *Loftus* called to give a character of Father Downes.

Said, he was a tenant of his for ten or twelve years, and behaved well, and said he generally had a good character, and that he should believe him upon his oath.

Serjeant *Marshall* mentioned the limitations of the estate by the will of earl James, and observed that lord Altham was tenant for life, remainder to his son; and that by concealing that he had a son, it was easier for him to sell reversions; and that it was his interest to conceal a son from his creditors; that though sometimes the lord Altham and the present defendant were not upon good terms, yet they joined in setting reversionary leases. He then set forth the limitations of the wills and codicils, which were on the table.

Eleanor Murphy called again.

Being asked if Rolph did live at the house of Dunmaine in her time; says, that Rolph did not live there in her time; says, she was laundry-maid there when lady Altham was brought to bed. Being desired to name the other servants; says, Mrs. Heath and Anthony Dyer lived there, and Mary Doyle was housemaid, and one Weedon was coachman; but says, she did not remember that Mary Waters or one Setright was there when lady Altham came to the country. Says, that a woman cook came along with my lady, and that there was not a man-cook in her time. Being asked if she remembered one Betty Doyle at Dunmaine; says, she did not remember Betty Doyle's living there; she mentioned another woman being there who was a weeder in the garden. Being asked whether Mary Doyle lived in the house before her; says, that Mary Doyle was in the house before her. Being asked if Mrs. Butler is dead or alive; says, she knows not whether she be dead or alive; says, Mr. Taylor hired the deponent, and at that time she heard lady Altham was to come home. She said, that her ladyship was at captain Butler's before she had a child.

Thomas Rolph was called again to be examined, and *Eleanor Murphy* was on the table at the same time in court.

Eleanor Murphy was asked if she knew Rolph; Murphy said she never knew Rolph.

Rolph was asked what time he came to lord Altham's service: he said, he came in 1711, or 1712, and left it in 1715, and was in Dunmaine when lord and lady Altham came together: he said, he was always in Dunmaine except when lady Altham went to Wexford assizes. Being

asked if one Charles Meagher the butler was there in his time; he said that Meagher was not there in his time.

Mary Doyle called again to be examined and sworn.

Being asked how long she lived in the service; says, she lived four months in the service, and that Charles Meagher was butler in her time, and that Rolph was not there in her time.

Rolph was asked, if he remembered Mary Doyle there; he said, he did not remember her a servant there in his time.

Mary Doyle was asked if Dennis Redmonds was there in her time; she said he was; and that Eleanor Murphy stayed in the service after her: she said, she came into the service after Christmas; and that Eleanor Murphy was in service before her; and that she herself was in the service before lady Altham came to Dunmaine.

Murphy said, she lived with madam Butler in Ross before she came to Dunmaine.

Rolph was asked, if Joan Laffan was there in his time; he said, Joan Laffan was not there in his time; and that he was in my lord Altham's service when my lady Altham came to Dunmaine, in Christmas, 1713.

Eleanor Murphy said, she saw Joan Laffan at Mr. Butler's when she was in service at Mr. Butler's, and that Dennis Redmonds was in service in Dunmaine when she was there.

Rolph being asked where he lived before he came over to Ireland; he said, he lived in Chelsea. Being asked where he took shipping for this kingdom; he said, he took shipping at Holyhead, and went home by the way of Bristol.

Joan Laffan was called to be examined and sworn, and *Rolph* and *Eleanor Murphy* were at the same time on the table in court.

Being asked if she ever saw Rolph; she said, she could not tell if she had ever seen him. Being asked who was butler in her time; she said, Charles Meagher was butler in her time.

Rolph was then asked, if he ever remembered to have seen Joan Laffan; he said, he never remembered to have seen her before his then seeing her.

Laffan was asked if she knew Eleanor Murphy or Mary Doyle; she said, she knew them above 20 years, but they were not at Dunmaine in her time. She was asked when she came to Dunmaine; she said, she came there in the harvest-time, and that lady Altham hired her about All-Hallow-tide.

Rolph said, lord Altham stayed three weeks in Dunmaine when he came from Wexford. He was asked if he ever lived in Kent near Maidstone; he said, he never lived there; he said he quitted Dunmaine in 1715, after Michaelmas, and that lord Altham was then in Dublin; he said, he went to Wexford assizes at the time of Masterson and Walsh's trial; that my lord came from Wexford to Dunmaine, and went afterwards to Dublin.

Eleanor Murphy being asked where she was at the time of the great eclipse; said, she was in Ross at the time of the great darkness before she came to my lady's service; and that she lived at Madam Butler's in Ross at the time of the great darkness.

Dennis Redmonds was then called to be examined and sworn, and he, *Rolph*, *Joan Laffan*, and *Eleanor Murphy* were all at the same time on the table in court.

Redmonds was asked who was butler in his time; he said, that one Meagher was butler in his time, and that he remembered one Rolph in his time about the cellar; and he said, that Meagher gave the servants drink at the time of the child's christening. He said, he knew Murphy, but could not tell whether she was in the service in his time.

Mary Doyle being asked again if Eleanor Murphy was in the service at Dunmaine before her time; she said, she could not now tell if she was in the service before her time.

Redmonds being asked if he remembered the time of the great eclipse; he said, he could not remember the time of the great eclipse; but he said he remembered the time of the rejoicings for the birth of the child. Being asked if he remembered the time Rolph went away from the service; he said, he did not remember when Rolph went away. Being asked if ever he went to Dublin with lord and lady Altham; he said, he did not. Being asked if he remembered the quarrel between Rolph and the gardener; he said, he remembered no quarrel between them. Being asked where he left the midwife he brought along with him to Dunmaine; he said, he left her in the middle of the yard before the great door. Being asked if he understood English; he said he did.

John Turner called again to be examined and sworn.

Turner being asked what time he made his first visit to Dunmaine; says, he made his first visit shortly after his marriage, which was on the 29th of September 1714. Being asked how long his wife staid in Dunmaine; says, his wife was there six or seven weeks. Being asked of what size lord Altham was; he pointed to a middle sized gentleman in court, and said he was shorter than him. Being asked if ever he dined with any of the head-servants; he said he never did. Being asked if he remembered the butler; says, he did not remember who was butler when he was at Dunmaine. He was asked if he remembered to see Rolph the butler; he said, he did not remember to see him in Dunmaine; he said, he was in Dunmaine in July and August, and that he remembers to see the lady Altham in August 1715, at Dunmaine.

Rolph being asked how long my lord and lady went to Dublin before he quitted the service; he said, about three months, and that they left it in June or July 1715, and that they did not return to Dunmaine before he left it.

Being asked how long after Wexford assizes my lord went to Dublin; he said, my lord went about three weeks or a month, but is not sure that my lady went then; he said, he believed it was the year after the Rebellion he left Dunmaine, and was encamped in Hyde Park.

Turner was examined as to lady Altham's being at Wexford assizes.

He said, that he overtook my lord going to the assizes in a chariot, and that there were two servants along with him, but that he saw no women along with him; he said my lady was at home, and that he saw her at home after my lord went to the assizes. Being asked if he heard of any remarkable trial at the assizes; he said, he believed Mr. Walsh and some other persons were indicted there. Being asked if he remembered the eclipse; he said, he did; that he believed it was in the year he was married, and he thought it was in the beginning of summer, and that he believed it was after Wexford assizes. Being asked if he did remember where he was at the time of the eclipse; he said, that at the time of the eclipse he was between Maghery and Wexford, near Mr. Colclough's, but that he does not remember what was his business there at that time.

The Court ordered Mrs. *Henrietta Cole* and Mrs. *Heath*, to confront each other.

To Mrs. *Heath*.

Q. Mrs. Heath, you said, as well as I remember your testimony, that Rolph was butler at Dunmaine?

Mrs. *Heath*. Yes, when I first went down.

Can you recollect how long he continued there?—No, but I remember he went away when we were in Dublin.

When?—The last time that we came up,

You mentioned that you saw the fire-works, the first birth day of king George the first, from captain Annesley's lodgings?—I did.

Had you left Rolph in the country then, or had you not?—I left him in the country, in the house.

Did you find him in the house when you returned?—No, for my lord hired a butler in Dublin, one Charles Magher, and sent him down.

Was he sent before my lady went back?—He was sent while we were at Mrs. Vice's, and hired there.

Was there any account that Rolph had quitted the family before Magher was hired?—I cannot tell; but there was a quarrel between Rolph and the gardener, and he was ordered to quit it.

What time of the year did you go back with my lady to Dunmaine?—It was above a year we stayed in town.

Did Magher act as butler during that time?—He did, my lord.

You came over with my lady from England?—I did.

You first came to the house of captain Briscoe?—We came there to lodge.

Where did you go immediately after you left captain Briscoe's?—We went down to Dunmaine, and got there on Christmas-eve.

Did not you go first into other lodgings?—We did not go at all to any house to lodge.

To Mrs. *Cole*.

Do you remember the time of lady Altham's coming to your house, when the reconciliation happened?—Mrs. *Cole*. I do.

What became of my lord and lady afterwards?—To the best of my knowledge, they did not stay in our house above four or five days, and they went and took lodgings at Mrs. Vice's.

To Mrs. *Heath*.

Q. Do you know this gentlewoman?

Mrs. *Heath*. I do remember her.

To Mrs. *Cole*.

Q. Did you ever visit, after they had left your house, while they remained in town?

Mrs. *Cole*. I cannot tell, but I believe we might.

Recollect yourself and fix, whether you are certain that they went to Vice's, or any other place from your father's?—Indeed, my lord, I believe they went to Mrs. Vice's.

Can you be positive that they lodged in any other house in Dublin but your father's, before they left Dublin?—I am positive.

What do you found your opinion upon?—I believe I have seen them in Dublin.

Well, but what reason have you to think they went to Vice's before they went to Dunmaine?—The reason I can recollect is, that after my lord and lady came together, my father was still uneasy, though they were come together, till my lord took her to a lodging of his own; and he thought if they went to lodge at some other place, it might have a better face or air of a reconciliation.

Did you understand your father to mean by that, that it would become more public and notorious to mankind, that lord and lady Altham were really reconciled?—Yes, I did understand that to be his meaning.

How long was lady Altham at your house, in the whole?—A month or six weeks before my lord came and was reconciled, and not above four or five days after the reconciliation, at our house.

You remember the time of your going down to Dunmaine?—I do.

What time was it?—It was in the winter.

Do you remember any thing concerning the lady's being indisposed there?—Yes, I do.

Tell that again.—There was an accident happened, which frightened and fretted my lady, upon which she became indisposed, and I remember a servant's being sent up by my lord to desire my lady to come to supper, and my mother was with her two or three times to call her, and yet she excused herself.

Do you remember any thing that happened upon that?—My lady miscarried.

Who gave that notice first to your mother?—Mrs. Heath.

At what time?—My mother was called up in the night.

By whom?—By Mrs. Heath, who came to my mother's room, and said, For God's sake, madam, get up as soon as you can, for my lady is exceeding ill.

To Mrs. *Heath*.

Q. Do you remember that fact?

Mrs. *Heath*. No, my lord, there was no such thing happened, for my lady never miscarried.

Do you remember that you called up Mrs. Briscoe in the night?—No, I never did; I don't know what I should call her for.

Did you ever tell Mrs. Briscoe that your lady had miscarried?—No, for if I had, I should have told a false thing; and I never lay a night in any house in Dublin but captain Briscoe's till we came to Dunmaine.

To Mrs. *Cole*.

Q. Were you, after that time, in my lady's bed-chamber?—I was.

How soon after?—The next morning.

To Mrs. *Heath*.

Q. Was she in my lady's bed-chamber the next morning?

Mrs. *Heath*. I do not know but she might, for my lady always breakfasted in her bed-chamber.

To Mrs. *Cole*.

Q. Who was it that shewed to you that, which you took to be the abortion?

Mrs. *Cole*. My mother, my lord.

Where was Mrs. Heath then?—Indeed I cannot tell whether she was there or not.

How old were you when my lady came into Ireland?—I was either 13, 14, or 15, I cannot remember.

How old are you now?—I believe I am either 45, or 46.

How old were you when at Dunmaine?—I say, I believe I was either 13, 14, or 15, I cannot recollect.

Do you remember how long my lord and lady stayed in Dublin after they left your father's house, before they went to Dunmaine?—Not very long: I cannot exactly tell.

Did you see them in that time seldom or often?—I cannot tell how often.

To Mrs. *Heath*.

Q. Did my lady keep her bed, or not, the day after that accident of the saucers?

Mrs. *Heath*. No, my lord, it never disturbed her, for she was glad they were gone.

Did she keep her room the next day?—No, my lord.

To Mrs. *Cole*.

Q. Did my lady keep her room the day after?

Mrs. *Cole*. She did, and for some days after.

Who was butler when you were there?—One Rolph.*

* After the evidence for the plaintiff on the reply was closed, Mr. Serjeant Marshall, of counsel for the plaintiff, stated the title of Arthur lord Altham, from the wills and codicils of James, the first earl of Anglesea, to shew that Arthur lord Altham was only tenant for life; the counsel for the defendant having insisted, that he was tenant in tail under the said wills and codicils; upon which the wills and codicils were in part read.——But the Court were pleased to interpose, and said, That this was a question of law that might require great consideration, and was not necessary to be determined at this time; the only material point being, what was the opinion of lord Altham concerning his title; that is, at the time mentioned by col. Wall, in his evidence, (which was, that he never heard lord Altham had a child by my lady; for in 1725, counsel gave an opinion that he had an estate tail, in the remainder of the Anglesea estate. Col. Wall told my lord, that he could sell the reversion of the Anglesea estate better if he had a son, for he could by a fine bar his issue; but that he could not bar the remainder, not being in possession; and that he often heard my lord wish he had a legitimate son; and that he had an illegitimate one) therefore whether Arthur lord Altham considered himself as tenant in tail, or only tenant for life, of the Anglesea estate, for, according to his opinion, concerning his title in that estate, it was his interest to own or disown his having a lawful son. *Former Edition.*

Here both parties, plaintiff and defendant, closed their evidence about 6 o'clock on Tuesday night the 22d of November, and the Court expressed great surprize at finding such contradiction between the plaintiff and defendant's witnesses; and the Court and jury being greatly fatigued with this long trial, adjourned to 8 o'clock on Thursday morning following; at which time it was agreed by plaintiff and defendant, that three lawyers on each side should speak to the matter. The consent for adjournment was signed as usual by the plaintiff and defendant, and their respective attornies, and read in open court. And thus ended the 10th day's examination of witnesses in this cause.

November 24, 1743.

Thursday morning, half an hour past eight o'clock, the Court met according to adjournment, and the jury being called over, answered to their names respectively.

Court. This day, gentlemen, being appointed for counsel on both sides to speak to this cause, which has so long taken up the time of the Court, and prevented the progress of other suits, it is hoped you will finish speaking to it this day.—Mr. Prime Serjeant Malone, please to begin.

Sir *Thomas Taylor, Foreman of the Jury*. My lords, my fellow jurors have directed me to know what they are entitled to if they find a verdict, and hope the attornies on both sides will settle that matter.

Court. It is very proper.—Call Mr. Caldwell attorney for the plaintiff, and Mr. Thomas Borroughs attorney for the defendant; and they appeared.

Gentlemen, the jury have desired to know what they are entitled to, if they bring in a verdict; which the Court thinks right.

The respective attornies agreed, that each man of the jury should be allowed 20*s.* a day for their attendance,† which was to be paid moitively by both parties, plaintiff, and defendant.

Mr. *Prime Serjeant Malone*, of counsel for the defendant. The matter in question, my lords, has taken up so much of your lordships' time, and of the gentlemen of the jury, that I shall be as concise as I can, and hope to satisfy the jury, that a verdict ought to be found in favour of the defendant my client. But if I should happen, my lords, to touch upon any thing which I formerly mentioned (as this affair has been attended with such multiplicity of evidences) I would request your lordships' indulgence.

The single question, my lords, before the Court and the jury is, Whether the lessor of the plaintiff, Mr. James Annesley, is, or is not the legitimate son of the late Arthur lord Altham?

The plaintiff's counsel have very ingeniously dressed out their case; but when the ornaments are taken away, it will I hope appear, that the plaintiff is the natural and not the legitimate son of Arthur late lord Altham.

My lords, before I proceed to the evidence, it will be proper to examine the condition and circumstances of the family before the time alleged for the birth of the lessor of the plaintiff.

Arthur first earl of Anglesea, had issue five sons, James, his eldest son, Altham his second son, Richard, third son, created lord Altham, Charles his fourth son, and Arthur his fifth son.

On the marriage of James in 1699, a settlement was made by Arthur the first earl, and several provisions and limitations therein; [which Mr. Prime Serjeant mentioned.]

Richard lord Altham died in 1701, leaving Arthur late lord Altham, and the present defendant.

James son of earl Arthur, levied fines, and suffered a recovery of his estate, and on the 14th of May, 1701, made his will, wherein was limited a remainder to Richard lord Altham for life, remainder to his first and every other son in tail male, with several remainders over.

Subsequent to this, upon the death of Richard lord Altham, on the 9th of December 1701, he made another will, limiting a remainder to Arthur late lord Altham for life, remainder to his first, and every other son, with several remainders over; but no manner of notice was taken of the defendant, who is the second son of lord Richard, and earl James the same day affixed a codicil thereto.

On the 10th of December 1701, he affixed two codicils more to his will; and subsequent to all these, on the second of January, 1701, he affixed two other codicils to his will; so that there were two wills, and six codicils with respect to this matter.

And the lessor of the plaintiff presumes to pretend a right to the estate of the late lord Altham under the said wills and codicils.

Earl James had issue James, John and Arthur, who were successively earls of Anglesea, and who all died without issue male; and had the late lord Altham, who was next in succession in point of blood, left a son, that son would have succeeded to the Altham and Anglesea estates; but I believe it has appeared to the satisfaction of your lordships, and the gentlemen of the jury, by the evidence of the defendant, that he left no issue.

If the late lord Altham had had a son by his lady, it would have been a matter of such consequence, that son being heir apparent to the Anglesea estate and title, that his birth would be publicly known; and the birth of such a son would be attended with such notoriety, that it could not be concealed.

The near relations of the family would be made acquainted therewith; his friends, neighbours and acquaintances, who used to visit his lordship, must know something of it; yet it is not pretended, that any of these were apprised of the late lord Altham's ever having a son by his lady: if there was such a son, such a transaction would be public, it could not remain a doubt, and it is impossible it should be a secret to all the world, except two or three of the meanest servants; which carries a presumption very near a demonstration, that the lord Altham never had a son by his lady.

I would, my lords, observe another circumstance which must be prodigiously surprizing if there had been such a son: it was not even intimated, that any of the news-papers published at that time, ever mentioned the birth of any such son; I believe it is unnecessary to inform your lordships, how industrious the news-writers are to fill their papers with paragraphs on such occasions, and especially when a nobleman is blessed with an heir to so immense an estate; is it not constantly inserted in the daily and weekly papers both in this kingdom, and England, The lady of such a one was safely delivered of a son, to the great joy of that noble family? &c. and these latter words are particularly added when any noble family has continued some considerable time without issue. And as that was pretty much the case with respect to the late lord Altham, it is manifest, his lordship never had any legitimate issue. I say, my lords, if lord Altham had been so happy as to have a son and heir, surely his family, who were interested in the succession, cannot be supposed to be strangers thereto; it would be the common rumour and discourse of the whole neighbourhood, and the public in general would have proclaimed it.

Some stress, my lords, has been laid by the

† The Jury afterwards very charitably and honourably made a present thereof to the infirmary of the Inns Quay, Dublin.—See the "Trial at Bar," p. 107.

plaintiff's counsel, on the fondness shewed by lord Altham to the lessor of the plaintiff when a child. We see, my lords, very frequently, how fond men are of an illegitimate son, especially when they have no legitimate issue; and I believe some instances might be shewn, that men have sometimes preferred their natural issue, to their lawful children; so that I say, the fondness of the late lord Altham can have no weight to support the pretensions of the lessor of the plaintiff; for if a man should have a bastard by a servant maid, is it not natural for him to take care of his offspring?

The lessor of the plaintiff has endeavoured to fish up circumstances, yet has failed in proving his birth; and the foundation being sapped, the superstructure will consequently fall.

He began with endeavouring to prove lady Altham a woman likely to have children, and that she had two miscarriages and a real birth in one year. I believe, my lords, the gentlemen of the jury, from their own attention to the occurrences in life, will observe how improbable, nay even impossible it is, for a woman to miscarry twice, at times so very distant, and in the space of that very year to be brought to bed of a son. This shews how the lessor of the plaintiff has overshot himself, and has quite overturned the credibility of his pretensions.

It is agreed, my lords, that the late lord Altham and his lady were married in 1706; that they afterwards parted in 1709, and that about 1713 they were reconciled, and lady Altham came into Ireland; the falling out on account of Mr. Palliser, and the separation thereupon was publicly known in the neighbourhood. The circumstances of their reconciliation after the separation of four years, would call in general on the attention of the family, and the curiosity of the people; so that if a child was born to inherit that estate, it must have necessarily engaged the attention of the family; it would have engaged the attention of the whole kingdom; and if this has not appeared with the utmost clearness, it carries with it the strongest presumption against the plaintiff. My lords, a fact of such importance that appears in the least doubtful, must be false; because, if true, it would have been evident and notorious beyond the reach of a doubt.

My lords, two ladies are produced as evidence for the plaintiff, Mrs. Cole and Miss Briscoe, whereon a good deal of stress is laid, with respect to the period of time that lady Altham went to Dunmaine after the reconciliation. Mrs. Cole said, That lady Altham came to Ireland in 1713, and stayed at her father's house for some time; from thence went to lodge at Vice's, and from Vice's went to Dunmaine. This, I say, is made use of to lessen the evidence of Mrs. Heath, who said, that lady Altham went directly to Dunmaine from capt. Briscoe's house, and therein disagreed with the evidence of Mrs. Cole.

It must be presumed, that if lady Altham went to Vice's before she went to the country, Miss Briscoe would have visited her, which she nor Mrs. Cole does not remember: want of memory in that particular lessens their credit in others. And indeed I think it very improbable, that lady Altham would have changed her lodgings from Briscoe's house to Vice's for such a short space of time, and so idle a reason as is suggested; and this circumstance should in a great measure take away the force of Mrs. Cole and Miss Briscoe's evidence.

It may be reasonably supposed, my lords, that after the pretended reconciliation, some of my lord Altham's relations (as I observed before) would pay her ladyship some of the ordinary honours due on such an occasion, some of the family would have been entertained, some of them would have been invited, some of them would have visited her, or would have taken leave of her when she went to the country; and as Miss Briscoe or Mrs. Cole had never mentioned any of these circumstances, their testimony is not much to be relied on; so that in this case, what Mrs. Cole said in favour of the plaintiff, and the evidence of Mrs. Heath in behalf of the defendant, deserve to be very well considered by the gentlemen of the jury.

My lords, I believe the gentlemen of the jury on their notes remember, that Mrs. Cole first swore she was 12 or 13 years old at the time of the pretended miscarriage, and afterwards said she was 15 years old; a girl of 12 cannot be supposed to take notice of such minute circumstances, in relation to the miscarriage, for such things could not make an impression at that age; it was indeed prudent of Mrs. Cole, to have afterwards added two years, to the best of her remembrance. As Mrs. Heath was constantly with lady Altham, she could not forget such remarkable circumstances as Mrs. Cole mentioned.

Mrs. Heath was then in the bloom of life, about the age of 25 years, when all the human faculties are in full vigour; and surely it is natural to believe, that a person can remember transactions at that age, when the judgment is ripe, and the memory more susceptible of retention, than at the age of 12 or 13 years, as Mrs. Cole says she then was; so that I appeal to the common sense of mankind, whether the evidence of Mrs. Cole, or Mrs. Heath should prevail. Mrs. Cole, I think, said, that lady Altham lodged at her father's house six weeks; Mrs. Heath mentioned only three weeks; one was a child, and the other a woman grown: It was impossible that Mrs. Heath could be mistaken, but Mrs. Cole was liable to be mistaken.

Therefore in my humble apprehension, and I hope your lordships and the jury will be of the same opinion, the evidence of Mrs. Cole can have no great weight.

The first miscarriage, my lords, according to Mrs. Cole's account, was in April, May, or June, 1714; she is not certain in which of these months it happened; it seems a dream to her, and not a reality; yet she pretends to have heard it from Mrs. Heath; but herein, I apprehend, she cannot receive credit.

The circumstances which Mrs. Cole mentioned, of awaking her mother at night by Mrs. Heath, should be considered, and that Mrs. Cole was not the person who was awaked or called up. And as to what she says, that her mother shewed her the abortion the next morning; it cannot be supposed, that a girl of 12 years old could know what an abortion was, or what the word meant, which must be presumed to have been lately put into her mouth, by comparing what she has lately heard, with other incidents, in order to be made a story; therefore I say, it carries with it the strongest presumption, that this must arise from some late discourses, adding thereto a feint remembrance, and mentioning some circumstances that happened 29 years ago, whereby she has persuaded herself that these things are true, which are the mere effects of her own brain; and thus Mrs. Cole is made to say, what she has offered in evidence.

My lords, Mrs. Cole in this respect is but a single witness, and is contradicted by Mrs. Heath and Rolph, to whom she appeals, and who, she owns, were servants in the house. And surely, if lady Altham had miscarried, it must certainly be supposed that Mrs. Heath, her ladyship's woman, would be privy thereto; and as she never knew any thing of that matter, and there is not a single instance offered to prove it but the memory of a young girl, which is but little to be relied on, it is plain, that no such pretended miscarriage ever happened.

Catherine M'Cormick, a woman in low circumstances, is produced to prove a second miscarriage; a child proves the first, and a servant maid who lived at Vice's is now pretended to prove a second miscarriage.

M'Cormick swears, lady Altham came to town to Vice's about the latter end of May, or beginning of June 1714, and about six weeks after miscarried, which must be near, or about the month of August. Cole's and M'Cormick's accounts are inconsistent, and as both, my lords, are impossible to be believed, it brings a disrepute on one or other of the witnesses; so that as one cannot tell which to believe, there can be no dependence on the testimony of either. Both Mrs. Briscoe and Mrs. Cole swear, they saw lady Altham in Dublin in August 1714, and that they never heard of a second miscarriage; and, as they say, they frequently visited lady Altham, she could not miscarry without their knowledge. M'Cormick said, one Lawlor, a midwife, attended lady Altham, and that she prevented the sending for Mrs. Lucas, who was the midwife called for; and that it was Mrs. Heath informed her of the second miscarriage. It seems very odd and absurd, that Mrs. Lucas should be mentioned to be sent for, and not one word of Lawlor, yet that Lawlor should be the person brought to attend on that occasion.

The account Mrs. Heath gives of Mrs. Lucas being intended to be sent for, is very consistent; but this seems improved by the ingenuity of the conductors, that the said miscarriage should like a madness be blown over, and that the Briscoes should know nothing of it.

Mrs. Alice Bates, my lords, is a stranger to the second miscarriage at Vice's: she says, that in two months after lady Altham's coming to Vice's, she was visibly with child, and that she clapped her hand on her ladyship's big belly. This is very improbable; or that lord Altham should say to her, By God, Ally, Moll's with child; and though she would endeavour to prove her ladyship's pregnancy by the manner she pretends lord Altham spoke so familiarly to her, yet, in my humble apprehension, it destroys her credit.

If lord Altham gloried in her ladyship's big belly, it is astonishing that it should not be known to all his acquaintance and relations; for if he spoke with so much freedom to Mrs. Bates, it must be supposed, he would have published it to all the world. Bates said, she published it in the family of the Briscoes, and they say, they knew nothing of it.

Bates said, that lady Altham was big with child in November at Vice's. M'Cormick swore, when she observed lady Altham with child, it was about Christmas; and as these evidences vary in such a manner, it should take away the force of their evidence.

I am now, my lords and gentlemen, come to the period of time wherein the supposed birth of the lessor of the plaintiff is said to have happened, which was either the latter end of April, or beginning of May 1715, a remarkable æra for two miscarriages, and the birth of a child in one year.

To prove which, Mr. Dennis Redmonds is the first person produced, who, by his own confession, was a stable boy; and that is the best description of him: but his evidence is falsified by himself: he tells you that he came to lord Altham's service about 33 years ago, which was before the reconciliation of his lordship to his lady, and that he continued in the service for three years; if he is right in this, he must have left the service before the time of the pretended birth.

My lords, it appears that lord Altham went to live at Dunmaine in 1711, yet Redmonds must be in the service, as he says, in 1710. This point seems to be carried by the gentlemen a little too far; they have settled their witness in the service five years antecedent to the birth; and as he lived but about three years in lord Altham's service, he could not have known the transactions of the supposed birth. How little stress is to be laid on this witness is very plain. Indeed his very appearance created a strong prejudice to his disadvantage, and that prejudice is well justified by the inconsistency of his evidence.

He said, that he knew Rolph was in the family in his time; and he remembered no other circumstance in relation to him, but that he was about the cellar: And he did not remember any servant, but that Charles Meagher was butler at the time of the birth: and yet it appears that Meagher came not into

the service until after the time of the pretended birth. It is pretty remarkable, that all the other defendant's witnesses know nothing of Rolph's being in the family; but they fix on Charles Meagher as a prelude to the play.

Mary Doyle, my lords, is the next evidence in support of this pretended birth. She was a chamber maid in the family; and about 28 or 29 years ago she came into the service, and made a very short stay therein; she was never in the family before, and never came into lady Altham's chamber before the time of the birth; yet she is so lucky to come there at that critical juncture. She could not remember of any person being there, except madam Butler of Ross, Eleanor Murphy, the midwife, and herself.—But Mrs. Heath was there some time afterwards, yet Eleanor Murphy could not remember of any person being in the room when lady Altham was brought to bed, except Mrs. Heath. When an affair, my lords, is ushered in after this manner, and the evidence an absolute stranger to other circumstances (which are to be known by the rest of the witnesses;) this I apprehend must greatly tend to have overturned the credit of their testimony.

Can it be supposed, my lords, that a child born to all those honours should only be known to a chamber-maid and an under laundry-maid (Eleanor Murphy)? If they were in the service (which I must own I cannot prevail on myself to believe) it must be after the time fixed for the supposed birth, and by the meanness of their stations it can scarce be presumed they would have been employed about the birth. My lords, it is demonstrable from their own shewing, that one or the other of them is perjured; for Mary Doyle said she was in the service before Eleanor Murphy, and Murphy said that Doyle was in the service before her. It seems they both forgot their lessons; and Mary Doyle being interrogated last day, said first, that Eleanor Murphy was in lord Altham's service before her, and afterwards said she could not tell if Eleanor Murphy was in the service before her time. These, my lords, are contradictions not to be reconciled, and should induce a disbelief of both their evidence.

I must now observe to your lordships, how Eleanor Murphy contradicts herself in point of time as to the eclipse, which happened the 22d of April in the year 1715; it was a very memorable thing, and she said that she was at that time at captain Butler's at Ross; if she swore true she must have been in Dunmaine at that time, it being about that period of time that the lessor of the plaintiff has fixed his birth. And another contradiction arises from her testimony, that she said she was in Dunmaine three months before the birth (which was in April or May, as pretended;) yet from her own admission she was in Ross the 22d of April, and came (as she says) to lord Altham's service the day following. This is as equally inconsistent as the rest; and, my lords, to consider her testimony in another respect, if she came to the service the day after the eclipse, and was in the service three months before the birth, the child must be born in the month of July. From circumstances only persons sometimes can be proved perjured; but it is plain they were at a loss and could not make all parts of the machine to hang together. As a proof hereof, let us consider how Mary Doyle swears that major Fitzgerald came to Dunmaine the day after the birth, and lay there that night: He swore he came to Dunmaine in the month of September, the day after the child was born, but did not continue there; for that he went to Ross that night. Mr. Fitzgerald gave very particular reasons for his being at Dunmaine that month; that the harvest was over, and that people at that time generally pay their half years rent: And he gave an account how he was invited by lord Altham; and that the child was shewn to him, and he gave the nurse half-a guinea. Surely, my lords, it is incredible that lady Altham could have a child in May and another in September following.

I humbly conceive, my lords, that major Fitzgerald, from his education and character, must be presumed to be believed before Doyle or Murphy; or if their evidence be regarded, consequently what Mr. Fitzgerald swore cannot be true. As for my part, I would not give up the major to them in point of credit.

He tells you how he was attacked, and how he defended himself and recovered his house. He appears to be a gentleman of figure and reputation, and therefore his testimony ought to be relied on preferably to theirs: but as it is impossible both stories should be true, it must bring an imputation on the cause; and, my lords, it is humbly presumed that by the several contradictions arising from the evidence in behalf of the lessor of the plaintiff, that in order to entitle him to a verdict it is essentially requisite on him to ascertain a more positive, distinct, and creditable account of his birth.

My lords, I must take notice to your lordships to what difficulties the plaintiff was drove, in point of evidence. There has not been a single person of credit near Ross, nor a freeholder of 10*l.* a year about that place, produced to prove his birth, though Dunmaine lies within three miles of Ross, (a town of great trade and business,) and though lord Altham had a considerable estate there; and this is attended with another circumstance, that the plaintiff's birth was not registered in the parish where he is pretended to be born. And though it is said that there were public rejoicings in Dunmaine for his birth, yet we find no gentleman in that part of the country knew any thing of it, nor is there any person above the degree of a servant produced to give any account of his birth. Why has not the plaintiff produced better evidence? Every thing is to be proved by the best testimony it will admit of. The fact might well admit better evidence, but the cause will not afford it.

I shall next make some observations, my lords, on the appointing Joan Landy to be nurse for this pretended child. It is said the child remained with her fourteen or fifteen months; her name was given in to the defendant's counsel to be examined as one of the witnesses for the plaintiff: Why is not she produced? The gentlemen of the other side promised from day to day that we should see her examined; and we expected that accordingly she was to have wound up the bottom. She could not shelter herself by saying she was only three months in the service: Either the consciousness that she could not swear that lady Altham had a child, or that her infirmity would not admit her to have art enough to disguise, prevented the plaintiff from examining her.

The plaintiff's counsel, my lords, being pressed by the defendant's counsel to produce her, have made an ingenious apology for her; that she is an infirm old woman; but this cannot be the reason. However weak she is, she must still speak truth; she was longer conversant in the affairs of the family, than either Doyle or Murphy, consequently it induces a strong presumption of the badness of the cause. There must be some contrivance in giving her name among the list of evidences, and afterwards in omitting to examine her.—I say therefore, my lords, it is plain, that the plaintiff apprehended truth would force its way, if Landy had been examined; she must know whether she had a bastard by lord Altham, or whether she nursed any child for him; and as I am informed that she is in town, and perhaps in court, it must have the strongest impression on the mind of every man, that the whole affair on the part of the plaintiff, is a mere fiction, since he avoids the examination of a person who must be best apprized of the whole transaction.

And here, my lords, I should take notice to your lordships, and the gentlemen of the jury, that Mary Doyle swore that Joan Landy was married to one M'Cormick, before the birth of the lessor of the plaintiff; and that they lived in the lands of Dunmaine; though all the other witnesses say, they were not married till after the separation of my lord and lady at Dunmaine, which was a long time after the lessor of the plaintiff is supposed to be born; and this likewise shews the improbability of the plaintiff's story.

Joan Landy must be with child, it is true, to qualify her to be a nurse; and it appears she was unmarried at the time of nursing the child, and her child must be a year older than lady Altham's pretended child.

If lady Altham had a child, my lords, it is extremely surprising that so little care should be taken of it, as to give it into the care of Joan Landy to be nursed, who was scarce chaste enough (if I am rightly instructed) to confine herself to one person; nobody can tell what disorders she might contract: for these reasons, from the apprehension of such dangers, it is very improbable lady Altham would have entrusted her child to such a nurse.

There are other reasons, my lords, which must weigh greatly with your lordships, and the gentlemen of the jury. It is proved that lady Altham suspected Joan Landy to be with child by my lord, and therefore turned her out of the house on that account; is it possible to think, that this person to which lady Altham had so great a disgust and aversion, should be the very person she should think proper to fix on for the nursing her son and heir? And can it enter into the mind of man, that lord Altham, who never before had a child by his lady, and could not well expect to have many more, should consent that this only child of the family, born to such high honour and immense estate, should be sent to such a creature as Landy was, and be nursed in a mean cottier's cabbin? It is unusual with gentlemen of the country to send their only child to be nursed abroad, and especially when there are conveniences for that purpose at home; as to Landy's cottage, it appeared to be a cabbin of the meanest kind.

It is natural to suppose, my lords, that if lord Altham had a legitimate son, he would not be admitted to be nursed abroad, proper persons would have been appointed to attend the child at home; and the tenderness of lady Altham for her child, would so strongly overflow in her, that she could not bear having him out of her sight, and lord Altham's interest, as well as his fondness, would influence him to have the child always under his eye.

But to gloss over this fiction, and give it the appearance of a reality, this cabbin is to be dressed up; and Murphy adds a third room to the cottage, and this room is decked and ornamented for the nursing of the child; but the other witnesses contradict Murphy, and affirm, that there was not a third room added.

Murphy said, that about three weeks after the birth of the child, it was sent to be nursed in this new-made room, a habitation extremely improper for a tender infant, born to such honour and such an estate, and whose preservation must at that time have been his parent's greatest care. The fiction is too improbable to meet any credit.

My lords, one Bartholomew Furlong mentions, that three weeks before the child was born, he applied in order to get the nursing of the child for his wife; by the plaintiff's evidence, in about six weeks after this application, the child was sent to Landy's; and though this man was well recommended, and had the character of an honest man, yet his wife was refused, and a kitchen-wench under an ill repute (as appeared in evidence) with the meanest of the servants, was preferred to Furlong's wife. But this is vanished over by a sudden indisposition, to occasion her milk not to be wholesome; and doctor Brown, who was said to have examined her milk, happens now not to be living.

If a person had many children, and was stinted for room in his house, and the nursing a child at home was attended with inconveniences, this might be assigned as a reason for sending the child abroad. But that could not be the lord Altham's case, he had a large country-house, and a number of servants; it is very improbable, that he should send his only son and heir out of his own house.

The plaintiff, my lords, to make his pretensions the more plausible, has produced Philip Breen and some other witnesses who said there were great rejoicings and bonfires made for the birth of the child; and that there was a great christening, and liquor given in abundance to the servants on that occasion. If there were any such rejoicings, they would have been public, and other servants must have seen them; but this, it seems, was intended to be concealed from all the other servants, and the rest of mankind, except the witnesses who now endeavour to prove it.

The grove, near lord Altham's house, was an odd place for a bonfire for public rejoicings; if the fire was made without the grove, the neighbours must have seen it; but the whole matter is blended with such inconsistences, that it must appear an odd jumbled story.

My lords, I must now beg leave to make some observations, to shew your lordships and the gentlemen of the jury, that the proof in point of credibility is on the side of the defendant, the earl of Anglesea, and that if lord Altham had a child at the time pretended by the evidence to be born, Joan Landy and not lady Altham must be the mother.

As this extraordinary case, my lords, rolls on the birth of the lessor of the plaintiff, I shall consider some of of the defendant's proofs, and shall first take notice of Mrs. Heath, who was lady Altham's woman, and lived with her till her death; she swears positively, that her ladyship never had a child while she was in her service, and never heard till lately that lady Altham ever had a child. She came to Ireland in 1713, and went from Dublin with her ladyship to Dunmaine the Christmas-eve after her coming over, and lived with her till her death, and never was absent one week from her: so that it was impossible for lady Altham to have a child without her knowledge; yet she says, she never observed any signs of her ladyship's pregnancy; and nobody can be supposed to know the circumstances of the family better than she.

Rolph swore that lady Altham never had a child, nor ever miscarried. Dwyer, my lord's gentleman, swears the same, and they must have known it, if any such had been, for they were the principal persons who were servants in the family: so that, I say, Mrs. Heath's testimony is strongly confirmed by their evidence.

My lords, I would submit to your lordships, and to the memory of the gentlemen of the jury, that the gentlemen of that part of the country, swear they believe that lady Altham never had a child, that they never heard till lately that her ladyship had a child; and that if she had had a child, they must have heard of it; and the reason of the thing plainly speaks, that the fact, if true, must have been publicly known in the neighbourhood.

Mr. Palliser the younger, who lived in the family for a long time, and is mentioned as the unhappy cause of the separation, swears he never heard that lady Altham had a child.

Mr. William Napper swears he lived at Ross for 50 years, and was married to a near relation of lord Altham's, and intrusted in the affairs of the family, and was employed by the late lord Anglesea to make leases of the Ross estate, (the late lord Anglesea coming into possession thereof after the death of the late lord Altham:) so that he must well know, if lord Altham had a son, the lord Anglesea could not have a right. Yet no person made any objection to the late lord Anglesea's title, nor did the tenants make a difficulty to attorn to him; and if lord Altham left a son, it is impossible it would not have been known in the town of Ross.

My lords, if lady Altham had a son, it would naturally be a great comfort to her in her affliction after the separation; the prospect of having a son who was to succeed to so considerable an estate, must alleviate her anxiety; in every company she would have made frequent mention of him; yet she never spoke one syllable of him to any person whatever.

As to James Walsh, it is impossible, my lords, his testimony could be true: he states it, that the day of the separation lady Altham would choose to come to town in the middle of the day, to be the object of public view, though innocent, and come to captain Butler's before dinner; herein Walsh differs from the plaintiff's other witnesses, as to the time of the day.

Walsh swears further, that her ladyship came to Ross in a chair drawn by one horse, and that he handed her out of it; some of the other witnesses say, she came in a four-wheel chair, others a four-wheel carriage, and in this respect Walsh also varies from the rest of the evidences.

Mrs. Heath says, that lady Altham positively directed the coachman to go easy, that it might be late when she came to Ross; and this tallies with what the other witnesses swear in that respect, that it was duskish and late in the evening when lady Altham came to Ross (the day she left Dunmaine) consequently she must come there after dinner-time: so that if there be any reliance on the testimony of the plaintiff's other witnesses, Walsh in this particular must be looked upon as a made witness, and not to be credited. It is very observable, my lords, how convincing the proofs are on the side of the defendant; whereas those for the plaintiff are incompatible, and sap the foundation whereon they build.

For the dressing up the story at Dunmaine, my lords, Joan Laffan is produced. Joan

Landy was judged by the plaintiff, to be an improper witness; therefore Mrs. Laffan the dry nurse (because she is supposed to have more cunning) is brought to supply the want of the evidence of Landy the wet nurse.

Laffan at first said, she came into the service in 1716, but afterwards recollected herself that it was in harvest 1715. Though this was a small mistake, it was found material to correct it, yet still her testimony can't be reconciled but by her coming into the service in 1716, which makes truth break out to shew the improbability of her evidence.

If Laffan came into the service in 1716, it would over-reach the time given in evidence by Doyle and Murphy; therefore she must say, the child was three months old at her coming into the family in 1715. It is clear that this piece of her evidence was introduced in this period, to give a sanction to the other witnesses, Doyle and Murphy.

I would, my lords, beg leave to ask how could the plaintiff's witnesses know how a nobleman's child was to be dressed? It is plain this point was settled before they came on the table to be examined; but the manner in which they delivered in their evidences, and their very looks, betrayed a conscious guilt.

Laffan says, she was a chambermaid in the service at Ross; and that the child was about a year and a half in the whole under her care, before the separation; and that Charles Meagher the butler brought the child to Kinnay. Rolph says, he did not leave the service till about Christmas, 1715. It is easily discerned how consistently Rolph gave his evidence; his quarrel with the gardener, his going into the guards, and the time of his encampment must make such impressions on his mind, that he must have remembered it; but Doyle and Murphy falsify each other, and Laffan contradicts them, as I shall shew immediately. So that I humbly conceive their evidence ought to be rejected.

If the child was in Laffan's care for a year and a half, and that she came into the service in August 1715, then all her care of the child must cease at least before July or August 1717.

Now, my lords, it is not pretended that lord Altham went to Kinnay till the year 1718; and if what Laffan says, be true, that the child was taken from her and sent to lord Altham's to Kinnay, then there is a chasm of a year, from 1717 to 1718, not accounted for, which cannot be filled up, but by supposing that Laffan came into the service in 1716. So that, I say, the circumstance of her coming into the service in the year 1715 cannot reconcile her evidence; but in 1716 might answer to the child's going to Kinnay in 1718; however, that would not correspond with her dry-nursing of the child before the separation. I appeal therefore to your lordships, what dependance there can be on Laffan's testimony.

Lord Altham's taking the child to his lordship's house, and his kindness to him at Kinnay and Carrickduff, is a circumstance of no moment to shew the legitimacy of the lessor of the plaintiff; in regard it is common to noblemen who have no lawful issue, to give their children genteel education, and keep them in a grand manner, but God forbid that instances of that kind should obtrude an heir on the family.

It is easily accountable by the plaintiff's evidences, that the child was brought into the house after the separation, and afterwards maintained by lord Altham, and might be reputed by some as his lawful son; but if the birth be not proved, all the rest of his evidence must fall to the ground.

The defendant has proved, that lord Altham frequently wished that his illegitimate son was legitimate, in order to cut out his brother; therefore supposing the declarations of lord Altham's as admitted, that can never be a sufficient inducement to believe the lessor of the plaintiff his lawful son. And it is very obvious, that if lord Altham introduced him by the manner of expression, This is my lawful son, as pretended by the plaintiff's witnesses, it is an uncommon a way of speaking, that it supposes a suspicion of his illegitimacy. Col. Pigot's testimony avails nothing; he heard it reported that lady Altham had a child; that in point of law is not to go to the jury.

If the declarations of lord Altham should have any weight, the plaintiff's witnesses stand contradicted by witnesses of equal credit in behalf of the defendant. Dr. Medlicott said, that lord Altham declared, that as he had no child, he did not care what became of the title after his death; and this is so like his character, that no doubt can be made of the truth of it. And the disposition he shewed to make what ready money he could of the estate, plainly indicates he had no legitimate issue.

Colonel Harman is very express in his testimony with respect to my lord's having no lawful issue; and he was in such a degree of intimacy, that his evidence must be unquestionable.

I shall now, my lords, proceed to the evidence in Proper-lane. John Byrn the father, and Thomas Byrn the son, and Patrick Plunket, produced as witnesses for the plaintiff, say, that Mr. James Annesley was reputed the lawful son of my lord Altham. Thomas Byrn says, that the lessor of the plaintiff came to him in a mean condition, in September 1724, and that he then took care of his father's brewery, his father being then in the country; and that he concealed the lessor of the plaintiff for six weeks in his father's house.

It appears by the testimony of Waldron, that he went to school with him in Warborough-street to one Dunn; and Dunn says, that from September 1724 to the Easter following, he was at his school. So that his testimony and Thomas Byrn's don't square together. Dunn said, he called him the young lord Altham during that time; but if Byrn be believed, he was then in the lowest condition, a poor boy destitute of all relief.

Lord Altham's behaviour after his leaving

Proper-lane, is the strongest proof, that the lessor of the plaintiff was not his lawful son.

Is it to be conceived, my lords, that a father would throw off his lawful son at the age of about eight or nine years, and expose him as a vagabond, when the child is incapable of committing an offence that could deserve such punishment? The natural ties of blood must be supposed to operate; and it cannot be conceived that any man of the least humanity could be guilty of an act of that kind. But this conduct of a father may be reconciled in the case of a bastard; because he at first may believe that he was his son, and afterwards may be induced to believe the contrary; and the boy's being so incorrigible, as appeared in proof, might have some influence to raise doubts in his mind; but if he had any apprehension that he was his lawful son, the heir to his estate and titles, surely, my lords, it is impossible to imagine, he would see him so abandoned.

It had been greatly to the advantage of the late lord Altham to have a son.

The late lord Altham had a remainder in tail in a great part of the Anglesea estate, expectant on the estate for life of earl Arthur, who had no issue; and if he had a son, he could have barred the remainder by levying a fine; and it would have been his interest to have done it, because his lordship could then make a better title to a purchaser; but if he died without a son, the remainders over would take place, and consequently the estate would be the worse to a purchaser. But now let us see how the case would stand if lord Altham had a lawful son. My lord then could have raised money by sale of reversions, in regard that the earl was but tenant for life; and it is well known, that his having such a son must have procured him esteem and respect as well as profit, it being natural to shew greater regard to those who are likely to transmit their estates and titles to their own descendants.

And it must create an additional respect to his lordship, to consider, if he had such a son, and should happen to survive the late lord Anglesea, that he might with his concurrence dispose of his own and the Anglesea estate. Let the point of law be what it will, it appears by colonel Wall (having taken opinion of counsel thereon) that lord Altham in 1725, thought it would be of infinite service to him to have a son, that he might thereby enlarge his fortune; and while he was possessed with this belief, and in such a necessitous condition at that time, if he had any apprehension that there was a notion that he had a son and heir, would it not have been a good opportunity for him to take the child into his care and impose him on the public as his legitimate son, when he knew the enlargements of his power in that case? Or if he had a legitimate son, which he might think proper to conceal for some time before, surely then (as he judged it so much his interest to have a son) he would have declared it to the whole kingdom; therefore his not doing so in the strongest circumstance to prove that he had none.

My lords, there is another weighty circumstance, which must strike every person that hears this affair. Lady Altham was in Dublin from the year 1719 to 1724, when the boy was wandering about the streets in the greatest distress, and no application was made to her ladyship for the boy; and surely if he imagined he was her son, he would have applied to her in such indigence. Moreover, my lords, lady Altham lived at Ross three or four years, and in Dublin for four or five years, and never even mentioned the name of a son except to Mrs. Margaret Hodgers, who was in the Temple before my time, and is better known by some of the gentlemen of the other side than she is to me; but her evidence must be an idle story. Mrs. Pegg Hodgers tells you, she never saw her ladyship but once, and yet she comes into the room to alderman King's, makes a low curtesy,* and immediately after my lady Altham (who had never exchanged a word with her before) enters into conversation with her, tells Mrs. Hodgers, that her ladyship had a child, and that you have better luck than I have; which appears to be very improbable.

My lords, lady Altham (as appears by alderman King's testimony) lodged and dieted with him for about 13 months, and frequently discoursed with him about her family affairs, and never made mention of a son to him; and I believe it will not be denied, but he deserves more credit than Mrs. Hodgers. I would observe to your lordships, that alderman King gives a very good account of the behaviour of Mrs. Heath, and this is a strong reason that she is to be believed before Mrs. Hodgers.

Mrs. Elizabeth M'Mullen, a witness examined for the defendant, says, she was acquainted with lady Altham for about seven or eight years, and frequently conversed with her ladyship whilst she lodged at her house, yet she never mentioned any thing of a son to her, nor did she ever hear she had a son. And when my lady was apprised of the death of lord Altham, by Mrs. M'Mullen's letter to Mrs. Heath, which was dated 18th of December 1727, and the contents of it communicated to her ladyship by Mrs. Heath; yet lady Altham never took notice of a son, and notwithstanding she survived lord Altham for two years, yet she never so much as spoke of a son; and though she was disordered in her limbs, her understanding and memory were not in the least impaired; for Mrs. Heath said, she retained her senses to the last day of her death.

Lady Altham was supported by the late duke of Buckingham, during his life, and by his duchess after his death; and her ladyship well knew she had friends, who would be glad to support the birthright of her child, if she had any: but as no such thing has ever appeared,

* Hereupon the Prime Serjeant imitated Mrs. Hodgers in a curtesy, and Lord Chief-Baron smilingly said, You have added a curtesy, Mr. Prime Serjeant, gracefully to her evidence.

and as nothing to that purpose has been offered in proof, it is obvious to human reason, that her ladyship never had a child.

My lords, the transportation and prosecution are the only colours for this suit, which, were they out of the question, I dare venture to say, that this cause would be hooted out of court: but gentlemen of the jury, I would beg leave to observe, that suspicions of misconduct should not be a reason to judge of a matter of fact. Whoever is governed by suspicion, must be governed by error. Misbehaviour may create a suspicion, but the fact proving the clearness of property should not intervene with suspicion, nor should be of weight against positive evidence, consequently ought to have no influence in determining this cause, and I cannot help saying it was cooked up to give credit to the story; for it is most likely that the boy indentured voluntarily, and that the defendant did not transport him against his own will.

Dominick Farrell, a witness for the plaintiff, sets out as seeming to be a gentleman of credit and figure, by his visits to Dunmaine; there he says he saw the lady dandle and treat the child; but his testimony cannot be true, because he says he saw the child in Dunmaine in 1717 or 1718, yet the separation happened in February 1716. Farrell, my lords, is ushered in previously to the transportation, to shew that it was he recommended the boy to Purcell, and how charitably Purcell behaved to the boy. I must own, it is not common to see instances of humanity from a butcher, to support the child of another person out of mere charity: however, I shall only observe some contradictions in the testimony of Farrell from the plaintiff's other witnesses: he widely differs from them, as to the period of time of his seeing the child in Dunmaine in 1718; and he likewise varies from Purcell in other particulars. Farrell says, he called the boy when he saw him riding in Smithfield; and Purcell says, the boy was talking to Farrell when he first saw him. Purcell says, the boy was present, and Farrell says the contrary. Farrell swears it will be eleven years next Christmas since he went first to Cork to live, and that the boy was at Purcell's, when he went there, and an year and a half in Purcell's care, and therein he stands falsified by the rest of the witnesses.

It is very improbable, my lords, that an attempt should be made to kidnap the boy at Purcell's, and that Purcell should not apply to a magistrate, especially when he believed that farther attempts were intended to be made; and it adds to this improbability, that he, who was so fond of the child, should never make any enquiry for him after he parted from his house. Purcell says farther, that he educated him as his own boy, and that the boy called his wife mistress; which seems very strange, that Purcell would admit him so to do, he being told by Farrell that he was son to lord Altham; and it likewise seems somewhat odd, that the boy would leave Purcell's (where he was used with so much kindness) unknown to him, and without any provocation given by Purcell to wander about the streets. But there can be no dependence on the weakness of such evidence.

As to the transportation, my lords, the account given of it is very improbable; that the defendant, then lord Altham, would in his usual dress, when he could have disguised himself, and at noon day, direct the boy to be carried near the very stall where Purcell was, who was the boy's only support and best friend, and a mob to rise by means thereof, yet that no notice should be taken of him. Can it be believed, that if the defendant could be capable of such an attempt, that he would be such a fool to chuse that time of the day for his purpose, when it might be done at any other time without running such hazard or danger?

Now, my lords, let us see how the witnesses for the transportation coincide with each other. Byrn the constable swears, the boy was put into the boat in a quarter of an hour after he came to George's-Quay, and that the defendant appeared publicly on the Quay. Reily the servant swears, defendant was on the Quay when he sent him to borrow the guinea; and that he stayed for about an hour and a quarter, or an hour and a half, and at his return found defendant still on the Quay; and as Inchicore (the place where he got the guinea) is near three miles distant from the Quay, it must be reasonably supposed, Reily took more time than he reckons going to, and coming from thence. It was said, that Donnelly went first into the boat, and afterwards it was said, my lord went first, and Donnelly last: if these witnesses are not to be believed in the whole, they should not be believed in part; and as Byrn and Reily differ about the time, it must bring an imputation on their credit.

The next proof of the transportation are the books of the late Mr. Stephenson, and the Thokel books; and from the latter it may be concluded, that James Annesley transported himself as a servant, for there the name of James Hennesley is found, who appears to be indentured: and though the name of Hennesley is not entered in Stephenson's book, yet notwithstanding it must be supposed, that Hennesley and Annesley, is one identical person, because Hennesley is among the names of those who went with the same master, and the same ship which is entered in Stephenson's books. This will appear the more probable, my lords, as they are names of almost an equal sound; for He is sometimes pronounced like Ha; for instance, Hertfordshire is pronounced Hartfordshire; and Ha sometimes sounded like A alone; the surname Henderson pronounced Anderson; which is very similar to the present case, that by the name Hennesley may be meant Annesley. Besides, as the name of James Hennesley is registered in the Thokel book, and is not entered in Stephenson's book along with the rest of the names, who went in the ship James, the former ought to be more depended upon; and in regard Cromie, who was Stephenson's clerk, swears, that all persons

who went aboard, were brought before the lord mayor; that he never knew of any person who went aboard but such as were indentured, and never knew of any taken by force; it may be very well presumed, that Hennesley and Annesley is one and the same person; and the probability weighs, that the lessor of the plaintiff was tired of wandering and strolling about the streets here, and therefore transported himself beyond the seas.

Now, my lords, I shall observe to your lordships the evidence of Mr. Giffard, with respect to the prosecution; but as it has been already animadverted on, when he was on the table, I shall trouble your lordships but with very little with regard to him. This gentleman comes voluntarily to betray his client, who could not be compelled by a process from a foreign kingdom, and therefore no stress should be laid on his testimony. If there had been any method used to oblige him to discover the secrets of his client, there might be some inducement to give him credit; but when he appears here in another light, it must be supposed, there hangs some bias on his mind. He owns, lord Anglesea provoked him, because there were disputes between them on account of bills of cost; and as Giffard has shewn a resentment on that occasion, he cannot be said to be an uninfluenced witness; and though he might be employed by the defendant in the prosecution, when no improper means were made use of, the defendant cannot be said strictly to be guilty of a crime: and indeed it is very improbable, that the defendant could be so weak as to make such declarations to Giffard, and thus having put himself in his power, to fall out with him for so small a sum as 200*l.*

My lords, I am sorry to mention what contrivances there have been made use of to throw dirt at the defendant, and no art has been omitted to take away the credit of his evidence. A bill has been filed against Mrs. Heath, to discover lady Altham's effects, which was purely calculated, in order to prevent her from being examined in behalf of the defendant. Why was a lieutenancy offered to Rolph? The tendency of it is easily seen through, to induce circumstances of suspicion. My lords, the earl of Anglesea was then in great distress, being involved in so many suits, by which he was perhaps actuated with resentment; and a man thus enraged, may possibly say things contrary to his sentiments, which on proper reflection, may fill him with concern; he was then inflamed with passion, and might probably think a proposal of a sum of money might extricate him from his difficulties. However, Giffard is but a single witness, and not free from influence; but truth is not to be controuled by suspicions.

My lords, I fear I have taken up too much of your time, and of the gentlemen of the jury; I shall now conclude, by only observing to your lordships, that no man can be safe in his property, if a child thus trumped up is to trip up the heels of the rightful heir to the family; because a precedent of this kind might be attended with the most dangerous consequence to every gentleman's family; for if it should at any time happen that a man should have a child born out of wedlock, who, by some means or other, might fall into the hands of artful men, he might set up some pretensions in prejudice to the lawful heir, by the same plan, and by such evidence as is cooked up for the lessor of the plaintiff. Therefore to prevent any such impositions on the public, and to deter all adventurers from engaging in such practices, so destructive to society in general, and for the sake of justice, I hope the gentlemen of the jury will give a verdict for the defendant.

Note, The foregoing argument lasted from a quarter before nine o'clock till a quarter past one.

Mr. *Solicitor General* (Warden Flood, esq.) of counsel for the defendant.

My lords, the evidence on both sides has been so fully spoke to, and so clearly stated by Mr. Prime Serjeant, that I shall only trouble your lordships and the gentlemen of the jury (who have the greatest estate in their disposal that was ever tried by any jury) with some observations on the evidence produced in behalf of the plaintiff.

The lord and lady Altham were married very early, and cohabited a long time in England without having a child; they separated for some time, and in 1713 were reunited.

Before the re-union no proof, my lords, has been attempted to be made by the plaintiff that lady Altham was a fruitful woman; but after the reconciliation, in order to support a pretended birth, it must be thought necessary first to prove her ladyship's fruitfulness by two supposed miscarriages.

The evidence of Mrs. Cole is endeavoured to be applied for proof of the first miscarriage, which (she says) was occasioned by the china saucers being thrown by lord Altham; but the improbability of her evidence is very clear, in regard the saucers were levelled at the butler and not at my lady, how could her ladyship be displeased at what was intended to her as a compliment? Moreover, as it does not appear at that time there was any cause of quarrel between my lord and lady, so there could not be a presumption of a fright, nor consequently of a miscarriage.

Mrs. Catharine M'Cormick is to be depended on to prove a second miscarriage, and she only must be supposed privy thereto; how consistent her testimony is, I submit to your lordships and the gentlemen of the jury.

The account Mrs. Bates gives of the first miscarriage is equally absurd, the bare mention of it is sufficient to reject it. Is it probable, my lords, that lady Altham, who is proved by plaintiff's witnesses to be a proud exalted woman, would admit such an ordinary mean servant to be so familiar to put her hand on her ladyship's belly?

My lords, Mrs. Doyle (the chamber-maid,) and Murphy the (laundry-maid) must next come on to prove the pretended birth at Dunmaine; yet not one person of the family must either know or hear any thing in relation thereto. The rule of reason, my lords, is to prove great things by great persons, and low things by low persons; and every proof ought to be adapted to the nature of the thing. It has appeared, my lords, that in the year 1715 the earl of Anglesea was so afflicted with the gout, that lord Altham apprehended his life was despaired of, and it was judged by most people he could not live long. Lord Anglesea then resided in that part of the country, and had no prospect of having any issue, yet he never heard of the lady Altham's having a child to be heir to the title and estate of his family.

Doyle and Murphy swear they lived in the house of Dunmaine at the time of the birth, and here they stand contradicted by Rolph, whom they said they never knew to live there, though he was the butler at the time they would pretend the child was born. Every one of the witnesses for the plaintiff, except Doyle, say, that Joan Landy was not married till after the birth: but Doyle says she was married before the birth: consequently she should be looked upon as a made witness. Murphy contradicts herself as to the time of the eclipse; she swears she was then at Madam Butler's at Ross, consequently she could not be at Dunmaine at the time prefixed for the birth? so that unless we suppose her in two places at one and the same time, her evidence must be repugnant to truth.

Breen (a labourer's son,) and Brooks (a petty surgeon) are the next witnesses for this pretended birth. Brooks says, he bled lady Altham just before her delivery. I believe, my lords, it is very unusual for women to be let blood on such occasions. Brooks very modestly tells you he was but a piece of a surgeon, and I fear he was but a very indifferent one: Neither was he ever employed before by the family; I am inclined to think he never was, otherwise he would not venture to bleed in the dark (without a candle.) Mr. Sutton, a very eminent surgeon, who was well acquainted with the family, and lived in the town of Ross, was not sent for; but the other quack was preferred to him. How reconcilable this can be, I appeal to your lordships.

Turner is another witness produced by the plaintiff to support his pretensions. The difficulty of believing his testimony may be easily observed; that he who lived so long in the house can't tell the name of any one of the servants. And moreover, lady Altham must be in Dublin in August 1715, at the time he says she had a child.

As to alderman Barnes, I shall ascribe the inconsistency of his testimony, to his great age, and want of memory; lord Altham tells him, that his wife, Moll Sheffield, was delivered of a son; yet the day after he dined at Dunmaine with her ladyship, and he never enquired about any son, nor was the name of a son made mention of there.

Mrs. Annesley, who is produced as a witness for the plaintiff, only mentions the toasting of a health, but speaks not a word of a birth; nor did she ever hear of a miscarriage.

Christopher Brown is produced by the plaintiff as to proof of the pretended christening; he had his lesson to be exact as to the godfathers; but can't tell any other person in company, though he waited at table that day. He describes the great hall where he dined, yet it appears by Scott there is no such hall in the house. But, my lords, it is plain that the only way of detecting these evidences is to take them out of the road they were instructed in, and by other circumstances the inconsistency of their testimony is shewn. When Brown was asked to name any of the servants that dined with him, he could not tell. It is needless, my lords, in me to remark how improperly he gave his evidence, your lordships must have it on your memories.

The transaction at Wexford assizes has appeared to your lordships; and the defendant has proved very fully the lady Altham's being there at that time: If that be true as appears from the circumstances (which they mentioned) of the lord and lady Altham's going there; to wit, that my lady and Mrs. Giffard went in a coach, my lord rode, Mrs. Heath rode, and such and such servants rode; I say, then there was no appearance of a child; thus, consequently, the pretended birth must be overturned.

To disprove this, Mr. Colclough is produced; he was then on the grand jury, and so engaged that he did not notice the lady Altham; and though it is allowed lord Altham was there, he owns he did not see him; and by the very same reason lady Altham and Mrs. Giffard might be there, and possibly have escaped his sight.

I shall not trouble your lordships with respect to major Fitzgerald; he stands opposite to all the other witnesses, in point of time, as to the supposed birth.

My lords, I beg leave to observe to your lordships, that Higginson's evidence is attended with a good deal of doubt and uncertainty; he said, he was at Dunmaine, and that lady Altham (whom he never saw before) called to him, and gave him a glass of wine, and he drank to her safe delivery: If the plaintiff thought him so material a witness, how comes it that his name was not given in at the beginning of this trial, among the list of the plaintiff's other witnesses, and not to intrude him at the close thereof, without the defendant's knowledge? But, my lords, it is plain he was only produced to stop a gap; but from such kind of evidence the jury can discern on which side the probability lies.

My lords, it appears (from a previous application to Mrs. Heath) how sensible the plaintiff was of the force of her evidence, and therefore a bill was thought proper to be filed for prevention thereof; which plainly demonstrates, that the lessor of the plaintiff was

afraid of his pretensions being affected by the weight of her testimony.

One Hussey, my lords, has attempted to contradict Mrs. Heath; he says, he spent most of his time in England, and he flourishes so genteelly on himself in his examination, that one should take him for a gentleman of figure and distinction; he tells you, that he ordered his servants to put up the person's horse who served him with a subpœna; that he has vouchsafed to come up to Dublin; that he had an employ in one of his majesty's yachts in England; and when this affair is discussed, he is only a common waiter to the Board of Green-cloth, and his religion prevented him from being entitled to a commission; and though he gives you an account of Mrs. Heath's changing her sentiments at the second conference differently from the first, yet he never remarked the same to her. But it is easily seen to what purpose he is examined; for when the stratagem of a bill could not take place, this knight-errant (if one may call him so) is produced, having no other expedient to controul Mrs, Heath's evidence.

My lords, I must say, it is next to an impossibility to imagine that lord Altham, who had a private estate of his own, and the expectancy of the lord Anglesea's estate, should have a legitimate son and heir; and that the Pallisers (who were acquainted in the family) or that Mr. or Mrs. Lambert, Mr. Elmes, or Mrs. Giffard, who (as plaintiff's witnesses confess) visited lady Altham, should know nothing thereof; nay, that even the neighbouring tenants must be strangers to it.

My lords, How can it be reconciled to the common rules of prudence and good-nature, that if lady Altham had a son, she should send the child to be nursed by a mean woman of an ill repute? by a woman who had criminal commerce with her husband? Surely a lady of her rank and distinction would not have made choice of such a nurse. It is plain then, that the supposed birth must be only a fiction complicated with absurdities.

We allow that the lessor of the plaintiff might be lord Altham's son by Joan Landy, and that lady Altham conceiving a displeasure against her, and being incensed against lord Altham for the dishonour done her, would not admit Juggy Laudy in the house of Dunmaine; and this seems the most rational way of judging.

But, my lords, Laffan, Murphy, and Doyle tell us, that a new room was furnished in Landy's house, and the child sent thither to be nursed; it is equally improbable, that lord and lady Altham should not have more care and tenderness for a son born to such honours and titles, than to send him to a new-built room, or to subject an infant to a cold and other disorders.

It is very manifest, my lords, how ingenious the conductors of this affair have contrived it, to have fixed on persons to be sponsors who are long since dead; and though they have cooked up a story as artfully as they could, they could not still frame it free from improbability. We find that the sponsors were not equal to the birth, and one of the godfathers, Mr. Anthony Colclough, was a Roman Catholic; and if my lord Altham had a son by his lady, it is presumed he would not have pitched on a Papist to be godfather, who by the laws of this kingdom is not qualified to stand surety for a Protestant child in baptism.

But, my lords, at the time of this pretended christening, the duke of Buckingham was then living, lord Haversham, and the late earl of Anglesea were alive, the duchess of Buckingham was alive; they were relations to the family, and would not refuse being sponsors, but would have readily offered themselves on that occasion; so that I say, my lords, fiction detects itself through the whole affair.

My lords, I would take notice to your lordships, that the late lord Altham happened to be somewhat extravagant, which occasioned his want of money, and therefore proposed selling the Altham estate; but frequent disputes arose between the defendant and him, for not joining therein; but if his lordship had a son, he could have made a better title to purchasers, as Mr. Prime Serjeant observed.

The two props which support this cause, are the transportation and prosecution; but the title here contended for by the plaintiff, ought to be proved beyond all contradiction; and I would beg leave, my lords, to remind your lordships, and the gentlemen of the jury, that on the death of the late lord Altham, the Altham estate devolved to the late earl of Anglesea, and nothing descended to the defendant but the title; and therefore I would observe as to the transportation, that as it appears the lessor of the plaintiff wandered about the streets in an idle way, it is most likely he voluntarily transported himself. If the defendant apprehended he was to come into possession of the Altham estate, after the death of his brother, there might be some reason offered for the kidnapping; but as the defendant, the earl of Anglesea, could reap no advantage by so strange a proceeding, the thing appears very improbable and romantic.

My lords, the duke and duchess of Buckingham, and lord Anglesea, were alive when the late lord Altham died; and it cannot be supposed, if he had a son, but that they would have been glad to have taken care of him, and that he might receive a proper education suitable to his high rank and quality.

My lords, I humbly apprehend, there is another incident very proper for the consideration of the jury, that is, that the lady Altham continued in Dublin for about five months after lord Altham's death. It is surprising if she had a son, she should make no opposition to the defendant's taking the title of lord Altham, or that some of his noble relations should not have asserted his right.

My lords, another circumstance occurs in this affair; that if lady Altham left a son, it

may be presumed, that some of the gentlemen who took leases from the late earl of Anglesea, of the Altham estate, would have been glad to have set him up, either in point of charity, or humanity, or perhaps out of aversion to the late lord Anglesea.

My lords, we may infer from Mr. Tighe's behaviour to Mr. Annesley, that he did not believe he was the son of the lady Altham; he is a gentleman of character, and it cannot be supposed, that any man susceptible of the least generosity or good nature, if he had any apprehension of the plaintiff's legitimacy, would admit him to be a turn-spit, or wear a livery. Moreover, Mr. Tighe by his profession, being bred to the law, must know what proper steps were to be taken by the lessor of the plaintiff, if he was lord Altham's son, to recover his right; but his not troubling himself about that matter, is a strong presumption he had judged him to be what he had heard, the natural son of the late lord Altham.

My lords, as this is a cause of the greatest consequence that ever was tried by any jury, it must be a singular pleasure to every person concerned (and I am sure it is so to me) that jurors of such worth, honour, and probity at this time, are to determine an affair of such importance; and as nothing but justice can influence the minds of gentlemen of such distinction, I hope they will find a verdict for the defendant.

Eaton Stanyard, esq. recorder of the city of Dublin, for the defendant.

My lords, and gentlemen of the jury, the question to be considered is, whether lady Altham ever had a son? And if she had, whether Mr. Annesley, the lessor of the plaintiff, is that person? And if this cannot be proved clearly, the jury cannot rely on presumptions.

My lords, it was thought proper to introduce two miscarriages previous to the birth; the plaintiff pretends to assign as a cause of the first miscarriage, the breaking the China saucers. This piece of evidence appears very improbable; because destroying the cups was intended a respect to my lady. Can it be conceived, my lords, that lord Altham, who was so solicitous for a son and heir by my lady, would not be more cautious of putting her into frights, which might endanger a miscarriage? And it is sufficient to destroy the credit of Mrs. Cole, that the account she gave of the abortion, should be communicated to a young child.

As to the second miscarriage, there can be no colour to have the least reliance on the testimony of Catharine M'Cormick in support of it. It has appeared, my lords, that Mrs. Blake is a relation to the family, and visited lady Altham in Dublin at the time M'Cormick pretends the second miscarriage happened, yet my lady never told her a word of it. Mrs. Hannah Shaw swore that Catharine M'Cormick mentioned to her that lady Altham never had a child; and M'Cormick farther signified to Mrs. Shaw, how application was made to her by a person who used to get evidences for the lessor of the plaintiff; therefore M'Cormick's evidence can have no weight, and if proved to be false, brings a disrepute on all the rest of the evidences.

As to Mrs. Deborah Annesley, she only swore her brother drank the child's health, which can avail nothing.

Now, my lords, let us see how this pretended birth is proved. The plaintiff's witnesses say, that a midwife was sent for to Ross, and that Dennis Redmonds was the person pitched upon for that errand. Can it be presumed that if lady Altham was in that condition, that care would not be taken that a midwife should be in the house some time before the birth, and not be under the necessity of sending for one the moment she was in labour? There was nobody to assist her but Mrs. Heath, and none attended her ladyship but a chamber-maid and a laundry-maid. Every expectation, my lords, from such a birth would induce better attendants and more proper nurse tenders.

It is surprizing that Redmonds should not know for what purpose he was sent, and that he should leave the midwife in the yard without taking any farther notice of her, and go immediately to the stable to take care of his horse, which it seems he regarded more than the midwife.

As to Brooke's testimony, my lords, it is a heap of nonsense and absurdity. He swore he was a piece of a surgeon for 47 years, and was so 10 years before the birth of the child, and yet is but 50 years old. He afterwards said, when he was cross-examined, that he practised surgery since he was four years old; and says he did not consider what quantity of blood he had taken from lady Altham. He said he had a farm at a place called Farees, near Ross, yet no gentleman of that neighbourhood knew of any such man living there: Besides, my lords, this must be attended with all imaginable inconsistency: It was uncertain to meet him at home, but there was a certainty of meeting a surgeon in Ross, and one better skilled in his profession. So that on the whole, what regard can be paid, my lords, to evidence so diametrically opposite to all the rules of probability.

Turner is a witness not to be credited; the manner of his faultering in his examination induces a suspicion: He fixes the time of the eclipse ten months after it happened; but it seems he was not prepared to give any answer to that period. So that we find when these witnesses are taken out of their course, they are at a loss what answer to give.

Scott says he used to come to Dunmaine with how-do-yous, in enquiring after the child's health; and that he delivered messages to Laffan, and sometimes to Rolph; and that Rolph was butler at the birth of the child, though Rolph and Laffan swore they never saw one another before the day of their examination. In fine, he stands in opposition to the plaintiff's

other tribe of witnesses about Rolph being in Dunmaine at the time of the birth.

Mrs. Giffard's testimony, my lords, is supported by the servants of the family, that lady Altham was at Wexford assizes, and lodged at one Sweeny's. Mr. John Kerr has proved the time of the assizes, and that lord chief justice Foster went that circuit. This is a circumstance very material, and that entirely overturns the plaintiff's whole system; for by the plaintiff's evidence she must be with child, or lying in at that time; which cannot be true, because she was then in Wexford. And lady Altham could not be brought to bed in May subsequent to the assizes, because she was the 28th of that month (being the birth-day of king George the first) in Dublin. And I must beg leave to say that Mr. Colclough did not destroy a tittle of what Mrs. Giffard swore; for he said, he did not see lord Altham then at Wexford; yet Higgisson paid his lordship 20*l.* there, and Mr. Colclough might as probably have overlooked lady Altham there as his lordship.

Mary Doyle and Eleanor Murphy are quite contrary to one another in point of evidence. Doyle says the child was christened in the big parlour, and Murphy swears it was in the yellow room up one pair of stairs.

As to Higgisson, it is plain he is produced as a witness to intersperse false facts with real ones; he says, he only received the rents of the estate near Nanny Water, but not of the Ross estate: He describes part of lady Altham's dress; that she wore a white apron and a white handkerchief, and adds that her ladyship was big with child. Is it probable, my lords, that she would come down two pair of stairs and call for wine for him, and all this while he was on horseback, and would not even vouchsafe to pay her ladyship the common compliment by alighting? Nay, it can't be presumed that a lady of her high spirit would come down stairs, but would have chosen on such an occasion to send her servant. I must repeat it, that here a false fact is tacked to a real fact by the ingenuity of the managers, to give a colour to the fiction.

I come now, my lords, to the testimony of Catharine O'Neal, which I can't help calling a scene of iniquity. She says, she went to lady Altham in Cross-lane in Dublin, and told her the circumstances of the child. Is it natural to imagine that a lady (lost to all comfort, being then separated from lord Altham) should be told, that her only son was begging about the streets, and would neither enquire or send for him? This witness says farther, that her ladyship's reason for not admitting any of the servants to carry the child to see her, was, for fear it might occasion them to lose their places. Can it be presumed, that a distressed mother would set a greater regard on what might have happened to a servant, than on the welfare of her only child, or that she would have neglected him in that manner? No, my lords, the direct contrary must be supposed, and that she would have been glad to see him at any risk, that proper care might be taken of him.

But alderman King's testimony clears it up, that my lady had no son; for if she had, she would most certainly some time or other have spoke of it while she lodged at the alderman's. And would it not be the greatest satisfaction to herself, in case she had a son, to bring him to England along with her? The duke and duchess of Buckingham, and all her relations in England, would have received with pleasure, and educated with great care a son, who might in time by his rank and fortune become conspicuous. Besides, my lords, her interest as well as nature would have induced her to it; for after the death of the late lord Altham, lady Altham might become guardian to the child. She had a natural right to that trust, and out of great estates, large allowances are given to those who are entrusted with the care of children; and where such a trust devolves on a parent, otherwise indifferently provided for, that incident is of some weight with a court of equity, to be more liberal in their allowance. These considerations might be additional motives to induce her to take care of his education, and espouse his interest; and as none of these things appeared in evidence, it is contrary to all reason in the world to imagine, that the lessor of the plaintiff can be the real or legitimate son of the lord and lady Altham.

As to the transportation, your lordships will please to observe, that Cromie swears, that Skellern made entries in Stephenson's books, for fear of being imposed upon, of the several persons that went aboard, and that the clerk came aboard, and took a list of all persons, and called them over on board before the ship sailed, and every person walked by as he answered to his name; and though the boy might answer to the name of Annesley, the master of the ship might pronounce it Hennesley, and write it so; and when he went to the Tholsel to give in the names to Mr. Gune, the town clerk, he might spell the name Hennesley instead of Annesley, and thereby occasion a mistake in the Tholsel book.

But, my lords, can any one pretend to say, if the boy was forced away, that when Mr. Skellern the clerk came on board to take the names, the boy would not have complained of his misfortunes, and of his being taken away by force, or made some clamour, and then he might have been redressed? yet it has never appeared, that the plaintiff made any such complaints.

It is very evident, my lords, that no industry has been wanting in the plaintiff to seek out for witnesses, in order to deprive the defendant of their testimony. How comes it, that a dinner of lamb and other victuals, has been sent by Mr. Mackercher to Rolph's house? Why was there application made to Rolph by him? Why truly, because he was informed, that Rolph was in the family, and that he was a material witness.

My lords, I must take notice to your lord-

ships, that the testimony of Cavenagh, who is examined for the defendant, is very strong; though he does not take upon himself to swear as to positive time, yet it shews what he swore was true, and should have weight with the jury.

Hussey made himself very inconsistent on his examination. Was it natural when he found, as he said, that Mrs. Heath changed sides, and that she was a peremptory witness, that he would not have expostulated with her thereupon? He has been pleased to ramble much in the course of his testimony, by giving an account of his gravel walks; but if he came here to tell truth, what occasion was there for those excursions? unless he would make us believe he was a man of greater consequence than he has appeared to be.

My lords, the plaintiff's pretensions are attempted to be supported with the slightest proofs. Your lordships, and the gentlemen of the jury will take it into their consideration, what objections have been made to the plaintiff's witnesses, how inconsistent each one of them has been with himself, and how inconsistent they have been all with each other; and if the lessor of the plaintiff is to prove his legitimacy, it should be by positive and uncontrovertible evidence, and not by suggestions or presumptions. A supposed child, my lords, is an injury to the original donor, to the remainder-men, to lessees and purchasers, and to the public in general. To me it is astonishing, and I believe it is so to all mankind, how it can be presumed, that lady Altham should have a child, and that her ladyship should not claim it whilst she was living.

I fear I have trespassed too much on your lordships' time, and on the gentlemen of the jury, and shall only observe, that the defendant is now possessed of the estate of the family; and as his birth is unquestionable, and that there is all the doubt and uncertainty in the world attending the pretensions of the lessor of the plaintiff, I hope the gentlemen of the jury will think a verdict ought to be found for the defendant in possession.

Court. Gentlemen of the jury, will you please to take any refreshment before plaintiff's counsel begin to speak to the evidence on their side of the question?

Jury. We humbly thank your lordships, we shall be glad to refresh ourselves. [It was now between four and five o'clock in the afternoon, when the Jury refreshed themselves for about half an hour.]

Court. Gentlemen of counsel for the lessor of the plaintiff, please to proceed.

Serj. *Marshall.* My lords, and you gentlemen of the jury, I am in this cause of counsel with Mr. James Annesley, the lessor of the plaintiff, and I believe there has scarce been an instance in any age, of such a scene of iniquity, cruelty, and inhumanity as this, with which Mr. Annesley has been persecuted for the course of many years; he has been kidnapped, transported, and sold as a slave for thirteen or fourteen years: the very recital of it must excite compassion in every human breast; and when his slavery was expired, he came into England to assert his right, but had the misfortune to shoot a man accidentally; and then the defendant (I am sorry to mention it) contrived to indict him for murder at the sessions at the Old Bailey, held for a gaol-delivery for the city of London and county of Middlesex, where the lessor of the plaintiff was tried, and honourably acquitted.

My lords, the defendant's counsel in opening his case, said, they would prove the plaintiff applied to several people, and told them he would be pleased to go over seas, and that he was not kidnapped; and that no force or compulsion was made use of to transport him, but that he went abroad voluntarily; yet as the gentlemen have not attempted to prove it, it stands uncontroverted, that the plaintiff was spirited away by the defendant the earl of Anglesea, to feel the effects of slavery in America, to subject him to the dangers of the seas, and inclemencies of different climates, with intention to put an end to a life that stood in the defendant's way. But the hand of Providence has still protected him in the midst of his afflictions; admiral Vernon contributes to have him conducted to these kingdoms, and good fortune furnished him with friends when his life was thirsted after; he now comes into court before your lordships to support his undoubted right, and shew the world the severities he underwent.

My lords, the lessor of the plaintiff was very young, about twelve years old when he was kidnapped and transported, and thus deprived of an opportunity of asserting his right, he was abandoned and reduced to the lowest ebb of misery. The defendant the earl of Anglesea, had new additions of honour and title by the plaintiff's misfortunes; and being of a proud, avaricious disposition, tempered with cruelty, and inclined to oppression, (it is with reluctance I mention these characters) could not bear that a boy in those low circumstances should succeed to the Altham estate and title, or be presumptive heir to the earl of Anglesea. Expedients were to be found out to prevent his arriving at these honours, which were accordingly put in execution.

My lords, the defendant would endeavour to overturn the plaintiff's right, by pretending an insufficiency of his evidence; but, my lords, this must be a vain pretext, since he himself was the sole occasion thereof; and as the transportation has been proved as clear as the noon day, the defendant, the earl of Anglesea, must be considered as a spoliator in law, and must not take advantage of the difficulties arising from the wickedness of his own acts, to prejudice the plaintiff.

If the lessor of the plaintiff at the time of the fatal transportation, about 15 years ago, had been admitted to prosecute his just right, he then might have had an opportunity of proving his birth by demonstrative, undeniable evi-

dence. I say, therefore, by this means, the defendant has advantages abundantly superior to him, while the lessor of the plaintiff labours under the greatest disadvantages; and indeed, considering the nature of the thing, it is very providential, that at this time of day any of the plaintiff's witnesses, who prove his birth, happen to be living. And, my lords, when I come to speak to the evidences on both sides, and compare them together, I believe I shall be able to prove, that the probability is to be applied to the evidence of our side, and that they deserve credit, and shew beyond all doubt the legitimacy of the plaintiff.

There may be, my lords, some little variations in our evidence, but this is very natural, considering the distance of 28 years since the lessor of the plaintiff was born.

My lords, I shall beg leave to lay before your lordships, and the gentlemen of the jury the nature of the plaintiff's case, and hope your lordships will pardon me, if I happen to repeat any thing which I formerly mentioned when I had the honour of stating the plaintiff's evidence before we proceeded to the examination.

It has appeared most evidently, my lords, in my humble apprehension, that the plaintiff was born at Dunmaine, in the county of Wexford, and is the son of Arthur late lord Altham, by his wife the lady Altham.

My lords, it seems lord Altham was a passionate man, and my lady was a sickly puny woman, and for other reasons, which I shall mention by and by, when I come to speak to what was urged by defendant's counsel to that particular, it was thought proper by lord and lady Altham, to send their child to Joan Landy to be nursed, who was married (as appears by some of the plaintiff's evidence) to one M'Cormick, a sailor, by whom Joan Landy had a child.

But some of the witnesses have said, that lord Altham had got Joan Landy with child; but let that matter be as it may, after her quitting the service, she went to her father's house on the lands of Dunmaine, and there lay-in some time before lady Altham was brought-to-bed of a son.—My lady suspected lord Altham was the father of Joan Landy's child, from informations her ladyship received from some busy people; but being afterwards convinced, that Landy had a child by her husband M'Cormick, then lady Altham sent the lessor of the plaintiff, her ladyship's son and heir, to be nursed to Landy; and though the defendant's counsel would endeavour to urge how careless lady Altham was with respect to her child, from this particular; yet I believe your lordships, and the gentlemen of the jury, have it in their notes what circumspection was used to examine the milk of Furlong's wife, and it appearing unsound by the opinion of one Dr. Brown, the lessor of the plaintiff was sent to Landy to be nursed, she being approved a fit person for that purpose.

My lords, it appears that all proper care was taken to fit up Landy's father's house proper for the reception of the child; and that lord Altham caused a coach road to be made from Dunmaine to Landy's house for the conveniency of his lady's visiting the child, where the child remained at nurse for about 18 months, until my lord Altham took him home, and took the proper care of his person and education.

And now I must mention that my lord and lady separated on account of an unfortunate suspicion of Mr. Thomas Palliser, and afterwards my lord became familiar with one Miss Gregory, who expected his lordship would marry her, in case lady Altham had died. She, it seems, was my client's bitter enemy, because she apprehended he was a bar to her ambition; and having a great ascendant over lord Altham she contrived to set the boy adrift naked to the world, when he was scarce 8 years old, and very artfully gave out that the boy was the son of Joan Landy. And the boy being thus abandoned, knew not what to do, but wandered about the streets; and the defendant afterwards readily encouraged the report of his illegitimacy, to serve his iniquitous designs of usurping his title, and therefore transported him to America in hopes he should never more be heard of.

My lords, we have produced Mrs. Annesley, who is married to a near relation of the defendant, who swears positively that it was well known in the family that lady Altham had a son. If the title of the lessor of the plaintiff was a mere pretension (as contended for by the gentlemen of the other side) it is surprising that the earl of Anglesea would not produce any one person of his family in favour of his side of the question, though he is so well acquainted with them, and might have influence enough to produce them, if they could testify any thing against the plaintiff's right.

Mr. Higgison, my lords, says, it was known in Enniscorty that lady Altham had a child; and alderman Barnes says, it was well known in Ross; yet, I say, none of the family has been produced to declare that it was not known.

The counsel on the other side would endeavour to lay a mighty stress on the meanness and poverty of some of the plaintiff's witnesses: but, my lords, how trivial this objection is, I appeal to your lordships and the gentlemen of the jury. It is impossible to keep witnesses alive; and we must prove our right by such witnesses as are living; the plaintiff came to England as early as he could to claim his title.

Mrs. Heath says, lady Altham was visited but seldom, and but by very few neighbours in that country; indeed she says, Mrs. Piggot visited her ladyship; and I must own, in my opinion, those that were produced were not suitable visitors for a lady of her distinction; there are two women produced for the defendant, who paid her ladyship visits, but they never visited her after the separation, and I am afraid they are not persons to be credited, at

least in point of virtue, one of them has been strangely represented in court.

Mrs. Cole, my lords, is a woman of unquestionable credit; she says, lady Altham came to Ireland in 1713, and it was said she was with child in that year; her ladyship lodged first at captain Briscoe's, from thence she went to Mr. Vice's, and from Vice's to Dunmaine. She swears lord Altham threw some saucers near her ladyship's forehead, which occasioned her miscarriage. Lady Altham, by the defendant's witnesses, is represented a haughty proud woman, which is a strong reason to believe she was then affrighted, and that such an accident might be attended with the consequences which afterwards happened.

The waking of Mrs. Cole's mother at night, is a circumstance that must strike her memory so strong, as not to be easily forgotten; and as the defendant's counsel appealed to the gentlemen of the jury, I likewise submit to them, whether a girl of 13 years is not old enough to enquire into, and know what a miscarriage is.

As to the second miscarriage, at Vice's in Dublin, Catharine M'Cormick only said, that there was a suspicion of a second miscarriage, and that it was so reported, but did not say that lady Altham miscarried; and this suspicion was confirmed by Mrs. Heath, who owns that there was a quarrel between lord Altham and his lady, that a midwife was sent for, and that lord Altham declared that he would send for one, and that if she was not with child, he would put her away. The reason that Mrs. Heath says that my lord gave for his sending for the midwife, appears to be idle, and without the least shadow of truth, because my lord continued with my lady afterwards, till February 1716: so that it is plain Mrs. Heath must have found out this private reason of her own.

And, my lords, the plaintiff's counsel asked Mrs. Cole and Mrs. Briscoe, what they heard with respect to lady Altham's being with child? and they were prevented by the defendant's counsel from answering, as being matter of hearsay-evidence; yet from the objection it ought to be inferred, and the gentlemen of the jury must presume so, that Mrs. Cole and Miss Briscoe's mother told them that lady Altham was with child.

My lords, as to the freedom used by lord Altham with Mrs. Bates, from what has appeared of lord Altham's disposition even from the defendant's witnesses, it is not in the least improbable; for do not all of them mention the intimacy they had with lord Altham? And pray why might he not be as free with Mrs. Bates, by clapping her on the shoulder, as Mr. Prime Serjeant mentioned?

My lords, it happened, that very few neighbours visited lady Altham, when she was brought to-bed; Mrs. Butler was the only neighbour who paid her visits, and to whom her ladyship fled for refuge at the time of the separation; she was in the room at the time of the birth, but she is dead.—And lord Altham was not visited by any people of rank, for colonel Loftus says he did not visit him: so that, my lords, considering the distance of time, and the disadvantages my client is under, he has given as convincing proofs of his title and legitimacy, as the nature of the case can well admit.

Dennis Redmonds, who was a servant in lord Altham's family, appears (even by Mr. Palliser's confession) to have been desired not to give his evidence, because Mr. Palliser understood his testimony might greatly prejudice the defendant.

My lords, the defendant's counsel have shewn a good deal of ingenuity in puzzling and perplexing the plaintiff's evidence, on the cross-examination; yet the truth remains entire and unquestioned, that lady Altham was brought to-bed of a son, and that that son is the lessor of the plaintiff. And though the plaintiff's witnesses might vary about the time of the eclipse, at this length of time, that cannot be material: nor whether the birth was before or after the eclipse; nor whether one servant was in the house before another servant, the fact remains proved, the birth of the lessor of the plaintiff is ascertained: nay the variations shew that the evidence is not framed; for if there was an exact agreement between witnesses, it would be an argument they were instructed in their story, which answers the defendant's objection in that particular. And though the defendant would endeavour to shew, that maid-servants are not the proper witnesses for such a birth, surely, my lords, as this case is circumstanced, the servant maids who lived in the house are the most likely persons to be informed of an affair of that nature.

My lords, Mr. Higgison (whom I shall have occasion to mention farther hereafter) is a man of an unexceptionable character, and his evidence for the plaintiff is strengthened by such circumstances, that plainly shew he could not be mistaken; he proves particularly the time, as to her ladyship's pregnancy, and his character was not attempted to be impeached by the defendant's counsel; for when colonel Loftus and Mr. Colclough were examined as to the character of other witnesses, no questions were asked as to the credit of this gentleman.

Lord Mount Alexander, my lords, says, that lord Altham had protested to captain Groves that his wife was with child.

Colonel Piggot and alderman Barnes swear, that it was reported lady Altham had a child. And when colonel Piggot would have related to the Court what he heard his mother say with regard to her being godmother to lady Altham's son, it was objected to by the defendant, as hearsay-evidence. And as to alderman Barnes, the jury are the best judges whether he was out of his senses, for every gentleman that heard him must see how sensibly he delivered his testimony.

As to major Fitzgerald, my lords, he might forget the season of the year when my lady was brought to-bed; and this is not surprising

it being so long since: but a birth so well proved cannot in the least be discredited by his not remembering the particular season.

My lords, I come next to answer why Joan Landy was not examined, on which the gentlemen of the other side have laid such stress. We offered her to the defendant's counsel, but truly they did not think proper to examine her; and the reason of their doing so appears plainly, because she has been tampered with, and that might come out upon her examination; and though Rolph and some others of the defendant's witnesses said, that it was well known that Landy was with child by lord Altham, the defendant, or others, and that lady Altham knew it; yet the circumstances of the affair plainly shew how improbable this imputation is. Landy continued three months in the house of Dunmaine after my lady came there: I believe it will hardly be imagined that lady Altham (who was of a haughty spirit) would admit her to live so long in the house, if there had been any notion of her being with child by lord Altham.

My lords, the gentlemen of the other side have exerted themselves, in endeavouring to shew the improbability of lady Altham's child being nursed abroad. This objection may very readily receive an answer, that the children of noble families are very often sent abroad for this reason, that the luxurious way of living in great houses, may be of disservice to the nurse, and consequently hurt the child: so that it is judged sometimes more eligible not to have the child nursed at home; and I have been informed in court by a nobleman, that the present lord Ophaly, the son and heir of the earl of Kildare, the first peer of this kingdom, was sent abroad to be nursed, and I apprehend that such an instance is sufficient to obviate what was offered by the gentlemen as to that point.

My lords, as to the meanness of Landy's house, wherein the child was nursed, the three witnesses produced by the defendant give different accounts of it: one says there was no door, but a bush; another says there was a door; one says there was no partition in the cabbin, the other two witnesses say there was a partition: Mr. Elms says, the partition was of sod and stone wall; but Rolph, who pretended to know it better, by his describing the figure of it on a paper, on his examination, said, that a hurdle fixed to the ground to keep off the straw, served as a kind of partition: this repugnancy of these witnesses is sufficient to destroy the credit of all of them.

I shall, my lords, proceed to make some farther observations on the evidence produced by the defendant, and must remark to your lordships, that if a story was to be made up without any foundation in truth, as defendant pretends, he had it more in his power to trump up a fictitious story than the plaintiff, the defendant having a country seat in the county of Wexford, near the place of the birth, whereas the lessor of the plaintiff was out of the kingdom for so many years, and destitute of friends, interest and fortune.

As to the testimony of Rolph and Heath, they contradict each other; indeed it was requisite they should agree in something, and that was, that they went out of curiosity to see the child. Yet how silly must that curiosity be, to see whether it was my lord Altham's or the dog-boy's child? But the defendant being sensible, my lords, how fully the lessor of the plaintiff had proved the time of his birth, would very ingeniously endeavour to overturn it, by pretending the lady Altham was in spring 1715, at Wexford assizes, when Mr. Walsh and Mr. Masterson were tried there, for inlisting men for the service of the Pretender; however Mr. Higgison has falsified all the defendant's witnesses; and his evidence it will plainly evince, that this story is framed by the defendant to serve particular purposes, and therefore the testimony of Mrs. Giffard, Mrs. Heath, and Rolph, must fall to the ground.

Giffard in her evidence names those, she says, that went with lord and lady Altham to Wexford assizes.

Mrs. Heath adds Mrs. Giffard's sister to the number of those persons that went. I shall humbly submit to the gentlemen of the jury, if Mr. Colclough does not plainly disprove Mrs. Giffard. She swore, that lady Altham sat by Mr. Colclough the greatest part of Masterson's trial; Mr. Colclough positively swears, that no lady sat by him, and gives a very good reason for his being positive in this circumstance, to wit, that he was so engaged in seeing justice done to Mr. Masterson, who was his relation, then on trial for his life, that he would not sit by the best lady in the land. He also says, that he knew lady Altham very well, and did not see her in court; and, my lords, if my lady Altham had been in the court-house, numbers of persons must have known it.

Mr. Kerr, my lords, a witness for the defendant, proves the day the assizes began, and tells your lordships, he saw no ladies there. Mr. Masterson's trial was on Monday the 18th of April 1715, yet Mr. Higgison swears, that on Tuesday morning the 19th of April the same year, he saw lady Altham at Dunmaine big with child.

Turner, my lords, swears my lord Altham went to the assizes, but that lady Altham was not there; for that her ladyship was at home at Dunmaine house.

Rolph, who is examined for the defendant, in order to prove lady Altham at the assizes, says, he attended lord Altham there, yet did not know in what part of the town he lodged, which shews strongly he was not there.

My lords, the defendant has produced Mr. Palliser the elder, Mr. Aaron Lambert, and his wife, and Mr. Elms, as to the reputation of the neighbourhood of Dunmaine, that lady Altham had not a child, and they say, they visited lady Altham once a fortnight, and that her ladyship could not be brought to bed without their knowledge, &c. But the gentlemen of the jury will

please to consider, that they all agree in a sameness of expression in their examination, and knew nothing at all in their cross-examination, which must be attended with some suspicion. As to the credit to be given to those witnesses, I must beg leave to take notice, that Mr. Palliser the elder seems to have lost all his memory in this affair; for on his cross-examination, he did not know when he was in the barony of Forth, or when he lived in the Great Island. Mr. Lambert happens to have the same misfortune, he even forgot the time he was married, and some other circumstances. As to Mrs. Lambert, it is sufficient to name her.

Mr. Palliser the younger, happens to be a very extraordinary witness; he says, that a very few days before the separation, lord Altham had told him his intentions of parting from his wife, because he had no children by her, in order to oblige lord Anglesea.

It is very unlikely, my lords, that if lord Altham was so determined, he would have imparted his resolutions to him; and Mr. Palliser said, he believed that lord Altham did not intend to kill him, he was so conscious of his innocence; and after he owned, that passes were directed by lord Altham at his body, and that Anthony Dwyer took the sword out of his lordship's hand.

It has appeared, my lords, that a coach road was made (as I already intimated) to Landy's, where the child was nursed. I submit to your lordships, and the gentlemen of the jury, how the defendant's witnesses contradict each other in attempting to disprove this. Rolph said, there was no road made, Elms said the same, but with difficulty it was extorted from Elms, that there was a road made; for that there was a slough thrown up at each side to make it passable, which was a short way, as he pretended, for my lord to go a hunting. Rolph says, there was a coach-road made on purpose to go to the church, and to the mill, and to Mr. Palliser's and Mrs. Giffard's houses, and that Mrs. Giffard usually came that way, and not round by the bridge; yet Mrs. Giffard said, she knew no other road from her house to Dunmaine, than the road over the bridge. As these evidences are inconsistent, the defendant entirely fails in his defence.

My lords, the defendant's counsel insisted, that the child was taken no notice of by lady Altham; but Lutwich swears, that he saw the child with her ladyship at one Wright's in Ross, where her ladyship went to lodge after she left Mrs. Butler's. He further proves, how the child was taken away by stealth. Margaret Hodges says, that lady Altham mentioned her child to her at alderman King's in Dublin; and Mrs. Heath thus far agreeing with Mrs. Hodges, that lodgings were taken on the Quay for lady Altham before her ladyship went to lodge at Mr. King's, and that a pistole was given in earnest and returned, confirms strongly the testimony of Mrs. Hodges.

My lords, as to alderman King's testmony, it only amounts to this, that lady Altham did never mention any thing of her son to him. This may be easily accounted for, because lord Altham forbid the child to be brought to his mother: lady Altham's condition at that time is well known; she was confined to her chamber, and could receive no intelligence but from Mrs. Heath.

Lady Altham left this kingdom in September 1724, and it has been proved by Herd, one of defendant's witnesses, that the child was in the care of lord Altham the August preceding that September, so there was only a month between the father's deserting him and her ladyship's going out of the kingdom; therefore it is not extraordinary that she did not hear of her child's misfortunes.—But it is undeniable that the plaintiff was taken care of and educated as the son of a nobleman, and likewise acknowledged by lord Altham as his son and heir. Mr. Misset, a gentleman of an undoubted character, proves, that the late lord Altham mentioned to him at Kinnay, that that boy (meaning Mr. Annesley) would be earl of Anglesea. Mr. Charles Byrn swears, that lord Altham treated him at Carrickduff as his son and heir, and acknowledged him as such: and this witness declares, that he would have resented the plaintiff's being brought to his house if he was thought the natural son of lord Altham. Mr. James Cavenagh acknowledged likewise, that he was treated at Carrickduff as lord Altham's lawful son; and I believe the defendant will not contest the veracity and character of those gentlemen.

My lords, I must beg leave to take some notice to your lordships of the circumstances of lady Altham in London, to obviate what the gentlemen say as to that point, and to account for her ladyship's not endeavouring to assert the plaintiff's title. It was proved by Mrs. Heath that lady Altham had 100*l.* a year to live on till the death of lord Altham; but if she happened to survive him, then she was to have nothing; therefore after his death her ladyship was supported by the bounty of the duke and duchess of Buckingham: and considering her condition and the distance of kingdoms, she was incapable of asserting the plaintiff's right. Besides, the infirmities and sickness she laboured under might affect her memory; and it may be presumed strongly, that she imagined he was dead.

My lords, by the limitation of the settlement under the will of 1701, lord Altham had but a tenancy for life: the first will limited the estate to Richard lord Altham for life, remainder to his issue in tail. It was undoubtedly for the benefit of lord Altham, in point of raising money by sale of reversion, to have deserted his son, for he was then under age and could not join; besides, if he was dead, or put out of the way, the estate must of course come to the defendant; so that by the defendant's joining with his brother, the late lord Altham, they could the easier raise money by selling such part of the estate as they thought proper.—Moreover, my

lords, Miss Gregory had such an ascendant over lord Altham, that she could lead him as she thought proper (as I remarked before), and she had an interest in prevailing on his lordship to disown his son, as she assumed the title of lady Altham, and expected if she had children that they might succeed to the estate: and thus to gratify an imperious mistress, that unfortunate nobleman was induced to abandon his son.

My lords, the transportation being an act of the defendant's, speaks stronger than words; because it must establish a presumption of the plaintiff's right; and no later than last Saturday, we find by the evidence of Mr. Stone, attempts have been made to disprove Purcell's testimony, which attempts have been rendered abortive, and serve only to confirm the truth of what he swore.

The names of Annesley and Hennesley are different from each other, and suppose distinct persons; and Hennesley not being mentioned in Stephenson's book is no reason that Annesley and Hennesley must be the same person, because Hennesley appears by the Tholsell books to have been indentured before the 25th of March 1728; and Mr. Tigh swears, Mr. Annesley did not leave his house till April 1728; and this must be a strong presumption that Annesley was not the Hennesley who was indentured. Besides, the ship did not sail till the 30th of April 1728 (as appeared by Stephenson's books) and Stephenson's list was taken just before the sailing, and several that were indentured afterwards ran away; it appearing that above 100 were indentured, and only 80 persons were in Stephenson's list.

As to the imprudence of committing an evil action in the open day, we have too many instances thereof from the misconduct of several persons.

My lords, if the lessor of the plaintiff had been indentured at the Tholsell, Mr. Gune the town-clerk must have known him, as he was acquainted with his father; and it has appeared in proof, that very strict enquiry is made at the Tholsell-office from those that go to the plantations, whether they indentured voluntarily or not; from hence it follows, that the lessor of the plaintiff was secretly kidnapped and transported to America.

Mr. Giffard's testimony stands unimpeached. The defendant confessed to him the just title of the lessor of the plaintiff, and that he was his brother's son; and though he might be supposed in a passion when he expressed those words, it cannot be presumed he would make declarations of surrendering to Mr. Annesley his right, unless he was conscious that Mr. Annesley was lawfully entitled thereto.

As to Joan Laffan, my lords, nothing but the force of truth could make her as consistent as she was. She has been examined a second time at the distance of three days, and re-examined over and over again the third and fourth time, and never varied in her testimony.

My lords, this being a cause of the greatest importance; and as all the acts of the defendant induce the strongest belief of the indubitable right of the lessor of the plaintiff, and must consequently support his proofs and weaken those of the defendant, I humbly hope the gentlemen of the jury will consider it well, and give a verdict agreeable to justice, which I doubt not will be for my client the lessor of the plaintiff.

Mr. Serjeant *Tisdall*, of counsel for the lessor of the plaintiff:

My lords, and you gentlemen of the jury, I am counsel of the same side with Mr. Serjeant Marshall. This is certainly a cause of the greatest consequence, and I am sure from your wise considerations, it will receive its due determination.

I shall first think necessary to observe, that from the circumstances of the plaintiff's case, and the death of parties, it was natural for some of the witnesses, in the space of so many years, to forget some things with respect to time and place; variations of this kind must necessarily happen in a course of evidence after so long a time; but the principal fact remains true.

The matter in dispute, my lords, is attended with a very particular misfortune on the side of the plaintiff. Mr. Annesley's father, the late lord Altham, had no relations in the county where the lessor of the plaintiff was born; nor had his mother any relations in this kingdom, which in a great measure accounts for that circumstance, that there are not people of rank, or relations in the family to prove his legitimacy.

My lords, the defendant is a peer of this kingdom, and of England, and is in possession of a great estate near the place of the plaintiff's birth; and as most of the inhabitants are tenants and acquaintance of the defendant, and under his influence, they might not be so easily prevailed upon to give evidence here.

It has been proved, that the plaintiff was transported out of this kingdom to America, in an illegal and iniquitous manner, when he was about 14 years old, and having not returned till lately, he must be ignorant what witnesses were living to prove his birth, till he made a diligent enquiry; he must be obliged to the friendship of those who voluntarily offered themselves; and now he does all he can, by offering them here in court as evidences.

My lords, it has not been attempted to be proved by any of the defendant's evidences (except Rolph) that any improper application has been made on the plaintiff's side for evidence; but the account Rolph gives is very inconsistent. Is it probable, my lords, that Mr. Mackercher, at the first sight, would offer Rolph a lieutenancy in presence of two other persons, and thereby put it in the power of Rolph to have ruined the cause of the plaintiff? or that when Rolph refused it, as he says, that he would have gone to him a second time, to ask him any questions in relation to what he

first proposed to him, when four other persons who were strangers were present? No, my ords, no rational man could be guilty of such a piece of misconduct. If any offers were to be made, they must be made to people in a lower condition than Rolph appears to be, from his own declaration, who would be ready if they met such encouragement, to appear here and give their testimony.

Though Mrs. Heath mentions how she has been applied to, yet she is silent as to any undue means; so that in fine, Rolph was the only person pretended to be tampered with, which shews, that this part of his testimony is very incredible.

The producing Mrs. Blake, my lords, is a great argument of the plaintiff's sincerity, and that he intended to give evidence of every thing that could give the court and jury some light of the matter now in controversy.

I shall now, my lords, endeavour to speak to the evidences on both sides, and hope to be able to shew, that the plaintiff has very clearly proved his title. Eleanor Murphy, and Mary Doyle, agree as to a positive proof of the birth and christening; the little variations of time are of no significancy; they likewise prove, that Redmonds was sent for a midwife; and Redmonds proves, that he went for one to Ross; and further says, that he was spoken to by colonel Palliser, in order to prevent giving his testimony; and the colonel owns, he had some discourse with him to this purpose, previous to his examination.

Brown says, there were bonfires and rejoicings for the birth of the child; and Scot swore that he was sent several times with messages from Mrs. Piggot, to enquire about the child's health, and that it was the reputation of the country, that lady Altham had a child, which strengthens the testimony of Murphy and Doyle.

My lords, there can be no manner of doubt, but that there was a coach-road made, as proved by the plaintiff, for the conveniency of lady Altham's going to Landy's house, where the child was nursed. Elms at first denied the road was made, and afterwards own'd it, as Mr. Serjeant Marshall has fully observed: But I must remark to your lordships, that Rolph says, a coach-road was made before the nurse's cabbin was built; and that the cabbin was built a year before my lady came to Dunmaine; and he further says, that the road was made on purpose for visiting Mrs. Giffard. Surely, my lords, this must be false, in regard lady Altham was not in the country for a long time after the road was made, according to Rolph's account, and there was no occasion to visit Mrs. Giffard before her ladyship came to Dunmaine, and consequently, it could not be made for the conveniency of visiting Mrs. Giffard. Besides, Mrs. Giffard says, she always came over the bridge, in contradiction to all the other witnesses; therefore it must be supposed, that the road was made on purpose to visit the child; and the great endeavours used by the defendant to overturn the plaintiff's witnesses in this particular, shew his apprehension of the consequences of this circumstance.

My lords, the defendant endeavours to lay great stress on the meanness of the dress and appearance of some of the plaintiff's witnesses; but this can't be an argument against the plaintiff's cause, because he must make use of what proofs the nature of the thing will admit, and of such witnesses as are living, that could give an account of his birth: and such are those who happened to be servants that time in the house; and the little variation of the circumstance of time and place, ought to have no weight. And as to Redmonds, however contemptible his appearance may be, he was a person fit enough for the errand to the midwife.

My lords, I shall next proceed to our witnesses, who prove lady Altham's pregnancy and miscarriage. Mrs. Cole gives a very credible account of the miscarriage; and though the counsel on the other side, have laboured very hard to shew that a child of her age could not be curious enough to enquire into a thing of this nature, yet the contrary may very well be supposed, as she probably never saw any such thing before; and therefore it was very natural it might make an impression on her mind. A person of an advanced age might very well be imagined not to have a curiosity on such an occasion, as perhaps having seen a thing of that nature before. Could this circumstance of Mrs. Cole's testimony be intended for any particular purpose? No, my lords, it could not; because she could never dream, nor was prophetic enough to know, that she should ever be called upon here to give her evidence; and though she and Mrs. Heath differ in their testimony about lady Altham's going to Vice's, this can be of no great consequence; and I appeal to your lordships, and the jury, from the rational distinct manner Mrs. Cole gave her evidence, whether she or Mrs. Heath deserve greater credit?

Alice Bates, my lords, swears to lady Altham's pregnancy and miscarriage at Vice's; and as to the objection of the freedom used by lord Altham with her, (as she related in her testimony) we see that gentlemen and ladies very frequently admit their servant maids to make free with them, and particularly on such occasions.

My lords, Mr. Turner swears, he went to Dunmaine immediately after his marriage, and as this gentleman resided so long in the family, he could not mistake, as to time or fact. He says, lady Altham was then pregnant; and Mr. Higgison swears, he saw lady Altham with child; he is an unimpeached witness, and by the circumstances he observed in his testimony, that he was bound for lord Altham for the sum of 20*l.*; and further, that he was receiver for his lordship for part of his estate; we have the strongest reason to be convinced of the truth of his testimony.

My lords, I shall now consider the negative proofs of lady Altham's pregnancy; and first, I shall begin with some of the servants of the house, produced by the defendant for this point. Owen Cavenagh owns, that he was absent for some time from Dunmaine, and that he left the service for some time, and returned thither again; therefore as he did not continue constantly in the house, there could be no certainty in his evidence; because lady Altham might be brought to bed when he was absent, whether he was in the service or not.

Rolph, by all the plaintiff's witnesses is said to leave lord Altham's service before the birth of the child; and as his testimony with respect to the coach-road appears to be false, his whole evidence ought to be discredited.

Anthony Dwyer, my lords, contradicts all the defendant's witnesses; for he says, there was no child at the house of Dunmaine after the separation, therefore he ought not to be believed.

My lords, your lordships, and the gentlemen of the jury will please to consider, that the proofs on the plaintiff's side are positive evidence, Murphy, Doyle, Macormick, Laffan, and Redmonds, who were servants in the house. Mrs. Cole, and Mrs. Briscoe, Alice Bates, major Fitzgerald, Mr. Turner, and Mr. Higgison, Scot, and Brooks, these are all entirely opposite, with respect to the pregnancy and miscarriage, to the other servants (the defendant's witnesses) Heath, Dwyer, Rolph, Neife, and Cavenagh; but as the evidence in behalf of the plaintiff is positive, it must be considered in a stronger light, and outweigh the defendant's evidence, as to the pregnancy and birth; therefore the superstructure which the defendant builds on such a foundation, must consequently fall.

My lords, I shall now take notice of those witnesses on the part of the defendant, who say, that it was not reputed in the country that lady Altham had a child. The first person, my lords, examined to this point was colonel Loftus; but this gentleman's testimony is no more than that he lived about seven or eight miles from Dunmaine, and had no acquaintance with lord or lady Altham, and knew nothing of the matter in question; so that it is plain, the intention of producing him was only to give a sort of dignity to the cause.

Colonel Palliser, my lords, is the next evidence for the defendant in this respect: he says, he never was absent from Dunmaine above a week together, and afterwards owns, he was absent above a month at one time; I fear he is too ready and forward a witness. In one particular he seemed an agent in the cause, by desiring Redmonds not to appear, on pretence that his evidence could signify nothing; and as he has shewn a good deal of inclination herein in favour of the defendant, I can't help saying, it throws some suspicion on his evidence.

Mr. Palliser the younger, my lords, said he believed his father visited at Dunmaine, but that he did not see lady Altham often at his father's house. He seems to have too much intimacy in that family from his own account; he tells you, that lord Altham mentioned to him his intention of turning away his lady, yet till that time his lordship never spoke to him of his family affairs. This really appears very strange and improbable; and if one fact is not true, it must discredit all the rest of his testimony.

My lords, he is contradicted by Joan Laffan, who swears, that he had lord Altham's cap on that morning of the separation; he said, that he had his hat and wig on; but when they were both on the table here together, he could not recollect he had a cap on, or if he changed his hat and wig for a cap. It is somewhat strange that Mr. Palliser should forget the most material passage of his life; for from the circumstances of that affair, and the treatment he met with, he must remember the particulars of that affair to his last day. The very particular breakfast he had, Joan Laffan remembered when she was called upon; and he acknowledged, as she said, that it was some mulled wine; so that in the minutest circumstance she was found consistent. Your lordships will please to consider, what powerful influence resentment has on the minds of men, it is not easily removed; and sometimes a strong resentment against the father is continued to the son. How much Mr. Palliser has been incensed against lord Altham, has plainly appeared.

Mr. Aaron Lambert, my lords, gives a very loose kind of testimony, and when a character was required of colonel Loftus, with respect to Mrs. Lambert, your lordships have seen how cautious he was of encouraging any credit to be given to her oath.

As to Mrs. Giffard, she pretends to remember every thing that happened relative to the assizes at Wexford, yet she forgot her sister, who went in company with her and lady Altham thither, as is evident from Mrs. Heath's testimony. And as to the circumstance of the assizes, the testimony of Mr. Colclough, Mr. Turner, and Mr. Higgison, for the plaintiff, are diametrically opposite to the testimony of Mrs. Giffard, Rolph, and Heath for the defendant.

Rolph, my lords, I must remark, was never at lord Altham's lodgings; and Mrs. Heath adds a new person to the company: I must submit to the gentlemen of the jury, whether the plaintiff's or the defendant's witnesses are most consistent, and which of them give the most probable evidence.

The next thing I shall trouble your lordships with, is to make some remarks on some declarations, made by the late lord Altham, that he had no legitimate issue; whereon the gentlemen of the other side strongly relied.

Colonel Harman was produced as a witness for the defendant to this purpose; but truly he could not tell whether the conversation he had with lord Altham was before or after the death

of queen Anne; therefore he is not certain in his evidence herein, and could not fix any particular time.

Father Downes, another of the defendant's evidence, could not likewise fix any particular time in his testimony.

Colonel Wall, my lords, says, that it was in 1725 lord Altham wished he had a lawful son; and Mr. Wall said, that it was the interest of my lord to have a son, on the opinion of the wills and codicils; whereas the point of law is quite contrary.

Colonel Becket's testimony, my lords, is manifestly inconsistent: he says, he dined with lord Altham in the summer-house at Mr. Vice's, and that it was not above a year from the time his lordship lodged at Mr. Vice's till he came to live at Inchicore. Now, my lords, it is evident in proof, that Mr. Beckett must have mistaken himself for several years, for that my lord lived in Dunmaine, Kinnay, Carrickduff, in Dublin, and other places for a good many years before he went to live at Inchicore.

As to Mr. Medlicott, it is very odd that lord Altham should make the declaration which he mentions, That as he had no son of his own, he did not care if the estate went to the devil. However this declaration may be made consistent, with some little variation, by only substituting the word *if* instead of *as*, which would make it, 'If he had no son of his own,' then it would be an hypothetical expression, and probably Mr. Medlicott might have forgot the identical words in so long a time. These last witnesses were all that were examined by the defendant as to the point of the declarations.

Now, my lords, I shall beg leave to mention what the witnesses in behalf of the lessor of the plaintiff swear as to this point. Colonel Pigott says, it was generally reported that lady Altham was brought to bed of a son about 28 years ago, and from his intimacy with that family he could not be mistaken.

Alderman Barnes, my lords, said, that lord Altham mentioned to him that lady Altham had a son about the time of the birth of the lessor of the plaintiff, and he believes he was told so by 500 people in Ross. Can it be imagined that his lordship would make such declarations, with a view of imposing a child on the public in prejudice to his brother, and the remainder-men of the family, if he had not a son? Landy's child was notoriously known and admitted to be a bastard, and it was not in the power of lord Altham to make him his legitimate son.

But, my lords, alderman Barnes's testimony is confirmed by lord Mount Alexander, from lord Altham's positive declaration, "By God, Grove, I have a child by my wife, that will make my brother's nose swell." The honour of this noble lord is sufficient to establish this as an undeniable truth. It is true, lord Mount Alexander does not fix a time for this declaration, but the nature of the thing speaks it, that it must be after the birth of the child; and it cannot be supposed lord Altham would be so absurd to declare he had a child, if he had not a son.

But, my lords, as these evidences on the part of the plaintiff are positive, and all the defendant's proofs are negative, the most favourable construction that can be made for them, is, that they are ignorant of a fact so notorious to the rest of the country.

My lords, that there may be no part of the chain of our evidence broken, we have shewn what care has been taken of the child; we have proved Joan Landy to be his nurse, and Joan Laffan his dry-nurse. Laffan was called up and narrowly examined three or four different times, notwithstanding which, she was always found consistent with herself, and all circumstances of her testimony were proved fully by her. The whole force of the defendant's witnesses was turned to destroy the character of this woman, but their testimony was general, and there was no fact proved to destroy her evidence, therefore what they swore did not affect her so as to render her a bad witness. She said she came to Dunmaine in harvest 1715, and lived a year in the family before the child was put under her care, which was in harvest 1716, six months before the separation, which was in the beginning of the year 1717, and that tallies with the time that she was appointed to take care of the child, and answers Mr. Prime Serjeant's objection as to that point.

Dominick Farrell, my lords, strengthens the testimony of Laffan. He is positive that he saw the child in the house of Dunmaine, in the care of his mother, the lady Altham, before the separation.

My lords, the counsel for the defendant finding that we had proved the lessor of the plaintiff to be the son of lord Altham by his lady, have endeavoured as much as they could to overturn this evidence, by pretending he was the son of Joan Landy; but I hope we have satisfied your lordships and the gentlemen of the jury, that their testimony, in this respect, is very inconsistent. William Elms has been produced, who swore, that Joan Landy's child was brought home to Dunmaine after the separation. Martin Niefe, and William Knowles, swear likewise, that the child was brought home after the separation; but Anthony Dwyer contradicts these witnesses: he says, he staid three quarters of a year after the separation, came up to parliament with lord Altham, and never saw a child at Dunmaine. Aaron Lambert said, he never saw a child in the house; and when some of the witnesses were asked, was there a child in the house, or was there not? Then comes the evasion; if there was a child in the house, it was imputed to the coachman, a circumstance which bespoke perjury, because of their endeavouring to ward off that blow; so that these witnesses clashing with the rest, must throw an imputation on their testimony.

Elizabeth Molloy, my lords, says, she was applied to, in order to dry-nurse Joan Landy's child, but could not fix a time; and further

said, she would dry-nurse children of ten years old, which is a thing very uncommon.

Anne Caulfield said, she saw Joan Landy's child at nurse, and that she saw lord Altham after the separation call to see a boy at Furlong's school; yet when she was cross-examined, whether it was the same child she saw at school that she saw at nurse, she said, she could not take upon herself to swear that for the whole world. I have troubled your lordships in mentioning those witnesses which the defendant produced to shew how uncertain they are in their evidence, and therefore that there can be no dependence upon them.

But, my lords, let the gentlemen of the other side say, there was or there was not a child at the house of Dunmaine; we have proved that lady Altham's child was there; and Redmonds and Breen, who were examined for the plaintiff, swear Joan Landy's child was dead and buried several years ago, which entirely overturns the pretence of the defendant, that the lessor of the plaintiff is Landy's child.

My lords, it has been proved to your lordships, that lord Altham treated the lessor of the plaintiff as his lawful son and heir. The testimony of Mr. Misset, and the conversation he had with lord Altham at Kinnay in the county of Kildare, prove this beyond all contradiction; and Mrs. Annesley supports his testimony, by the account she gives of her and her brother's drinking the child's health in lord Altham's presence, when his lordship lived at Kinnay. Surely such conversation would not be introduced in company of a relation of the family, if the child was intended to be imposed on them: she farther says, the legitimacy of the plaintiff was never doubted of in the country; and as she was allied to the family, her evidence must be of great weight to overturn the evidence of Mr. Medlicott.

The evidence of Mr. Charles Byrne and James Cavenagh proves to demonstration, that the child was looked upon at Carrickduff as the legitimate son of lord Altham; therefore, my lords, how can your lordships, or the gentlemen of the jury believe the testimony of Martin Niefe, who said, that the boy was reputed a bastard, and had too much of the blood of the Landys in him? Consequently Niefe's testimony must be rejected. So that, I say, by adding all the plaintiff's proofs together, there cannot be the least colour to doubt the legitimacy of the plaintiff.

My lords, both Mr. Byrne and Plunkett say, that he was looked upon in Proper-lane to be the legitimate son of lord Altham; and the influence Miss Gregory had over my lord (when he lived there) is likewise proved by Herd, and it is natural to suppose, she suggested things to lord Altham to his disadvantage. Mr. Plunkett tells your lordships, he interceded with lord Altham for him, when complaints were made against the child by Miss Gregory; therefore it is easy to be believed, that it was on her account he afterwards became totally neglected.

As to the testimony of Mrs. Mullen, who says, that the child made answer to her at the funeral of the late lord Altham, that he was Joan Landy's son, there cannot be the least reliance on her credit, because the child always asserted his legitimacy: and Mr. Hawkins king-at-arms refused enrolling the defendant, on account of the behaviour of the child, and his crying at the funeral; and Mr. Bush, and Mr. Tigh, and Purcell say, he convinced them of his legitimacy.

As to Mrs. Heath, she comes from a distant country: what inducement she might have to give evidence against Mr. Annesley, must be only known to herself; she might have imposed on lady Altham, as it appears that it was from her only that lady Altham received information, to neglect the child, and she may still continue averse to him.

My lords, as to what is observed by the gentlemen of the other side, to shew the improbability of Reily the servant's evidence, from the short space of time of going from George's Quay to Inchicore and coming back to the Quay, that was an affair that required expedition, he must be supposed to make all the dispatch he could; and as to what Reily said, that the defendant was on the Quay when he was sent for the guinea, and afterwards in an hour and an half found him there at his return, this is not repugnant to what Byrn says, that the boy was put into a boat about a quarter of an hour after he came to the Quay; for it may be very well presumed that the defendant might be on the Quay when he sent Reily for the guinea, in order to fix a boat to carry the boy to the ship; and after that, go back to Ormond market to Jones's, and return to the Quay at the time Reily brought him the guinea.

But, I believe, the gentlemen of the other side will not deny, that the transportation is proved to a demonstration, which shews the violent resentment the defendant conceived against Mr. Annesley, the lessor of the plaintiff, and the evil mind of the defendant, still implacable, so as even to lay out 800*l.* to prosecute him, in order to take away his life, to prevent him from ever enjoying his birth-right, which the defendant has unjustly possessed: therefore I say, to every impartial man, this must be the strongest argument of the defendant's consciousness of the lessor of the plaintiff's unquestionable right; and I make no doubt but the gentlemen of the jury will be of the same opinion, and consider this affair without any regard to any other person not before the Court at present, and give a verdict for Mr. Annesley the lessor of the plaintiff.

Mr. *Walsh*, of counsel for the lessor of the Plaintiff.

My lords, and you gentlemen of the jury; it is not to be expected that the lessor of the plaintiff, from the many disadvantages he labours under, can lay such full proofs of his birth before the jury, or fix his title as well as

if he had been always in the kingdom; on the other hand, the defendant has had full time to prepare his witnesses, as he was alarmed by the account of my client's returning from the West-Indies, and intending to claim the Anglesea estate. My lords, as this point has been so well discussed by the plaintiff's counsel, who spoke before me, I shall not take up much of your lordships' or the jury's time.

Your lordships will please to consider, that the defendant, as administrator to Arthur late lord Altham, has got all the papers in his hands, which could give farther light into this affair; therefore the strongest indulgence is to be shewn to all the evidence given at this distance of time on the part of the lessor of the plaintiff.

The only point in question is, the legitimacy of the lessor of the plaintiff; which he has proved by positive evidence, and thereby wiped off all that cloud of infamy that the defendant would endeavour to throw on him.

I shall now, my lords, beg leave to make a few observations on some of the defendant's evidence, and on the declarations of the defendant, which shew plainly his evil disposition towards the lessor of the plaintiff.

First, I would remark with respect to Mrs. Heath, because she is the defendant's principal witness, and if she is overturned, all the rest must fall to the ground.

Mrs. Heath agrees to the cause of the miscarriage (which was the breaking of the saucers) but not to the effect; she likewise confirms M'Cormick's testimony, that Lucas the midwife was intended to be sent for: she says, my lady Altham never kept her room one day; which is contradicted by Mr. Lambert. What she and Mrs. Giffard say, as to Wexford assizes, is contradicted by Mr. Colclough.

Colonel Palliser, my lords, owns he was often laid up with the gout, and often absent from his house in the Great Island, consequently could not be certain what happened at Dunmaine.

Mr. Palliser, his son, induces a suspicion of bearing a resentment in his mind, from the marks of infamy he received, which, if it was in a judicial way, he could not be believed in any court of law.

Herd's testimony in relation to Proper-lane, is outweighed by the evidence of Plunkett and both the Byrnes; he farther swears, that lord Altham declared he would not for 500*l.* the child should know, that Joan Landy was his mother.

Niefe swears, that when my lord corrected him, he always told him of his mother Joan Landy; he also swears the child went by the name of James Landy. It is somewhat extraordinary, that my lord should upbraid the boy with his mother Joan Landy, and yet declare, that he would not for 500*l.* that the boy should know that Joan Landy was his mother.

Furlong is very ridiculous in his testimony, and Downes is discredited by Ryan.

Beckett is a most uncertain witness, in his account about Vice's and Inchicore.

Colonel Harman is likewise uncertain.

Mr. Medlicott's account, my lords, is somewhat extraordinary; for if lord Altham made use of those declarations, he mentioned, a long time ago; yet he says, he never reflected on them till the last Curragh races.

Napper, my lords, could not know any thing of the point in question, because he owns the late lord Anglesea directed him never to go to Dunmaine.

In regard, my lords, the plaintiff's counsel have observed so fully on our witnesses; I shall beg leave to offer a few thoughts to the consideration of the jury.

Mr. Higgison wanted not the æra of the year of the eclipse, nor of the time of the Pretender's men being tried at the assizes of Wexford. He produces his book to put that matter out of dispute.

My lords, the testimony of colonel Piggot, of the reputation of the country, should have very great weight, and confirms the positive testimony of Scott, of his being sent on messages from Mrs. Piggott concerning the child; it is not common to send how-do-you's to a bastard son.

Lord Mount Alexander mentions the particular account of lady Altham's having a child. The veracity of these witnesses is unquestionable.

Hodges's testimony is confirmed by Mrs. Heath, which must have weight.

Lutwich is not attacked in his character.

On the whole, your lordships will please to consider, the testimony of the plaintiff's witnesses is attended with such consistency of time and place, that it must outweigh the wandering and uncertain evidence of the defendant's witnesses.

Is it reasonable that lord Altham should set up a bastard son for his legitimate child, there being at the same time a probability of his having lawful issue?

My lords, I must now beg leave to take notice of some declarations of the defendant, which plainly point out his malice and resentment towards the lessor of the plaintiff. Joan Laffan has proved, that the Christmas-Eve after the separation, the defendant was at Dunmaine-house, and not seeing the child, said to the witness, Where is Jemmy, or where is my brother's child? how did his mother behave at parting with him? And Laffan answered, that lady Altham had requested very earnestly to have the child with her: whereupon the defendant made use of an extraordinary oath, That he would not have his brother keep any of the breed, but pack them both to the d—l.

My lords, the late lord Altham's character and circumstances are to be considered by the jury, and Miss Gregory's influence and some sort of a sham marriage (if I am rightly instructed) may account for his lordship's maltreatment of the child, and she might persuade him into a notion, that though the child was the son of lady Altham, yet that he was not begotten by him. There was a farther reason,

that my lord being tenant for life, might give out that he had no son, in order the more easily to sell reversions by his brother's joining with him. This might be more easily effected, as the child had no relations or friends, but those that were aiming at his title and honour, and who imagined that if he, who was a bar to their interest and ambition, was removed, they then might be sure of making every advantage they long thirsted after.

My lords, though the plaintiff was young at the time of his transportation, it has appeared in proof that he did all that was in his power to let the world know that he was the legitimate son and heir of the late lord Altham; did he not even at his father's funeral lament his death in the most piteous manner, and assert his title? and was not Mr. Hawkins, the king at arms, so moved thereby, that he refused enrolling the defendant as lord Altham in the list of peers? This induced the defendant to shew the strongest resentment, which he did, threatening to transport him as an impostor and a vagabond, assigning the scandalous pretence of his having stolen a silver spoon; and then, in an unnatural and illegal manner, he makes an attempt on the son of his brother, kidnaps him in his tender years, four months after his father's death, and afterwards, with a most unaccountable indifference, tells Mr. Ash his attorney (as Mr. Ash declared on his examination) only that the boy was gone. It is pretty remarkable, that the gentlemen on the other side did not think it proper to cross-examine Mr. Ash as to that particular.

Your lordships will please to consider, that lady Altham was in a dead palsy before she left Ireland, which impaired her understanding, and that she continued so till death; and was thereby confined to her room. From this unhappy condition she might not know when lord Altham died; and if she did, as she was in a state of distress and dependence, she was in no condition to assert the right and support the interest of her son.

I should, my lords, be glad to throw a veil over the defendant's misconduct in an affair of a deeper dye; but in justice to my client, I cannot help mentioning to your lordships, and the gentlemen of the jury, what illegal means the defendant made use of to cause the lessor of the plaintiff to be prosecuted with the utmost severity, and to aim at his life in so extraordinary a manner. This affair has been opened to you by Mr. Giffard, who was attorney in that cause. It appears, that the defendant was at first touched with the qualms of a troubled mind, and determined to surrender to the lessor of the plaintiff his right and title, if he was allowed 3,000*l.* a year to live on in France; to qualify him for this scheme of life, he was instructed by a French master in the language of that country. This disposition to do justice was not of long continuance, an unfortunate accident subjected Mr. Annesley to a prosecution, by an unhappy chance of shooting a man; upon this all remorse is dissipated, the late kind intentions vanish, the defendant values not if it cost him 10,000*l.* so he could have the plaintiff hanged; and for that purpose he makes no difficulty to expend 800*l.* When he is disappointed in this, another expedient must be found; when the plaintiff's life is out of his reach, his character, his birth is to be impeached, and he is to be deemed the spurious offspring of a poor kitchen-wench. It is plain to every man that has heard any thing of this affair, that nothing but the strongest conviction of the plaintiff's right, could have spirited the defendant up to such a complication of iniquity.

My lords, it is true, the defendant's counsel have varnished over their case with a very glaring shew, with a view of influencing the gentlemen of the jury; but they are of that honour and integrity, that they will weigh the affair with the justest nicety. And now I shall conclude with the words in the gospel, which the defendant has adopted to himself, "This is the heir, come let us kill him, that the inheritance may be ours;" but thank the Almighty, the over-ruling hand of Providence has protected the lessor of the plaintiff, and I hope the jurors will think he is entitled to a verdict.

Here ended the arguments of counsel for both parties, about ten o'clock on Wednesday night; and the Court by the like consent as usual, adjourned to 12 o'clock next day.

Friday, Nov. 25.

The Court being met according to adjournment, and the jury having appeared as usual, the lord chief baron Bowes summed up the evidence in the following Charge:

L. C. Baron. Gentlemen of the Jury; We are now come to the last period of this very important trial, and after having attended to a longer evidence than ever was known upon a trial at law, you, gentlemen, by your verdict, must determine a question of as great consequence both as to property and title, as ever came before a jury.

I did apprehend when this trial began, that it would run out to a great length, and therefore apprized you of what I thought must be the consequence, that the Court would not be able minutely to sum up the evidence upon this, as upon like occasions; and therefore recommended it to you to make and enter your own observations, as the evidence should be laid before you: but when I consider your exemplary behaviour during the course of this long trial, the attention you have given, and the desire you have expressed to do justice; I think it incumbent upon the Court, as far as they can, to be aiding and assisting to you, in this your search after truth. To this end I shall, though very briefly and imperfectly, lay before you what hath occurred to me; which I shall do in this method. I shall endeavour by way of narrative, to collect the facts that have been sworn to on both sides; I shall next mention the objections, as far as I have taken them, that

have been made to the credit of the respective witnesses, together with some observations that may assist you in judging how far those objections ought to weigh with you. And as it will appear in the course of this evidence, that there have been inconsistencies, and, in the most material facts, direct contradictions; I shall therefore take notice of those circumstances attending this case which may throw a probability or improbability upon the testimony you have heard.

The action to be tried is, an ejectment brought for lands in the county of Meath; and by the admission of the counsel for the defendant the plaintiff's title is brought to a single question, whether the lessor, Mr. James Annesley, be the legitimate issue of Arthur late lord Altham? It is admitted on both sides, that the plaintiff and defendant claim the lands in question, under the will of James earl of Anglesea; and that by such will, the limitation to the heirs male of the body of Arthur late lord Altham, is prior to the remainder limited to the defendant; and therefore if the plaintiff can prove that he is the legitimate issue of Arthur late lord Altham, a verdict must be found for the lessor of the plaintiff; but if he fail, then there is an undoubted title in the defendant, being the person next in remainder under the will of James earl of Anglesea; and a verdict must be found for him.

Gentlemen, the question being a mere matter of fact, the plaintiff's counsel have proceeded to lay their evidence before you in the following manner: they have given evidence to induce a probability, that Mary the wife of Arthur, late lord Altham, might have had a child, and that, by examining Mrs. Dorothy Briscoe, and Mrs. Henrietta Cole, alias Briscoe, to shew that there was a reconciliation between the lord and lady Altham, some time in the year 1713; that they came together and cohabited at the house of their father in Bride-street, from whence they went to one Mrs. Vice's in Essex-street, and from thence to Dunmaine; and there another circumstance arises, which is, that Mrs. Cole and her mother being invited to Dunmaine, went thither, and while they were there, upon an accident, which has been so often repeated that I shall not go into the particulars of it, lady Altham was frighted, and in consequence of that fright miscarried; and the same witness, Mrs. Cole, swears that she saw an abortion. They have also produced Catharine Cormack, to shew a second miscarriage, in the same summer with that mentioned by Mrs. Cole; the circumstances of that likewise have been so often repeated, that I only mention the fact. Having done this, the plaintiff proceeded to shew an actual pregnancy in Mary lady Altham. The evidence for this was Alice Bates, the servant of Mrs. Briscoe, who was admitted to intimacy with lady Altham, and to whom it was told by lord Altham, and acknowledged by lady Altham; and who further swears the pregnancy was such that she did observe it, and by laying her hand upon the belly of lady Altham, she took upon her to say that lady Altham was big with child. I do not, as I go along, take notice of the objections to the respective witnesses, intending to consider them together. In the next place, they have endeavoured to prove circumstances preparatory to the delivery of lady Altham. Dennis Redmonds tells you, that he was sent for the midwife, and Thomas Brooks, that he was sent for as a surgeon to let her blood at the time of her labour; and Dennis Redmonds and Philip Breen both speak to their observing that lady Altham was pregnant before this time: And, gentlemen, it did appear that these two were servants about the house, though in a very low station; the one, I think, a helper in the garden, the other in the stables.

The next period is the actual delivery; and for that, they have produced two positive witnesses; the one Mary Doyle, a servant in the family; the other Eleanor Murphy, who calls herself chamber-maid; both these swear they were in the room at the time of the delivery; and as far as their testimony shall avail, are positive witnesses to the fact. The next, are the circumstances consequent upon the delivery, that were evidences of it. The first is spoke of by Breen and one or two more, and that is, the rejoicings that were made upon the birth of this heir. The next was the christening, which is sworn to by the two maids that I mentioned before; who also swear, that Mr. Colclough and Mr. Cliff were godfathers, Mrs. Pigot godmother, and that Mr. Lloyd was the clergyman that officiated in the christening of this child, The next is Christopher Brown, who was a servant attending upon one Mr. Anthony Cliff, not the Cliff that was the godfather, but an invited guest; and he speaks to the being there at that time, and attending his master at the table, at the entertainment that was made on the occasion. John Scott, a servant, I think, of Mr. Pigot's, he speaks to a subsequent time after the delivery, and says, that after his return with his master from England, he was sent a dozen times, as he has sworn, to this house with messages, and compliments to the lady, and to know how the child did.

Gentlemen, it will be material for you to observe that the birth to which this evidence has been applied, has been fixed by the witnesses, and admitted by the plaintiff's counsel, to have happened in the beginning of summer, 1715; which the witnesses have also explained to be about the month of May. There were two witnesses more, proper for me to take notice of, but I shall not give you their evidence by way of testimony, because they seem to differ from all the rest. The one was that of Charles Mac Carthy, who was brought to prove the pregnancy of lady Altham, and something further, but he set out from a period of time so different from the other witnesses, that the counsel for the plaintiff did not think proper to proceed in the examination of him; nor have

the counsel for the defendant made any use of him. The next I shall lay aside, is major Fitzgerald, whose evidence was to the declaration of lord Altham, the day my lady was in labour, and the invitation he had to go and tap the groaning-drink, and his excuse for not going, as it was an improper time; the invitation he had to go the next day; that he went, dined there, but did not lie there; that the child was brought down to him, and that he gave the nurse half a guinea; but then he fixes this in harvest, and therefore no advantage has been taken of that examination by the plaintiff; the defendant indeed has made use of it, which I shall take notice of in the objections.

The next evidence, gentlemen, has been to shew the dispositions that were made relating to the child thus brought into the world; and, indeed, I should have mentioned before, the evidence of Matthew Furlong, who applied for having his wife employed as nurse to that child; but, gentlemen, the same evidence for the plaintiff that swore to the christening, the same evidence that were about the house, and present at the birth, have gone farther, and told you that one Joan Landy was appointed the nurse for this child; and they have all of them given this account of Joan Landy, that she was a person unmarried, that was with child, and supposed to be so by lord Altham, that was turned away, as some say, upon my lady's coming down; as others say, before my lady came into that country: this person was chose to be the nurse. She had a place of residence, the cabbin that was built for her father, a quarter of a mile from the house of Dunmaine; which, as the witnesses for the plaintiff tell you, was fitted up upon the occasion of receiving her and this child. Laffan has told you that a room was added; others, that the cabbin was white-washed and beautified, but speak not of the room; but all agree that this nurse had the child there, and that for the conveniency of visiting this child, a road for the coach was made from Dunmaine-house to this place. They tell you that the child remained with her till Joan Laffan comes into play as dry nurse: And Joan Laffan says, she came into the family when the child was three or four months old, and she has fixed her coming to harvest after the king came to the crown; and that it was put into her care about three months before the separation of lord and lady Altham, and continued in her care so long as it continued at Dunmaine; and that the child was carried from her to Kinnea in the county of Kildare; and that it was about three or four years old at the time it went to Kinnea. They have introduced as evidence the declarations of lord and lady Altham, in respect to lady Altham's having a child, and in respect to lord Altham's acknowledging that child. The earliest in point of time is that of alderman Barnes of Kilkenny, who says, that it was in the beginning of the summer, and by his account not long after the birth; he tells you the occasion of his going to Ross, and that there he met with lord Altham; that my lord took him into an upper room, and disclosed his mind, by telling him, "Tom, I will tell you good news, I have a son by Moll Sheffield;" that he went next day to my lord's house, but that he did not see the child, nor did he hear either my lord or lady speak of it whilst he was there; but at last did say, that he believed the child's health might be drank at the table. The next witness that I shall mention upon this head, was Edward Lutwych, and he speaks to the seeing of a child at Ross, for whom my lady Altham had bespoke two pair of shoes, which he was to make, and when he brought them home, he inquired for the young lord, and they told him he was gone back to Dunmaine; upon which lady Altham broke out into this exclamation, "It had been better for me to have been the wife of the poorest tradesman in Ross than my lord Altham's; for then I could see my child every day, but now I can see him but by stealth." Gentlemen, the witnesses for the plaintiff that were in the house, and conversant in the family, tell you, that my lord did always acknowledge this child to be his lawful son; that this child was shewn as such to the persons that came to the house to visit, and some tell you, that they often saw the child in or about the house.

I mentioned, gentlemen, the child's being removed to Kinnea, in the county of Kildare, and this was after the separation of lady Altham from my lord. When the child was brought to Kinnea, they have gone on by evidence, to shew you, that there he was treated as the son of my lord by lady Altham. For this, they have produced Mr. Misset; who tells you, that there was a child that he took to be about six years old; that he went to a school in the neighbourhood, and was considered as the child of lord Altham; that it was called the young lord; that it was sent to school with a servant, and that he remembers it particularly by an open lace upon his hat, which he believes was the first and last that had ever been at that school. Whilst he was at Kinnea, as that witness says, the child was treated by my lord as his son; and Mrs. Annesley, a relation of the family, who lives in the neighbourhood of Kinnea, tells you, that her brother colonel Geoffry Paul, a gentleman well known to most persons here, used to visit my lord, and my lord to visit him, and that her brother used at table to drink the boy's health as my lord's son; and says, that she was sure, from the knowledge she had of her brother, that if he had suspected that he was the illegitimate son of lord Altham, he would not have done him the honour to have drank his health; and that she never heard he was the illegitimate son, till of late that he has been called so, on account of this present dispute.

The next place the child was carried to was Carrickduff, in the county of Carlow; and there you have had several witnesses to prove him the legitimate son, viz. Two Cavenaghs,

James Dempsie, and Mr. Charles Byrne; who all swear to this child's being there acknowledged as my lord's lawful son, and that they had no doubt upon them, at that period of time, concerning his being so; and it appears, that Dempsie was taken in to teach the child, and afterwards kept school where the child was constantly sent.

From hence, they have carried him to Dublin, to my lord Altham's house in Cross-lane; and here Catherine O'Neil, who was the person that brought him, gives you an account of the identity of the person, and likewise of his being acknowledged as the son of lord Altham. And Nicholas Duffe, who kept a public-house, and was a chairman in this town, who was frequently with my lord (and I think I may, once for all, observe, that this unhappy nobleman did not distinguish his company, as became one of his rank and quality) tells you, that my lord has mentioned this boy to him, as one that would one day be lord Altham; and another time, in discourse, told him, he would be earl of Anglesea. From Cross-lane (there is something mentioned of Stephen's Green, but I could not collect at what period of time he was there), the next place he is removed to with certainty, is Frapper-lane; and there he is some time with his father, is put to school to one Garth, and is known to several people in that neighbourhood: to this you have the evidence of the two Byrnes and Matthew Plunket, who swear that he was treated as the son of lord Altham, though the care of him seems to lessen at that place; for in Cross-lane you hear of Miss Gregory, and more of her in Frapper-lane; and to her they have imputed the neglect shewn to this son. From hence my lord moves to Inchicore, about the month of August, 1724, at which time the child, then about nine years of age, was left by his father. The evidence speak of his being sent immediately to the house of one Mrs. Cooper. Here the evidence begins to be less connected than before; but I shall mention it as given. Michael Waldron and Dunn say, he was put to school to the said Dunn, who also swears to the person, and that he was put to school by one Cavenagh, a dancing-master; that he afterwards saw lord Altham at Cavenagh's, and that lord Altham promised to pay him for his care of him. It was before this period of time, that Byrne junior speaks of his coming to him, and the care he took of his school-fellow, and the destitute condition he was then in. After this, the first account that I think is given of him, is that of Mr. Amyas Bushe, who speaks of him as a boy loitering about the college, who got his his subsistence by running of errands, by the name of a scull; that, moved by his story, he was taken in by the humanity of this young gentleman, and that he had intentions to do for him, if his grandfather would have permitted him to keep the lad. The next account we have of him is from Farrell; he tells you, that he received him for a little while into his house, and that at the request of his father; and gives an account how he handed him over to Purcell; and Purcell tells you the care he and his wife took of him, and that they both considered him as the lawful son of lord Altham. The boy left Purcell's ungratefully, after the treatment he met with there; and the next news of him was at the house of Mr. Tighe, taken in by his son; this in point of time must have been soon after the death of lord Altham, which happened in November, 1727; and in the February following, this boy, about 18 years of age, was missing, without any previous quarrel, and, as the witness soon after heard, was sent to the West Indies.

Gentlemen, the plaintiff, after this, thought it necessary to give some evidence, to account how a child that had been acknowledged by the father as his lawful son, came to be treated in this manner; and you will observe, that one of the witnesses, Plunket, says, that in Frapper-lane Miss Gregory lived with lord Altham as a mistress, that she complained of this boy, and that he was corrected: indeed, he does say, that the boy owned the fault that he was charged with; and a witness produced for the defendant, Arthur Herd, tells you what the offences were, and the immoderate correction that was given to this boy. And other witnesses have told you, that my lord, Miss Gregory and the boy did not agree, and that lord Altham could have no peace whilst the boy was in the house.

Gentlemen, the next fact that the counsel for the plaintiff have thought proper to apply their evidence to, has been to shew that this boy, at the time he was taken from Mr. Tighe's, was sent out of the kingdom by the procurement of the now defendant, and that by force, about five months after lord Altham's death. He, as has been said, died in November, 1727, and the boy was taken away the February following. And, gentlemen, as this seems to be a controverted fact, I shall mention the evidence particularly. The first account is that which Purcell gives, that after the child had the small pox, the present defendant came to his house, enquiring after this boy; that he there called him the son of lord Altham his brother; that the boy cried, and said he was afraid of his uncle captain Annesley; and that captain Annesley told Purcell he would speak to my lord, and induce him to make him a handsome consideration for his care of the child. Some time after this, and after my lord Altham's death, the boy came to Purcell, and told him, his mistress had sent him, for that a man had come to his house from his uncle, desiring him to go to the house of one Jones in the market; and that she desired Mr. Purcell to go along with him: He tells you, that he went thither, and that he met this captain Annesley there, and the expressions that were made use of by him in order to take away this boy; and he tells you that he rescued and carried home the boy. The next account that they give you, is by one Mark Byrne, a constable at that time, who tells you, that he was applied to by one

John Donnelly, who told him that he had a job, for which he was to have a guinea, which was to sett this boy, and bring him to lord Altham; that accordingly they carried him to the house of this same Jones; that lord Altham was there; that he accused him of stealing a silver spoon, and ordered them to take away the thieving son of a whore; that accordingly they took him away, and in carrying him to George's quay, as they were directed, that there was a crowd gathered; that the boy cried; that they put him in a hackney coach which they met near Essex-bridge, and carried him to the place appointed on George's quay; that my lord followed on foot; and there he tells you that he saw one Reily, a servant of lord Altham's, and that my lord went into the boat with Reily, the boy, and Donnelly; that they went off, and that he saw them go to the end of the wall. The next person produced was Reily, and he agrees in the material circumstances, which were, that he saw this boy on George's quay, that he went into the boat with my lord and the boy, and that my lord and the boy went on board the ship; that the boy was left behind in the ship, and by the time the boat returned it was night. Gentlemen, there is, to be sure, a difficulty to reconcile the testimony of this Reily; but I shall speak to that, when I speak to the objections made to the witnesses.

The next evidence they produced on this head was, to shew that a ship called the James of Dublin, Thomas Hendry master, sailed over the Bar of Dublin, the 30th of April 1728; the ship was entered in the Custom-house book the 18th, and the evidence afterwards shew that it sailed the 30th. Mr. Babe, the proper officer, produced the book, and there this entry did appear, with this addition, that the entry was made by Mr. Stevenson, a merchant in this town. The next step they took was to shew from the books of Mr. Stevenson, that this boy did actually sail on board that ship, and produced Mr. Cromie, at that time clerk to Mr. Stevenson, in order to shew you that this boy did actually sail on board this ship: He tells you, that this ship was partly freighted by Mr. Stevenson, that it was bound to Philadelphia, that the principal part of the cargo were men and maid servants; he produced Mr. Stevenson's book of entries, and this book being read as evidence, the title of it was, An Account of men and women servants on board the ship James, which went over the Bar of Dublin the 30th of April 1728. Gentlemen, there was a long list of names, and among the rest was that of James Annesley; and, gentlemen, this Cromie was cross-examined as to the manner of putting servants on board, in order to shew you that it was impossible this James Annesley could have been put on board without his free consent; for that the way of dealing was to have servants indentured before the lord mayor, and the custom was to have one part of the indentures delivered to the servant, the other to the master of the ship, and the name enrolled in the Tholsel-books: But it appeared from his evidence, that the list produced and kept by the merchant, was not taken from the indentures, or the books of the town clerk, but that the method of taking such list was, that the night before the ship sailed, the clerk of Mr. Stevenson went on board, and the master gave him the names of the persons on board, and from that list this entry was made in the merchant's books: So that from this account, it was very possible for persons to be sent away that had never indentured. In order to shew that this boy was really indentured, the counsel for the defendant produced the original book kept by the town clerk, in which are entered, by the town-clerk, the names of the persons who indent for foreign service, before my lord mayor; in which was entered the name James Hensley, and insisted that it was the same person, though wrong spelt; and that the plaintiff had indentured in the regular way, and was carried off, not by force, but according to law. But, gentlemen, I must observe to you, that the manner of indenting is such, that wherever a person of tender years as this child was, being about thirteen years old, was to indent, it is always expected that the parent, or some body that can answer for that child, should be there consenting to that indenture, or that some account should be given concerning him. I mention this, because no evidence has been produced by the defendant to show who were present; and you will consider whether it was not in the power of lord Anglesea to have produced the town-clerk himself who made the entry, and is now living, and whose knowledge of the Anglesea family was such, that upon his memory he might have given some light into this affair, and probably could not have mis-spelt the name of Annesley, with which he was well acquainted.

But, to put this fact out of doubt, the plaintiff produced Shelcross Ashe, an attorney of the Court of Common Pleas, who had been employed by the defendant the earl of Anglesea; who tells you, that upon the defendant's coming to the title of lord Altham, by his brother's death, the boy was mentioned to his lordship by a gentleman in Ashe's presence; that his lordship complained of the reproaches he underwent on the boy's account; and in particular, said that Hawkins, who was king at arms, had refused to enroll his title as lord Altham, upon the clamour made by this boy; and thereupon called him impostor, vagabond, and he believes, bastard: That Ashe then told his lordship, if the boy were a vagabond, he might be obliged to indent before my lord mayor at the Tholsel, and be transported. And Ashe further says, that some time after, he was again in company with the defendant at a tavern, with others of the defendant's intimates, when my lord Anglesea, then lord Altham, told the witness he was gone, meaning the boy; which, coupled with the former evidence, shews, as was insisted, that the defe[illegible]

ant intended to put the plaintiff out of the way; and gives credit to the witnesses, who for his lordship executed such intention, as before relateo.

The plaintiff went further, to shew that the defendant not only occasioned this person's being taken away, but upon the plaintiff's return into England, a misfortune befalling him, by the accidental killing a man at Staines; that opportunity was laid hold of to prosecute him, and under that colour to take away his life; for which purpose one John Giffard has been produced. He appears to have been an attorney of the Court of Common Pleas in England, and agent for the defendant. Some difficulty was made whether his evidence should be received; but the Court having admitted him to be examined, with liberty to disclose what did not come to his knowledge as agent for the defendant; You, gentlemen, will not consider whether the divulging conversation be what is called honourable between man and man, or whether the ill treatment this person received from the defendant has induced him to appear to give testimony in this cause, but whether what he has sworn be true.

This witness speaks to the declarations made by my lord Anglesea, at the time an appeal was depending between him and captain Annesley, before the Lords in England; upon which occasion, the defendant said, that it was better for him to throw up his titles, which he did not value, and to give up them and the estate, upon terms, to James Annesley the plaintiff, whose right they were; that he would go over to France, and live there, where he should be much easier and happier than he was at that time. He tells you, that this was repeated more than once; that it was not a sudden resolution, but the result of deliberate consideration, accompanied with another act, which was that of taking a person into his house, to teach him the French tongue, to qualify him to live in that kingdom. And the witness tells you farther, that the reason why this project was dropt, was the accidental homicide committed by the plaintiff; upon which lord Anglesea changed his purpose, and resolved to prosecute him; and frequently declared, that he would give 10,000*l.* if he could get him hanged, for then he should be easy in his titles and estate; and that this prosecution cost lord Anglesea 800*l.* As I shall not touch this part of the evidence again, I must desire you, gentlemen, to consider, whether the words sworn to be spoke by lord Anglesea, as to giving up his estate, may not be accounted for as the rash expressions of a man distressed in his circumstances; but, gentlemen, if you believe the other two facts, that is, that lord Altham did spirit away this youth, and that he did carry on this prosecution against him, the question will then be, what influence they ought to have upon this cause? And how far they ought to conclude against the defendant as to the fact in question. will deserve your consideration, that the plaintiff may not suffer by the illegal acts of the defendant, nor the defendant be injured by your relying too much upon presumptive evidence. If the defendant did send away the plaintiff, that absence must be imputed to the defendant. The suppressor and the destroyer of evidence are to be considered in the same light the law considers a spoliator, as having destroyed the proper evidence; and against him defective proof, so far as he has occasioned such defect, shall be received, and every thing presumed to make it effectual. Nay, I think you may by law go farther, and if the plaintiff has given probable evidence of his being the legitimate son of lord Altham, the proof may be turned on the defendant, and you may expect satisfaction from him, that lord Altham his brother died without issue: and this on account of that evidence which the plaintiff must be supposed to have lost, by the defendant's having so many years put it out of the plaintiff's power to assert his right. And you will also consider whether these acts are not evidence to satisfy you, that the defendant, in his own thoughts and way of reasoning, considered the staying of the boy here, as what might some way prejudice his title. But whether, as insisted upon by the plaintiff's counsel, you ought to take this as an admission on the part of the defendant, that the plaintiff was the lawful son of lord Altham, will deserve further consideration. Undoubtedly, there is a violent presumption, because no man is supposed to be wicked without design, and the design in this act must be some way or other relative to the title; but whether or no it was the opinion of the trouble he might have from this lad, that induced him to do this act, or a consciousness that the lad was the son of lord Altham, must be left to your determination; keeping in your mind, that it, though violent, is but a presumption, and that the defendant has an undoubted title, unless it be proved that there be a son of his elder brother now living.

Taking the influence of these wicked acts with you, I shall now briefly mention the nature of the defence; which has been, first of all, by many witnesses to shew that the reputation of the country was against there being such a child. Colonel Loftus, who lived within eight miles of Dunmaine, who was a person of that rank and distinction in the country as was likely to hear it, says, he never heard of it. Col. Palliser, Mr. and Mrs. Lambert, Mr. Palliser, Mrs. Giffard, have all gone likewise to the same point, and say, that they never heard of a miscarriage. But their not hearing of a miscarriage, has little weight, because things of that nature are conducted with privacy, and the report of them seldom reaches far. In the next place, they have produced the persons, who, they say, were the servants of the family at the time that this birth must have been: Mrs. Heath, my lady's woman, Rolph the butler, who was there during that time, Anthony Dyer, who was a gentleman to my lord, Martin Nief and Owen Cavenagh, servants in

the family. Gentlemen, Mrs. Heath, Rolph and Dyer, are all positive that there was no child, and that there could be no child without their knowledge; and Mrs. Heath goes so far as to say, there never was so much as a pregnancy. These are positive evidence, that stand in direct contradiction to the plaintiff's witnesses. They have also produced William Knapper and William Elmes to the same point, both conversant at Dunmaine: William Knapper in particular tells you, he was employed by the late earl of Anglesea to sell the Ross estate, which came to him upon lord Altham's death without issue, and that though he made a hundred articles for leases of the Ross estate to the tenants, he never heard one objection made that there was a son. They then went into another piece of evidence, which, if true, stands in the place of positive evidence, because inconsistent with lady Altham's being delivered of a child at the time deposed; and that was, my lord and lady Altham's going to Wexford at the spring assizes, held the 16th of April, 1715, and returning from thence to Dunmaine, and going soon after to Dublin: Mrs. Giffard's account is this, that there being some men to be tried as Pretender's men, the curiosity of lady Altham proposed a journey to Wexford; that she accompanied my lady in the chariot; that my lord, Mrs. Heath, and Rolph, rode; she says, when they came to Wexford, they lodged at the house of one Sweeney; that they went into court and stayed there during the trial, and that Mr. Cæsar Colclough sat by them part of the time; that they stayed a week in Wexford, and then went home; and, as appears by the examinations of Heath and Rolph, they went to Dublin in a very short time after, and stayed there all the summer; Heath swears it positively, and Rolph that they stayed there till he went away. Now, gentlemen, if this fact could be established, it would undoubtedly put an end to the controversy of this day; because, if lady Altham was at the assizes of Wexford, which appears to be the 16th of April; that she continued there a week, and went back and stayed but two or three weeks at Dunmaine, and thence went to Dublin, where she lived the remainder of the summer; and this being at the time when she was supposed to have been delivered of the plaintiff; you will consider if both can be true. But this fact has been disputed, and in this manner; first of all, Ker, who was clerk to my lord chief justice Foster, who went that circuit, tells you, that he does not remember to have seen any ladies there; this is not a positive proof, but it is a circumstantial one: the next is Cæsar Colclough, who swears that he does not remember to have seen them, and from the business he was engaged in, the gentleman on trial being his relation, he does not believe he sat by any woman that day. There were also two positive witnesses produced to prove lady Altham was not there, which were Turner and Higginson. Turner tells you, that he was at the house of Dunmaine, when my lord went to that assizes; that he saw him get into the coach, and that he saw my lady in the house after my lord was gone. Higginson tells you likewise, that on the Tuesday of this assizes, he was at Dunmaine, and the occasion that brought him thither (which makes him certain to the time) was, to desire lord Altham to send somebody to Inniscorthy for the 28 pounds arrear of rent, which his son was to bring there. He tells you, that he saw my lady, that she was undressed, and that he believes she was with child, and drank to her safe delivery. And there is one circumstance further, which you should take with you, that Mrs. Heath says in her account, the sister of Mrs. Giffard went with them; though Mrs. Giffard said, No one went with them but the persons she named, but did not name her sister.

The defendant has also, in order to account for what has been said by the plaintiff's witnesses, as to the child taken in by lord Altham after the separation, and who was carried by him from place to place, and treated as his son, examined the several witnesses produced by them, who were acquainted with lord Altham and his family, during the time the boy was with him, to prove that the boy kept by lord Altham was the son of Joan Landy by lord Altham, as was supposed; and that he was always considered and treated by that lord as his bastard. And thus, gentlemen, you see how the witnesses produced in this cause stand, as to the most material circumstances, in direct opposition to each other; so that the one or the other must speak false; which of them have done so, God only knows. You, gentlemen, must, after taking the whole into your consideration, say which, in your opinion, deserves credit. I shall now take notice of the objections to the witnesses on each side.

The objections that have been made to the plaintiff's witnesses, as to their uncertainty with regard to time and place, and other circumstances to which they were examined, were also made to the witnesses for the defendant; and if an imputation arises from thence, you will consider whether it be not equal on both sides. In the next place, an objection is made to the condition of the evidence for the plaintiff, that they are servants of the lowest stations, and meanest condition. You will consider how far that objection ought to lessen, much less take away the credit of their testimony: servants about the family, though in the meanest stations, were likely to know such particular facts as they have given evidence of. But on the other side, you will consider that the fact in question, is a single fact, which might be put in the mouth of any body, and which has been affirmed and denied on oath by the respective witnesses. You will, therefore, I think, find it necessary, with caution, to attend to the objections made to the credit of the several witnesses that stand in opposition to each other: for instance, if the credit of Mrs. Cole can engage your belief as to the circumstance of the miscarriage, then Mrs. Heath has not

sworn true; because she has sworn the contrary, and that to a fact which must have been observed by her. Again, if Mrs. Cole obtains credit, Mrs. Heath must be mistaken in another fact, though not of that consequence, and that is, the removal to Dunmaine: Mrs. Cole says, and Mrs. Briscoe too, that my lord and lady Altham went to lodgings in Essex-street; Mrs. Heath, that they went directly from capt. Briscoe's to Dunmaine. Now, gentlemen, as to Mrs. Cole's and Mrs. Briscoe's testimony, there is no imputation, other than what arises from their age, at the time to which their testimony relates, when the eldest of them could not be above 13 by her own account, and she speaks to a fact, which Mr. Prime Serjeant thinks was not likely to engage the attention of so young a person, I mean the place to which they removed; but you will consider, whether the removal of my lord and his lady from their family to another place in Dublin, especially as an intimacy was kept up between them, be not sufficient to answer that objection. As to the circumstance of the miscarriage, there she is extremely positive, and probably the curiosity of girls of her age, in these matters, exceeds that of grown persons. There was an observation made as to the word Abortion, but I think there can be no great weight laid upon that, the term may have been learnt since. There has been also a witness produced to discredit Mrs. Heath, as to the very substance of her testimony; what he has said must be fresh in your memory, but you will remember the seeming art made use of by him, to shew he was compelled to give his testimony. Besides, his testimony is not supported by circumstances, but is another instance of oath against oath.

Gentlemen, the next witness I shall take notice of, is Rolph: (I don't speak regularly to them, intending only to take up the most material) he certainly delivered his testimony in a very clear manner; he gave an account of his coming to and living in the family, and of his continuance in it, and manner of leaving it; and there is one circumstance that gives credit to Rolph, as he is the only one that can be said to receive credit from the witnesses on the other side. The plaintiff's witness, John Scott, has said, that Rolph was butler before, and continued after my lady's delivery; which agrees with Rolph's evidence, but varies from all who have spoke to the birth; who say, that Rolph was gone; that Magher lived there at the time of Doyle's and Murphy's being there. Dennis Redmond does say, there was such a servant as Rolph, but that he was gone before the delivery. But then you will consider what figure this Rolph made on his cross-examination; such an absolute uncertainty as to every thing but what he was brought to disclose, and his readiness to give evidence on one side of the question, necessarily induce suspicion; and you will consider his attempt to throw a reflection on the plaintiff, as if those concerned for him would have tampered with Rolph: but the story carries an improbability in it, that a man should send victuals before him, and come and offer to a stranger what was not in his power to give, and that in such an open manner.

[Here Mr. Baron Mounteney spoke to the Lord Chief Baron.]

Gentlemen, my brother Mounteney mentions one thing, which I am mistaken in, if he is right; he says, that when Mr. M'Kercher made the offer of a lieutenancy to Rolph, his own company were only present; I do apprehend there was not only the company of M'Kercher, but the company that was with Rolph. Gentlemen, if I mistake the evidence on either side, impute it to my memory, for I have no intention to misrepresent, and should be extremely glad if any body would set me right: when you come to look upon your notes, you will see how this fact stands.* But there is one thing I would observe as to the testimony of Rolph, and that is, that Mrs. Giffard and he differ: Rolph has said, that the new road leading from the house of Dunmaine to the cabbin, was made for the benefit of going to Mrs. Giffard's and colonel Palliser's, and that Mrs. Giffard always went that way: Mrs. Giffard says, that she never went that way, but always by the bridge. These are slight circumstances; but however, where witnesses stand in such direct opposition to each other, they deserve some attention.

Anthony Dyer, gentlemen, is another material evidence for the defendant. But you will consider how far his credit is affected by what I am going to mention. The witnesses on both sides have said, that after the separation of lord and lady Altham, the child, be it legitimate or illegitimate, came into the house of Dunmaine. William Elmes fixes it to three weeks after, and another to a month; but this man says, that he was there at the separation, and three quarters of a year after; and swears, there was no child in the house during that time. As to the positive evidence on the part of the plaintiff, Doyle and Murphy, the observations on them as to their coming into the service, have been made, and are extremely strong. Murphy did say, that Doyle came there first; she afterwards changed, and said, she came there before Doyle: you will consider also the manner in which they give their evidence. And in regard to Mr. Palliser, Mrs. Lambert, and those people that spoke to the pregnancy on the part of the defendant, they have gone so far, that if you believe them, there could not have been a miscarriage. There is one thing I forgot to mention, to strengthen the evidence of Mrs. Cole,

* It has been said that chief justice Pratt never took notes of the evidence given upon trials before him. From very many parts of this work it appears that formerly judges omitted to minute down the evidence. Among others, see vol. 8, p. 712; vol. 11, p. 437; vol. 12, pp. 422, 740; vol. 13, p. 186; and Layer's objection to C. J. Pratt's summing up, vol. 16, p. 293.

and weaken that of Mrs. Heath, which is, that Lambert said, that Sutton the surgeon was sent for to Ross, and stayed at Dunmaine a fortnight: now when you come to compare the times of his being sent for, and the miscarriage, you will consider, whether it does not tally pretty near with the time when Mrs. Cole gives an account of the miscarriage; and yet Mrs. Heath says, he never did attend my lady.

There is one general observation to be made on all the evidence; and, that is, that there is a forwardness, an inclination to go on to serve their party, on both sides, and that they want that candidness which gives a credit to witnesses; I say not this on either side, but you will consider whether it is not an observation that runs through the whole. I shall not trouble you with respect to the surgeon. The objection to him arises from the improbability of his own testimony. As to Christopher Brown, who was one of the servants attending at dinner at the christening, supposing what he says could be credited, you will consider how that man was mistaken in the description of the house. And you will permit me to observe, that there is a great difference between not recollecting circumstances, and a witness swearing to those that are false; the not recollecting may consist with integrity, the swearing to a falshood never can, nor can you give any credit to such a witness; because you cannot say that he is wrong as to this, and right as to that part of his evidence. With regard to the several witnesses who say the child, from first to last, was not only reputed, but called a bastard, and Joan Landy's child; and that the boy knew it, and sent his duty to her as his mother; you will consider how consistent that is with what William Elmes and others have said, who would have it understood that my lord would not for 500*l.* that the child should know his mother; and that my lord ordered them to set the dogs upon her if she came near the house; and yet those who speak of him at Kinnea and Carrickduff say, that my lord has often cursed him, for having too much of his mother's blood in him. How these different accounts can be reconciled, you must consider. There is one witness more on this head that I must take notice of, and that is Elizabeth M'Mullen; and she would have it understood, that out of the mouth of the boy himself, at the funeral of his father, upon being asked by her, who was his mother, he said Joan Landy. Gentlemen, you will compare this with the testimony of Mr. Bushe and Mr. Tighe; the boy, when he lived with Mr. Bushe, persisted that he was my lord's own son, and the same at Mr. Tighe's: now, if the boy had once received the notion of his being the lawful son of lord Altham, you will observe the improbability there is of his saying to her, a stranger, I am the son of Joan Landy. I will carry this a little farther, and that with regard to the letter, she says, was wrote by her, giving an account of lord Altham's death; if this circumstance be false, that letter must have been fictitious, and of later date.

I have now mentioned the evidence on both sides; and from what I have observed to you, it does appear that here is such a clashing of witnesses, such contrary evidence, that though some circumstances might be reconciled, yet others will remain irreconcilable; and therefore I must, and I think, you gentlemen will be obliged to consider the circumstances that will throw a probability or improbability upon the testimony you have heard. The strong circumstances which induce probability in favour of the plaintiff are those I have mentioned, of spiriting him away, and afterwards attempting, by an unjust prosecution to take away his life; to which I have before spoke at large, and need not repeat. On the part of the defendant, the circumstances are of a different kind; and those are such as relate to this family, from the beginning of the transaction to the end, and arise from the quality and circumstances of the persons, which, as has been urged, must have rendered a fact of this kind too notorious ever to have been doubted, especially in this kingdom: that it must have been known to the relations of this family in England, whose estate and honours were to be enjoyed by that son; that my lord Altham himself ought to have made it public; and that it was the interest of lady Altham that the duke of Buckingham, her father, should know that she was with child. Again, you will consider the improbability arising from the place where he was born; at Dunmaine, in a remote part of the country, attended by a country midwife and the surgeon you have seen. Ladies, say they, of her rank would not submit to it, and are usually placed, on such occasions, where they can have the best assistance; and the consequence of a child to this family particularly required it. In the next place, you will consider, whether there be not a farther improbability arising from the nurse; that a poor body should be employed is no wonder, but that an infamous poor body, rendered infamous, as was supposed, by my lord, and in that very place, should be taken by my lady to nurse her legitimate child, is scarce to be accounted for. There is nothing said to reconcile this, but the testimony given by Laffan; and she tells you, that this was a secret not disclosed to my lady, till after the separation: indeed, if you believe this, the improbability will decrease; but you will find it difficult to suppose my lady the only person in the family to whom this was a secret. The place where the child was nursed has been also urged; but the difficulty is not that a nobleman's child was nursed at a poor man's house, but whether that house was fit to receive a child intended to be preserved; and therefore the probability or improbability in this instance, will depend upon the credit you shall give to the different accounts of the cabbin where this nurse lived. It has been further said, that the sponsors at the christening of this child, ought to have been of high rank, and from among the relations of this noble family. Again this child, after the separation, was removed from place to

place, and we have not heard that lady Altham, either by herself or friends, took any care or notice of him, except the single instance at Ross. Was it not lady Altham's interest to have acquainted the duke of Buckingham that she had a son by her lord; that he had sent him away, and put this child into the care of his whore? And was it not probable if this notice had been given, that care would have been taken of this child by some of the family? The little care taken of his education by my lord, has also been urged. In answer to which you have been reminded of the character and circumstances of lord Altham. Again, my lord's parting with this child, or rather exposing him, in the manner you have heard, cannot, as it is said, be accounted for, supposing him to be the real son of lord Altham: but this is also attempted to be answered, by the influence of Miss Gregory, and her representing him as a bastard, in respect to my lord, though born in wedlock: but, say the counsel for the defendant, supposing the plaintiff to be, what they have endeavoured to prove, a bastard, the whole may be reconciled. But if the inhumanity of exposing this child raises the objection, you, gentlemen, will consider, whether a person capable of treating his own bastard in that manner, may not be supposed capable of being worked up, by a bad woman, to turn his legitimate child out of doors. The inhumanity seems equal in both cases, as both are entitled to the care and protection of the father. I had almost given the preference to the natural child, as the legitimate does not stand in equal want of it; the mother, the family may take care of him, but the other is a cast-off. But, gentlemen, though this objection may be removed, with respect to the father, it makes the objection very strong when applied to the mother; the sufferings of the child in this manner, were what one would expect should have excited and called for the mother's peculiar care: that she was not ignorant of it, you will gather from the testimony of Catherine O'Neile; and you will consider the manner in which the mother is supposed to treat that child: "I should be glad to see my son, but I know it would cost the servant that brought him his bread." It must be a weak affection that could, for that reason, be prevailed on not to see the child. This lady lived two years after the death of her husband, and we do not find any evidence of her care for this son; which has been urged also to shew, that he was not her son. Again, it was her interest to take notice of this child; it has been mentioned, and not denied, that there was an estate of 1,200*l.* a year that went away on the death of lord Altham, and would have gone to this son, if legitimate. It was insisted upon, that lady Altham might have applied for the guardianship of her son, and have had a good allowance made by the lord chancellor, for the discharge of that trust, which she wanted. I must also observe the additional weight they gave to this objection, from the testimony that Welsh gave, of her declaring that her heart would break, were it not that she had a promising young son, who would be a support to her in her old age. Alderman King, at whose house she resided 14 months, a man of integrity and truth, whose credit cannot be controverted, says, he never heard her mention her having a son, though the intimacy of dining at one table for that time, must probably have afforded frequent opportunities of doing so. And whether a woman, under the affliction of a separation, and her unhappy circumstances, could have concealed such a fact, is worthy your attention.

There was another matter urged, as an improbability, from the testimony of colonel Wall. I shall state to you how that fact stands. Colonel Wall said, he had taken an opinion for lord Altham, as to the power he had over the Anglesea estate: that, according to that opinion, lord Altham was tenant in tail, and might have barred his issue, and by that means, have had it in his power to raise more by the sale of his reversionary interest, supposing he was only tenant for life, expectant on the death of the then earl. But the same witness also said, that he would not, upon the credit of this opinion, carry the title to market, and that, notwithstanding this opinion, he was very angry with his brother, the now defendant, for refusing to join with him in selling their reversions. So that lord Altham's reversionary interest, being certain, and his other depending on an undecided question in law; you will consider, whether, upon these views, he was more likely to have made public, or concealed his having a son.

Having now gone through with what I proposed to say upon the evidence, I shall only in general take notice, that it will be proper for you, gentlemen, while you are considering this case, to take with you the characters of the persons actors in it; and thence to judge what was, or was not to be expected from them. Again, if there are, as I suppose there will be, some of the plaintiff's witnesses to whom you will not give credit, you will consider, whether the plaintiff in justice ought to be affected thereby: you will consider him as reduced, by the defendant, to the necessity of making use of such evidence as offered; and in such case, bad witnesses may have obtruded themselves, or art may have been used to put them in his way; so that unless it appeared that the plaintiff made use of them, knowing them to be bad, they ought not to be placed to his account. You will also consider, that though you have only the defendant before you, yet the remainder-men, who do not derive under the defendant, are to be affected by your verdict, and ought not to be postponed, unless you are satisfied that the plaintiff is the legitimate son of lord Altham: therefore you must consider, (taking the proofs, the probability and the several things together) whether the plaintiff be the lawful son or not? If he be, you must find for the plaintiff; if not, for the defendant.

Gentlemen, I forgot to mention the evidence

of my lord Mount-Alexander, and of Mr. Medlicott, concerning lord Altham's declarations, as to his having a son. Lord Mount-Alexander told you of an expression of lord Altham's to one Mr. Crow, an expression not very easy to be understood: "My wife has got a son, which will make that rake my brother's nose swell." Which has been applied to the son now in question: you will consider, whether it concludes necessarily to that, or whether lord Altham might not have, in his imagination, some other child begot on the body of my lady. There was an intimation of a son by one Segrave, who might be then living; how far this rumour was in my lord's mind, is hard to say; but if this was not in his thoughts, the expression is extraordinary: "My wife has got a son." This might be said of such a son; but you will consider whether it was a manner of expression for a son of his own, born in his own house. As to Mr. Medlicott, the words sworn to him were, that my lord should say, "I have no child, nor know not that I ever shall, I do not care if the devil had the estate." If my lord looked upon the son by his lady to have been begot by another man, consider, if the words import more than this: I have no son, no son that I suppose to be my own, I do not care if the devil had the estate.

But taking each set of words as contended for by each side, all that can be said is, that my lord has at different times varied his manner of speaking on this subject; whether you can find out the motives inducing him so to do, or can draw any conclusion therefrom, must be left to your consideration. I shall think myself happy, if any thing collected by me can assist you in the discovery of truth.

Mr. Baron Mounteney. Gentlemen of the jury, my lord chief baron hath summed up this evidence in so full, so judicious, and so masterly a manner, that it would be a very improper task for me to attempt to go again with you over the evidence at large.

I shall therefore confine myself to some of the more capital parts of the case: and (although I am extremely sensible in how inaccurate and disjointed a manner I shall lay my thoughts before you, yet) with the hope of striking out even the smallest spark of light, which may help to guide you through this dark affair, I shall endeavour to recollect a few remarks on those parts of the evidence which strike my understanding in the most forcible manner.

And, gentlemen, I shall take up the case where the evidence for the plaintiff, and the observations of the defendant's counsel, closed; I mean the kidnapping of the lessor of the plaintiff, and the prosecution for murder carried on against him by the defendant.

The latter of these two facts I shall consider first: it is proved by John Giffard, the attorney employed to carry it on; and in the course of his evidence, gentlemen, several things occur, which though not relative to that prosecution, are yet extremely material for your consideration.

In the first place, gentlemen, he relates to you a conversation between the defendant and himself so long ago as the month of March 1741, and the occasion upon which that conversation happened. He tells you, that at that time, it was the common topic of discourse, that Mr. Annesley was returned from the West-Indies to assert his right; and that the defendant my lord Anglesea was at that time embarrassed with a variety of law suits; that my lord expressed great uneasiness upon both accounts, and thereupon told him, that "he should be very glad to send to Mr. Annesley; and if he would allow him 2 or 3,000*l.* a-year, he would surrender up to him his titles and estates, and go live in France; for he should be much happier than to be so tormented, and had rather his brother's son should have it than any body else; for if Jemmy had the estate, he should live easy in France, for it was his right, and he would surrender it to him; that he did not value the title, he would go live in France; and that he might live the easier there, would send for a French master to converse with him in that language."

The counsel for the defendant, gentlemen, with great art and ingenuity endeavour to avoid the force of this evidence: and in the first place, they represent this declaration of my lord with regard to a compromise and his going to France, as an hasty, passionate expression, flowing from his uneasiness of mind, on account of the ill situation of his affairs, and his resentment against the Annesleys.

But, gentlemen, upon Giffard's evidence, this could not possibly be the case; for he tells you, it was my lord's resolution, that he continued in that resolution from the time of the first conversation, which was before the 10th of March 1741, to May 1742, that in pursuance of that resolution, he actually did (as he had declared he would) send for a person, one Stephen Hayes, and had him in the house, to converse with him in French; and that he, the witness, was present forty times.

The next thing, gentlemen, suggested by the defendant's counsel was, that my lord Anglesea (in his then uneasy situation, and so angry with the Annesleys as Giffard said he was) might possibly be induced to wish for such an accommodation as was mentioned with the lessor of the plaintiff, not through a consciousness of his being the legitimate son of the late lord Altham, but with a view of gratifying his resentment by disappointing the Annesleys, and at the same time of promoting his own interest by securing to himself a larger share of the estate than would otherwise remain to him.

But, gentlemen, when you consider the following part of Giffard's evidence, you will find, that neither can this interpretation hold; because, if this had been the scheme, my lord must certainly have persevered in it. Whereas, upon the unhappy accident of Mr. Annesley's

killing a man, this supposed scheme is abandoned, and another (much more beneficial, as Giffard told you, for the defendant, and absolutely destructive of the other) is immediately embraced; which was, to carry on a prosecution against Mr. Annesley for that fact, and if possible, to get him hanged.

Consider now, gentlemen, the evidence concerning that prosecution; and the circumstances attending it.

The first of May is the day on which the murder is in the indictment laid to be committed. On the second, lord Anglesea retains Giffard to go down to Staines to collect evidence, and to carry on the prosecution. On the fourth, the coroner's inquest finds it wilful murder. Before Giffard returns from Staines, my lord goes down to Hounslow to meet him, in order to learn how things went on; and declares to him that he did not care if it cost him 10,000*l.* if he could get Mr. Annesley hanged.

Quo animo are these things said and done by the defendant? Upon what grounds was it that the noble lord thus officiously interposed upon this occasion? That he shewed so much impatience to learn how things went on? That he actually expended such large sums of money as Giffard expressly tells you he did (I think no less than 800*l.*) and declared himself ready to expend much larger, in carrying on this prosecution? Was it for the sake of justice? If so, why all those precautions, that contrivance, which you were told of, that my lord might not appear to be concerned in it? If not for the sake of justice, then, gentlemen, you are to consider upon what other principle and motives this extraordinary conduct can be accounted for. And this will be the less difficult for you to do, when you shall compare these facts and circumstances with the reason given by my lord for that remarkable declaration of his as to the 10,000*l.* which Giffard swears positively my lord mentioned to him, viz. He did not care if it cost him 10,000*l.* if he could get him hanged; "for then he should be easy in his titles and estates."

There is another part of Giffard's evidence, which, as it strikes me strongly, I shall mention for your consideration; and that is, that my lord told him (fifty times, I think he said, between the 7th of December 1741, and the 14th of July 1742, which was the day of the trial) that this pretender, as he called him, was transported for stealing a silver spoon.

You will consider, gentlemen, what weight this circumstance may have when coupled with the complaints made against him by Miss Gregory of thieving, with what the witnesses, who prove the several attempts upon the boy, and at last the actual transportation of him, have told you of my lord's repeatedly calling him a thieving son of a whore; and with the particular charge which one of them swears my lord made against him of having stolen from him a silver spoon.

I have endeavoured to state to you, gentlemen, the main substance of Giffard's evidence: in order to avoid the force of it, the counsel for the defendant have strongly insisted upon two objections to his credit.

The first is, that understanding, as he owns he did, that my lord Anglesea by his declaration as to the 10,000*l.* meant, that he intended to destroy Mr. Annesley if he could, and that he would expend that sum in means to have him hanged, he did not decline being farther engaged, but still continued to carry on the prosecution.

And indeed, gentlemen, it does to me carry with it an imputation upon Giffard, that he did not immediately fling up any concern in this, or any other business of my lord's, and publish this declaration to all mankind. But, gentlemen, you will consider, on the other hand, what Giffard hath said in excuse of himself. He tells you, "If there was any dirty work, he had no hand in it." He distinguisheth between a bad purpose and the carrying on a legal prosecution; and he tells you, "that the coroner's inquest having found the fact wilful murder, he thought that a sufficient foundation for him to proceed."

The other objection to his credit is, that being an attorney retained by lord Anglesea to carry on this prosecution (in any suit between Mr. Annesley and my lord, he swears positively he never was, nor ever expected to be retained), he comes here voluntarily to disclose the secrets of his client.

Now, gentlemen, as to the prosecution, you will observe, that the original discovery of my lord's being concerned in it was not voluntarily made by the witness; for he tells you, that he found himself under the necessity of suing my lord for a large sum of money, which remained due to him upon his bill of costs; and that, upon his so doing, my lord filed a bill against him in the Court of Exchequer in England, in his answer and schedule to which he was obliged to set forth the particular items of his bill of costs; that by this means (as he supposeth) Mr. Mac Kercher got knowledge of it, and thereupon applied to him to give his testimony in this cause.

As to the conversation between my lord and him, I have already declared my sense so fully, when the point was debated, whether evidence of it should be admitted or not, that I shall trouble you with a very few words only upon it now.

Gentlemen, I can by no means allow it to be any objection to the credit of the witness, that he voluntarily discloseth that which the Court hath unanimously determined he was compellable to disclose. And I must say this farther, that, in my apprehension, Giffard could not have justified himself, either to God or man, if he had not disclosed it; especially, as it was a declaration wantonly made to him, not under the seal of friendship, nor of that confidence which is necessary between client and attorney.

Gentlemen, you are the judges, and you will carefully consider what degree of credit to

give to this and every other witness who hath been produced upon this occasion; and God forbid, that any part of the evidence, any argument, or any observation, should have more, or less weight with you than it will bear.

If you believe the evidence of Giffard, you will then consider, that you have an express acknowledgment of right in the lessor of the plaintiff from the mouth of the defendant; that, independently of this, you have declarations and facts which strongly import a consciousness of that right. And lastly, you will consider what strength this evidence of Giffard adds (if any strength is wanting) to the evidence of the kidnapping in 1728.

That fact, gentlemen, stands positively and fully proved by a multitude of witnesses, neither discredited, nor, as it was promised by the defendant's counsel, contradicted. And, indeed, if that fact was not so clearly proved, the evidence of Mr. Shelcross Ashe is, in my apprehension, sufficient to silence the least doubt about it.

You will then consider, gentlemen, if you believe that evidence, whether there does not from thence arise the most violent presumption of the defendant's knowledge of title in the lessor of the plaintiff.

It is represented to you by the defence, that it was notorious to every body conversant in that noble family, that lady Altham never had a son in Ireland: that she never miscarried: that she never was with child. On the other hand, that it was equally notorious, that my lord had a son by Joan Landy; and that the lessor of the plaintiff was that son. Now, if this was the case, for heaven's sake, gentlemen, what apprehensions could the defendant possibly be under from a boy, who, if he had set up any claim to the title and estate, must inevitably have been detected as a most notorious impostor?

But if, on the other hand, this boy was the legitimate son of lord Altham (and whether he was or not, must certainly lie in the knowledge of the defendant) then, gentlemen, you will consider whether this kidnapping and this prosecution will not be easily and naturally accounted for; and whether any other adequate cause than a knowledge of his being so, can, with any degree of probability, be assigned for this extraordinary, this iniquitous behaviour of the defendant.

But, gentlemen, the counsel for the defendant have told you, that the material fact in this case is the birth; and unless that is incontestably proved, that the plaintiff cannot possibly avail himself of any presumptions (an ingenious gentleman chose generally to call them suspicions) which arise in this case.

Gentlemen, I differ entirely from them upon that head. If that, which to be sure is the material fact, were proved to you incontestably, the plaintiff would then have no occasion for presumptions. Presumptions then only are, or can be, of use, when the fact in dispute is not, nor can be, proved incontestably.

Gentlemen, as this assertion hath been so strongly insisted on, and hath had so much stress laid upon it, by every one of the learned counsel, let me detain you a little to make a few observations upon the subject of presumptions.

Presumptions, gentlemen, have at all times, and in all laws which I have ever heard of, particularly in our own, been allowed to have great weight in doubtful cases. Some are of so high a nature, that the law will not admit of any proof to the contrary: and these are called presumptions *juris et de jure*. Again, there are presumptions of law; as likewise what the writers upon this subject call presumptions of man (such as are collected occasionally by man's understanding from given facts), which, though they fall short of that strength and conclusive force which the others have, are yet to stand in the place of full proof till the contrary is proved.

"*Violenta presumptio* is many times *plena probatio*," are the express words of my lord Coke; and the case which that great oracle of the law puts upon it, is this: "A man is run through the body with a sword, in an house, whereof he instantly died——A man is seen to come out of that house with a bloody sword, and no other man was at that time in the house." Upon these circumstances, gentlemen, a violent presumption arises, and shall stand for full proof, unless the contrary can be proved, that that man was the murderer.

Now, gentlemen, you will observe, that in the case put (and many others of a like, or even inferior kind may be put, in which great numbers of the king's subjects daily suffer capitally), the jury from circumstances infer a criminal fact committed by the person accused. *A fortiori* it should seem reasonable, from a criminal fact proved to infer the circumstances and motives leading to that fact.

Mr. Serjeant Marshall very properly mentioned to you the case of the spoliation of a deed.

In that case, gentlemen, it is an established maxim, "that all things are to be presumed in disfavour of the spoliator." And you will consider, whether a parity of reason will not operate strongly in the present case. Mr. Serjeant's reasoning on this head was entirely agreeable to what I remember to have heard laid down by one of the greatest men who ever sat in a court of judicature, viz. That circumstances were, in many cases, of greater force, and more to be depended upon, than the testimony of living witnesses.

Witnesses, gentlemen, may either be mistaken themselves, or wickedly intend to deceive others. God knows, we have seen too much of this in the present cause on both sides! But circumstances, gentlemen, and presumptions, naturally and necessarily arising out of a given fact, cannot lie. And gentlemen, it must be left to your consideration, whether in this case the presumptions arising from the kidnapping, and the prosecution for murder, do not speak stronger than a thousand witnesses.

The next observation, gentlemen, which naturally ariseth from the kidnapping, is, that the lessor of the plaintiff is thereby thrown fifteen years back in his evidence. If his case had come under your consideration, or that of any other jury, soon after the death of the late lord Altham, it would not have been attended with the difficulties it now is, but must have received a very easy and clear determination. Mrs Shiells, who is sworn to have brought him into the world,—the clergyman, who is sworn to have christened him—the persons, who are sworn to have been sponsors (with many other material witnesses) were probably all, or most of them then living, and might have borne their testimony. The account which you now have of them is, that they are all dead.

In the next place, gentlemen, you are to consider the dangers to which this gentleman lies open in asserting his supposed right; on the one hand, from witnesses officiously obtruding themselves, and on the other, from witnesses who may have been industriously obtruded upon him. And if you believe that these difficulties have been occasioned by the wicked act of the defendant, you are then to consider whether a much slighter evidence, than might otherwise have been required, will not satisfy you, in a case thus circumstanced, of the truth and justice of his claim.

But, gentlemen, the counsel for the defendant farther tell you, "that although you might possibly be induced to think the defendant capable of committing a wicked act, yet that ought not to influence your judgment as to the determination of his property."

And, gentlemen, I must agree that a wicked act, nay repeated wicked acts, in general, ought not to influence your judgment. But if the defendant hath committed a most wicked act against the person, who then asserted himself to be the son of lord and lady Altham, and who is now contesting with him his title and estate; if he hath done another very extraordinary, though legal, act against him, in a clandestine manner, and coupled with a declaration highly criminal, this, in my opinion, may, and ought to have great weight with you upon this occasion.

Another thing, gentlemen, insisted upon by the defendant's counsel was, that if the case be doubtful, the present possession ought to turn the scale in favour of the defendant.

Now here I must again differ from the learned gentlemen. If indeed upon the whole evidence the case stands doubtful, they say well: But if upon the direct positive evidence the case is balanced, then, gentlemen, the kidnapping and the prosecution will, in my apprehension, turn the scale in favour of the plaintiff. For a violent presumption is to stand for truth till the contrary is proved. Now, if upon the positive testimony on both sides, the mind remains *in equilibrio*, then, gentlemen, the contrary is not proved, and consequently the presumption stands.

I cannot help saying, that I think it pretty extraordinary in this case, that so many objections should be raised, and so much stress laid upon them, against your being influenced in your judgment by presumptions, by suspicions, by probabilities.

Gentlemen, their whole defence is built upon probability and improbability.

They first tell you, you are to judge not upon probabilities, but upon positive proof of the material facts; and to that positive proof, when given, they tell you, you ought to give no credit, for it is improbable.

There was one objection of this sort which I forgot to mention, and that was as to the proof of the kidnapping; they told you, gentlemen, that although the defendant could be supposed wicked enough to commit such a fact, yet it was inconceivable that he should be so weak as to do it at noon-day, that he should carry the boy through a public market: nay, by the very stall of Purcell, who had before protected him, (by the bye, gentlemen, you will remember that the boy was charged with felony, and carried off by known constables) and the same objection, I think, was before made to Giffard's testimony, that it was utterly incredible, that any man living should be so weak as to put himself into the power of any other man, by making such declarations as Giffard swore my lord made to him.

I must own, gentlemen, that this objection does not to my understanding carry any great weight with it.

Wickedness and weakness generally go hand-in-hand together; and upon the repeated observation of their doing so, is founded that well known saying,

"Quos Deus vult perdere prius dementat."

The next part of the case which I shall speak to, is the evidence of Mrs. Heath, as it stands opposed to that of Mrs. Cole; and the evidence of Rolph, opposed to that of Mrs. Colclough, Turner, and Higginson.

It was my desire that Mrs. Cole and Mrs. Heath might be confronted, because I did then, and do still think, that this case may receive great light, and may be greatly narrowed for your determination, by a careful consideration of Cole's evidence, as it stands in direct contradiction to the testimony of Heath, whom I look upon as a capital witness, and one of the main pillars of the defence.

In other parts of the case, gentlemen, you meet with many variations between the witnesses, as to periods of time, and other minute circumstances, which will not be of much consequence in the cause, or tend to impeach the credit of those witnesses on the one side, or the other:—But when once you come to a fact in which two positive witnesses flatly contradict each other—a fact, the truth or falshood of which the witnesses on each side must with as much certainty and exactness know at the time she gives her testimony, as she did at the time that fact is said to have happened, let it be ever so long ago—so that

one of them is, to demonstration, perjured; then, gentlemen, it becomes exceedingly material for you to consider which of two such witnesses you will give credit to; and your determination of that point may go a great way towards enabling you to form a judgment upon the whole case.

The first material circumstance which occurs to me, in which Cole and Heath differ, is as to the going or not going away of lord and lady Altham from captain Briscoe's (at whose house the reconciliation was brought about) to my lord's lodgings at Vice's, in Essex-street.

Mrs. Heath swears positively, that during their stay in Dublin, they never lodged one single night out of the house of captain Briscoe—Mrs. Cole (supported by her sister, Mrs. Briscoe—by Alice Bates, a servant in her father's family—and by Catharine Mac Cormick, Vice's servant) swears as positively, that after staying four or five days at her father's, they went to lodgings in Essex-street (as to the person's house she is not positive, but she takes it to be Vice's,) and there continued a considerable time, I think about two months, before they left Dublin, and went to Dunmaine. And, gentlemen, you will remember that Mrs. Cole, when she was a second time produced, gave you a particular reason why she could be so positive as to that fact, which was, "that, notwithstanding the reconciliation between my lord and lady, her father still continued uneasy about the matter; and was very desirous and pressing, that they would leave his house, and go to other lodgings, because he thought it would have a better air of their being well together;" which she explained afterwards, by saying, that it would become more public and notorious to mankind, that my lord and lady were in fact reconciled.

This circumstance, as soon as it was mentioned, I thought, struck some light into this affair—it did to me explain clearly two other odd circumstances, which I shall mention to you presently.

The next fact, concerning which Mrs. Cole and Mrs. Heath stand in direct opposition, is the supposed miscarriage at Dunmaine. Mrs. Cole swears positively, that about the middle of the night, after the accident of lord Altham's breaking the saucers, Mrs. Heath came into the bed-chamber of her mother, Mrs. Briscoe, with whom she lay, alarmed her with account of my lady's being extremely ill, and begged that she would immediately rise and go to her, which her mother accordingly did; that the next morning she (the witness) was in my lady's bed-chamber, where were present her mother, Mrs. Heath, and several of the servants—that her mother there told her, that my lady had miscarried, and shewed her the abortion in the bason.

Mrs. Heath, on the contrary, swears as positively, that she did not, either upon that or any other night, call up Mrs. Briscoe—that she does not remember, that Mrs. Briscoe, or her daughter, was in my lady's room the next morning—and she swears positively that my lady did not then miscarry, nay, that she was not, either then, or at any other time, with child.

It was insisted on strongly by the defendant's counsel, that this evidence of Cole was attended with great improbability—that it was incredibly strange, that a mother should shew an abortion to her female child of such tender years. And, indeed, gentlemen, I think that fact does, *prima facie*, appear to be extremely odd, and to carry with it a strong air of improbability.

There was another fact, proved in the very outset of the cause, which (though it had not the same remark made upon it by the counsel) struck me in a very odd light; and that was, that upon the reconciliation of lord and lady Altham, at captain Briscoe's, Mrs. Dorothy Briscoe, then not above ten, and her sister, Mrs. Cole, not then above twelve years of age, were, with the rest of the family, called into the room, to see my lord and lady in bed together.

But gentlemen, you will consider, whether the reason which Mrs. Cole tells you her father had for pressing lord and lady Altham to leave his house, and lodge elsewhere in Dublin, viz. that their reconciliation might become more notorious to mankind, does not fully explain, and strongly corroborate the proof of, those two odd, and otherwise unaccountable facts.

Gentlemen, you will consider further, whether from these three circumstances connected and compared together, there does not arise a strong probability, that captain Briscoe (who I think appears to have been the person employed by the duke of Buckingham to bring about the reconciliation) had some apprehensions, that although the reconciliation was effected, and although, in consequence of it, lady Altham should have issue by my lord—yet, that in some future time, and for some reasons or other, lord Altham (whose character and conduct appear pretty extraordinary upon the evidence in this cause) might be induced to bastardise that issue.

And, gentlemen, you will consider further, whether such an apprehension in Briscoe, as I have supposed, would have been unnatural or ill founded, when you have compared these circumstances (which, as I have mentioned, seem to render it probable, that he had such an apprehension) with the evidence of Palliser the younger. He relates to you a very extraordinary conversation which passed between my lord and him, about five days before the separation, as they were returning from Bourkstown to Dunmaine. He tells you, that my lord called to him in a familiar manner, and said, "Tom, I will tell you a secret, as I have no son by my wife, nor ever expect to have any, and as my lord Anglesea is very angry with me for keeping this woman—I am determined to put her away, not to disoblige my lord Anglesea." The same witness had before sworn positively that he never had—that he never attempted to have—that he be-

lieves in his conscience, that my lord did not suspect he had—any criminal commerce with lady Altham; and that my lord only made use of him as a colour and pretence for putting away his lady.

Now, gentlemen, you will observe, that upon this testimony even of the defendant's witness (who, indeed, is a very material witness for the defendant in some other parts of his evidence, if you give credit to him) lord Altham was a man capable of putting away his lawful wife, to whom he had lately been reconciled—upon a mere pretence—and for no other real cause than that he might not disoblige lord Anglesea:—If he were so, you will then consider, whether it be at all an unnatural and strained supposition, that he was capable of abandoning, and bastardizing his lawful son, in order to oblige some other person or persons.

This supposition, gentlemen, will, I think, appear still less unnatural, when you recollect how Miss Gregory's behaviour to the boy stands upon the testimony of another witness for the defendant: I mean Herd (who, in his account of the boy's treatment by my lord before they came to Dublin, differs totally, as my Lord Chief Baron hath already observed, from all the gentlemen of that part of the country who have been produced before you.)

Herd tells you, that when my lord lived in Frapper's-lane, great complaints were made to my lord against the child, by Miss Gregory, of his thieving—that he cannot tell whether the boy was really guilty or not, but that he confessed himself so—and that upon this my lord (whom the witness had never once seen strike the child upon any occasion in the country) corrected him more severely than ever he had seen any child corrected in his life.

When the witness was asked by my Lord Chief Baron, what those things were, with the thieving of which this boy (who is admitted on all hands to be the son of my lord, though his legitimacy is disputed) was charged by this lady, and for which he was so cruelly corrected by his father, he tells you they were "a jockey-belt and a pair of pigeons."

These are circumstances which, I must own, strike my understanding strongly: You, gentlemen, are the judges, and you will well consider, what weight they carry, when connected with the rest of the evidence; and what light may be collected from them to guide your judgments on this occasion.

I forgot to mention to you one thing, which I think is very remarkable, upon Heath's evidence; and that is, that she accompanies some of the plaintiff's witnesses in all the preparatory steps, and separates from them only, when they come to the critical and material facts themselves.

She recollects distinctly with M'Cormick, Vice's servant, "That my lord came home late one night disordered with liquor—that he made a great noise with the chair—that he quarrelled with her—that he jumped out of bed from my lady, and ran towards the window—that he called for Mrs. Lucas the midwife—swore he would send for her to see if my lady was with child, and with another oath declared, that if she was not with child, he would turn her away." All these circumstances she recollects minutely, and exactly agrees in them with the other witness; but as to my lady's screaming upon this occasion, there she separates. She says, My lady would have died first. As to her miscarrying, or to any discourse in the family the next day that she had miscarried—this she positively denies.

With regard to the miscarriage at Dunmaine, she agrees with Cole in the fact of my lord breaking the saucers, that those saucers had ugly or indecent figures on them, and that my lord had forbad their being brought to table. But that my lady was the least disordered upon this occasion, she denies—that she called up Mrs. Briscoe—that my lady miscarried—that she kept her chamber for several days, or even one day after—all this she positively denies, in direct contradiction to what has been sworn by Cole. And here, gentlemen, it will be extremely material for you to recollect that, pretty exactly to the time at which Cole swears this miscarriage happened, and my lady kept her chamber at least five days, it appears from the evidence of the defendant's witnesses (Mr. Aaron Lambert) that Sutton the surgeon, whom my lord brought over with him from England, but had turned out of his house, on account of some misbehaviour which he had been guilty of in the family, was twice sent for to Dunmaine; that he twice refused to go, being piqued at his having been turned out of the family; that being sent for a third time, and my lord's chariot coming for him, he went, and continued attending my lady at Dunmaine, to the best of the witness's remembrance, for a fortnight. This evidence was produced in order to discredit Brooks, the piece of a surgeon (as he called himself), produced on the part of the plaintiff, who, in my opinion, sufficiently discredited himself. You will consider, gentlemen, whether it does not go strongly in support of the testimony of Mrs. Cole, in contradiction and discredit of Heath; with regard to whom, an observation was made by the defendant's counsel, which I was exceedingly surprised to hear from that side of the table. They took notice of the peculiar excellency of our law, especially with regard to trials by jury, on which occasions the witnesses are examined *vivâ voce*; that from confronting witnesses who contradict each other, and carefully observing their appearance, and the manner in which they give their testimony, some light is to be collected; and the court and jury may in some measure be enabled to form a judgment upon a doubtful case.

The observation, gentlemen, is undoubtedly just, but what I little expected to have heard from that quarter. For, gentlemen, when you recollect and compare together the outrageous behaviour and vociferous asseverations of

Heath, with the calm, sedate, and modest demeanour of Cole, you will consider whether all the weight which can be laid upon an observation of that sort does not lie entirely on the other side.

Another point which hath been strongly, and indeed very properly insisted upon by the defendant's counsel, is this: they say it is extremely improbable, if this person were really the son of lady Altham, that my lady, who is proved to have lived two years after the death of her lord, should make no enquiry about him.

But, gentlemen, if you will compare the time of lord Altham's death with the time of kidnapping the boy, you will find, I think, that there is very little, if any, weight in this observation.

Lord Altham died in November, 1727; the letter which M'Mullen swears she sent to Mrs. Heath, notifying my lord's death, (and which Heath swears she communicated to my lady) bears date the 18th of that month; that letter must be some days at least going to England. On the 26th of the March following, the boy appears from the Tholsel book to be indentured to Thomas Hendry by the name of James Hensly, and on the 30th of April, the next month, it appears from Stevenson's book, that he passed over the bar of Dublin; so that taking that to be truth, (which, I think, is liable to strong objections of improbability, that M'Mullen sent that letter) there will be very little more than five months between lord Altham's death, and the transportation of the boy.

When Alice Bates appears, and gives you an account of her joking with lady Altham about her being with child, you are told by the defendant's counsel, that this is highly improbable; that lady Altham was a very haughty woman; that it is incredible she should condescend to such familiarity with a person so much her inferior.

Will it not appear to you equally improbable at least, that this haughty lady should condescend to receive visits once a week, as M'Mullen tells you she did, from her—the daughter of an ale-house keeper?

It must be allowed that my lady's living with alderman King for thirteen or fourteen months, conversing with him about her family affairs, and yet never mentioning to him her son, does *primâ facie* carry with it a great improbability of her having at that time a lawful son.

But considering that my lord had put her away upon a suspicion (either real or pretended) of her virtue, and had aspersed her character, it might not be so prudent, nor perhaps so probable, that she should discourse with him, or any other person, upon the subject of child-bearing.

However, allowing this to be improbable—will it not be equally improbable, that the care of communicating so material intelligence as the death of lord Altham, should be entrusted, not to this alderman King, or any other person of some tolerable figure in this town, but to such a woman as M'Mullen?

These, gentlemen, are circumstances which in my apprehension weigh strongly against the credit of M'Mullen's evidence. But taking that evidence to be true, you will consider, whether the small distance of time between lord Altham's death and the transportation, does not greatly lessen the force of this argument, which has been so strongly insisted upon by the defendant's counsel, especially if you add to it, the circumstances both of health and fortune, in which lady Altham appears to have been at this time.

And here, gentlemen, will come in very materially for your consideration the evidence of Mrs. Deborah Annesley, a near relation of this noble family.

She, who had before told you that her brother frequently visited my lord at Kinnea—that whenever he returned from thence, and whenever my lord visited at their house, it was their common practice to drink the health of my lord's son; that they all considered that boy as my lord's lawful son, and the future earl of Anglesea (so that it is not fact, as you have been told, that none of the relations of the family ever heard of lady Altham's having a son;) this lady, I say, tells you, that upon the death of lord Altham she and her sister made frequent enquiries after this boy: that for some time they could learn no account of him, and at last they concluded that he was dead. Now if it became a general reputation that he was so, then, gentlemen, though lady Altham likewise might have made frequent enquiries after this boy (*non constat* upon the evidence whether she did or not, and she might have made several, not at this day capable of proof,) and might receive an account, and give credit to it, that he was dead; and this might put a stop to any further enquiry, consistently with lady Altham's knowledge of this boy's being her legitimate son.

These parts of the case, independent of the other, which have all been fully laid before you by my Lord Chief Baron, seem to me to have great weight in them.

You, gentlemen, will consider what stress you will lay upon the observations I have thrown out to you, and what light may be collected from them.

There were several other things, gentlemen, which I designed to have mentioned to you; but the fatigue which we have all undergone hath been so very great, and the time I have had for recollection so very short, that my thoughts are too much dissipated to proceed, and indeed I have already trespassed too much upon your patience; considering the great attention which you have all along given, and the careful notes you have taken of the evidence; I shall therefore now conclude with that which I at first set out with, the kidnapping and the prosecution. If the case be doubtful, upon the other parts of the evidence (whether it be or not you are the proper judges,) I must then leave it to your consideration, whether the evidence of those two extraordinary facts may not be

sufficient to determine you what verdict to give upon this occasion.

Mr. Baron *Dawson*. Gentlemen of the jury, my Lord Chief Baron and my brother Mounteney have summed up the evidence, and observed upon it in so judicious and clear a manner, as makes any farther observations from me unnecessary; I shall therefore only require your patience for a few minutes, to shew you how I would consider this case if I was upon the jury, and my reasons for so doing. There are such contradictions on both sides of the question, that it would not be hard to shew, that several witnesses on each side are not entirely to be credited. Several of the witnesses on each side, not only contradict the witnesses on the other side, but also, in some instances, themselves, and therefore, independent of other things proper to be considered, one could not tell where to settle. If I was upon the jury, and to determine this question, I should lay before me and consider the story as told on each side; I should consider how far the story on one hand, independent of the witnesses, exceeded the other in point of probability: if on either hand the story told appeared extremely improbable, I should then require from that side, the strongest proof imaginable; and that because probability ought to weigh, except it be contradicted by testimony not to be doubted of: and therefore, if on either side the story should be extremely improbable, and probable on the other side, I should give my opinion on the side of probability. How far any thing of this kind appears in this case, will come under your consideration.

This is the longest trial ever known at the bar, this is the 15th day since the trial began; trials at bar are usually determined in one day, and the policy of the law hath taken care that no person should speak to the jury after any evidence given in court; there is no occasion, I am persuaded, gentlemen, to remind you that any thing heard out of court is not to govern you, you are to be governed by nothing but the evidence laid before you.

In the first place, the first stage is the time of the birth. You will take into your consideration the number of witnesses and their stations that swear to that birth, and also the number and station of the witnesses that swear in direct contradiction to them; if you cannot determine that question by comparing them together, you will then have recourse to the other part of the testimony, which is, the reputation of the country, and the persons that visited constantly at that house; you will consider the probability or improbability that a fact of this kind could have happened, and the people visiting not know of it. This could hardly be in a family of less consequence than my lord Altham's, but when you consider this family and the estate that was to fall to it, you will consider if there could be a birth, and persons visiting the family not knowing of it. There have been proofs on the one hand, laid before you of my lady's being with child, and on the other hand of her not being with child; either of these parties may swear false; but then you must take into your consideration, if they that swear she had a child swear truth, whether it could be possible that that could be kept a secret. There was not any interest or reason that it should be kept a secret. If it was not industriously kept secret, how comes it that all those persons that visited there should never have heard of a child?

To go to positive testimony, Laffan swears positively the child was presented to several gentlemen and ladies, and often to Mrs. Lambert. Mrs. Lambert swears positively the child never was shewn to her. Which is to be credited? There are several circumstances you will take into your consideration, concerning the probability or improbability of the birth of this child, whether the preparations for my lady's lying-in were suitable to her rank? whether Dunmaine, a small village, distant from any assistance necessary on such an occasion, was a proper place? whether my lady Altham would be easily brought to lye-in in the country, especially of her first child? These are considerations worthy your attention. There have been many gentlemen who gave evidence to there not having been a child; they swear not only that they never saw, but that they never heard of a child. I won't enter critically into every particular period of time sworn to by them; but if in three years those persons were three or four times a-piece at Dunmaine, and they swear truth, it will be of weight in the question whether there was a child or not. For admitting colonel Palliser and the other witnesses to be there four times a-year, you are the judges whether it is probable that there was a child there, and unknown to them. The separation is agreed on all hands to have been in the year 1716, and some little time after that, the child was brought home to my lord Altham's house. Dyer swears the child was not brought to Dunmaine in his time; but the witnesses for the plaintiff say, either from the separation, or soon after; and that the child continued in the house with lord Altham till about the year 1724. You are to observe, that my lord left Dunmaine about summer 1717; the separation was in February 1716-17, and lord Altham came up to parliament, and after that went to Kinnea; the parliament sat down the 27th of August 1717; then you will consider what has been sworn to of my lord's behaviour to this child all that time. During this period of time at Kinnea, Carrickduffe, Cross-lane and Frapper-lane, there are many witnesses on both sides that give a most contrary testimony to one another; there are witnesses on both sides, that I cannot say how to disbelieve, there are many of them that I cannot disbelieve, who swear to his being treated as a legitimate son; there are many of them whom I also cannot disbelieve, who give a contrary testimony, and say that he was treated as an illegitimate son; and colonel

Harman, Dr. Medlicott and colonel Wall gave an account of my lord's manner of calling him his bastard son. And in my apprehension, if the witnesses deserve credit, my lord Altham did during that time treat him to some persons as his lawful son, and to others, as his illegitimate son. You will consider the temper and disposition of lord Altham, and the circumstances he was in; he was a man not of prudence, either as to the management of his fortune or family; you will please to consider in what manner to account for this behaviour of his; whether there may, or may not be any reason for treating an illegitimate son in some companies as a legitimate son, and whether there may be, at any time, any reason for treating a legitimate as an illegitimate one. A man comes into the country where he was not known before, and has a child that he had not by his wife; perhaps he may have reason for treating him as a legitimate son. A man may carry an illegitimate child abroad, and visit with him in the neighbourhood, and pass him for his legitimate child; for perhaps he might be glad that that person whom he visited, should not know him to be a bastard; but a man can have no reason in my apprehension, for treating a lawful son as an unlawful one. Then you will consider the several schools the child was put to by lord Altham; you will consider whether these schools were fit schools for my lord, even in indigent circumstances, to put his lawful son to. You will consider the consequence of my lord's being under the influence of Miss Gregory; the consequence was, that this unhappy child was thrown abandoned to the world at not ten years old: here you will consider whether a treatment of that kind bespeaks him to be his legitimate or illegitimate son: had he been a legitimate son, surely my lord Altham must have had reflection enough to have considered what a dishonourable action he was doing publicly. On the other hand, you will consider that the influence of Miss Gregory might well be carried to make him doubt whether this child was his or not, if the child was by an improper woman. In the next place you will consider the situation and behaviour of the mother, that is the tender sex, and their tenderness to their children is hardly to be got the better of at any rate. Lady Altham was three years in Ross, and there is but one testimony of her seeing him then, and that is the man that swears he made him shoes. From this she comes to Dublin, and lives near my lord at the time this child is with him; it seems a little odd that she made no attempt to have this child brought to her but by Catherine O Neile; and I submit it to you, how far what she says can have weight; for she says, that my lady declared she would be glad to see the child, but she was afraid the servant that brought him would lose his bread. Can such a thing as that be put in competition with the tenderness of a mother for a child? That, gentlemen, is for your consideration. Why then, gentlemen, my lady comes to the house of alderman King, and he tells you, that for 13 or 14 months she frequently spoke to him of her family affairs, yet never mentions she had a child. It seems very strange; a woman, where she fancies herself injured, is mighty apt to tell the injuries done her to every body, and to aggravate her distress by saying she was deprived of the comfort of seeing her child. This was not to be entrusted to alderman King, but communicated to Mrs. Hodgers, whom she had never seen but once; you will consider this, gentlemen. In the year 1727 my lord died, and there can be no doubt but my lady knew it; there is not any proof of her having made any enquiry after the child: it is true, my lady might have made the enquiry after the child, and it might have proved ineffectual, because of his being transported so soon after; but of this there is no evidence; but how comes it she did not make the enquiry, especially where her own interest was to guide her in that case? And yet here is the force of the mother and interest joined together, and they work nothing on my lady Altham. You will consider that the estate of this family, on failure of issue, being to go to Arthur, late lord Anglesea, it was the interest of the mother to have made a strict enquiry after him; and yet there is a witness for the defendant, William Napper, who tells you, that he had a letter of attorney from lord Anglesea to take possession of the Ross estate; and by virtue thereof made numbers of minutes to several tenants, and no objection he ever heard made, that lord Altham ever had a son. That, gentlemen, seems a little extraordinary.

The next thing that offers, and the strength of the case for the plaintiff is, the transportation of him, and the directions the defendant gave to Mr. Giffard for the prosecution of him after his return into England. You will consider, as to the transportation, whether the defendant was the occasion of it, or not? If you should be of opinion he was, you will consider how far that will have an effect upon you. He claimed to be the lawful son of lord Altham; you will consider whether that might have been an inducement. If you should be of opinion that the story on each hand carries an equal degree of probability; this of the transportation should, in my apprehension, add great weight to the case of the plaintiff: If, on the other hand, you should not think them equally probable, you will consider how far the transportation will make you give credit to a fact you should otherwise think improbable. The same may be said in respect of the attempt in England, in relation to the prosecution of him there. I have mentioned before, that several of the witnesses on both sides cannot be very well depended upon; and therefore I think the probability or improbability of the thing may be of great weight in determining the present question.

Then Mr. Caldwell, attorney for the plaintiff, delivered to the jury the issue which they were to try. Afterwards the jury withdrew into the

jury-room, and in about two hours time they brought in their verdict.

Clerk of the Pleas. Cryer, make proclamation.

Cryer. Hear ye, hear ye, &c.

Clerk of the Pleas. Gentlemen, which do you find, for the plaintiff or the defendant?

Sir *Thomas Taylor*, Foreman. We find for the plaintiff, with 6*d.* damages, and 6*d.* costs.

Counsel for the Plaintiff. My lords, I pray judgment on behalf of the plaintiff, on reading this verdict, and that it may be recorded.

Clerk of the Pleas reads the verdict.

Mr. *Lee, of Counsel for the Defendant.* My lords, I hope your lordships will not now give judgment, for I humbly conceive the plaintiff's declaration is bad, and that he can't have judgment [and he offered some matter in law in arrest of the judgment.]

Court. Gentlemen, we will adjourn to nine o'clock to-morrow morning.

The Cryer accordingly adjourns the Court.

Saturday Morning.

Counsel for the Plaintiff. My lords, we pray judgment in behalf of the plaintiff on this verdict.

Court. Take judgment.

Counsel for the Defendant. I pray this Writ of Error may be received.

Court. Allow the Writ of Error.

A Report of this Trial is inserted in vol. 14, pp. 25. 87. 141. 205. 255. 316. 373. 431. 537. 599. of the Gentleman's Magazine; and in vol. 13, pp. 93. 204. 306. 332. of the same work I find the following particulars relating to Mr. Annesley:

"FROM THE MEMOIRS OF AN UNFORTUNATE YOUNG NOBLEMAN RETURNED FROM A THIRTEEN YEARS SLAVERY IN AMERICA, WHERE HE HAD BEEN SENT BY THE WICKED CONTRIVANCES OF HIS CRUEL UNCLE.

"The first 40 pages relate to the noble parents of this abandoned child, whose life, it seems, was an obstruction to the grant of some leases, which the extravagance of the baron his father made necessary. He was therefore removed from a public, to a very obscure school, and letters were written to corroborate a report of his death, and of that of the baroness, who had been forced to retire for subsistence, to the duke her father in another kingdom. After which, the relation says, that the baron her husband married a woman who happened, amidst the variety he had tried, to please and fix him.

"On his father's ceasing to pay for his board at school, this young nobleman began to feel his misfortunes. His clothes grew ragged and too little for him, his fare coarse and scanty, no recreations allowed, never looked upon but with frowns, nor spoke to but with reproaches, continually reprimanded, often cruelly beaten, sometimes barely for not doing what none took the pains to instruct him in. While others of his age were at their school exercises, he was employed either in drawing water, cleaning knives, or some servile office. Thus he continued for more than two years, when growing more sensible of his ill usage, he began to murmur, but was told that he was kept only on charity, and if he liked not that way of life, he might seek a better: the poor innocent, thinking he could not fare worse, without clothes, money, or the least hint given him where to find his father, turned his back upon that scene of woe, travelled without knowing where to go till he came to a small village. His tender limbs being much fatigued, for he was but turned of ten years old, he sat down at a door and wept bitterly for want of food; a good old woman relieved him with some bread, meat and butter-milk, which enabled him to pursue his journey, till he arrived at the capital. Here friendless and hungry he fell again into tears, which not availing him, he was obliged to beg, and by his modest deportment obtained some relief, and at night took up his lodging in a church porch. Next morning, recollecting that his school-master talked of writing to his father in this city, he went from one street to another, enquiring for the baron. At length was informed that his lordship had retired from town some time, none knew whither, on account of his debts. Our noble wanderer, now without hope, hunger pressing, and some churlish people threatening him with the house of correction for asking relief, he took to running of errands, and procured a mean subsistance, after the manner of other poor boys. It happened one day, some boys fell upon him and beat him severely, calling him dog and scoundrel, words he could less bear than the blows; he answered, They lied,—he was better than the best of them,—his father was a lord, and he should be a lord when a man.—After this he was in derision called my lord, which the mistress of a house hearing, called him, and seeing he had no deformity to deserve the title, as vulgarly given, Tell me, says she, why they call you my lord. Madam, replied he, I shall be a lord when my father dies. Ay! said she, who is your father?—The baron of A—— and my mother is the baroness of A——, but she has left the kingdom, and they say I shall never see her again.—Who tells you all this?—I know it very well, I lived in a great house once, and had a footman, and then was carried to a great school and was reckoned the head boy there, and had the finest cloaths: afterwards I was carried to another school, and there they abused me sadly, because they said, my father would not pay for me.—Why do you not go to

your father?—I don't know where to find him, answered the poor innocent, and burst into tears.—Do you think you should know him?—Yes, very well, though it is a great while since I saw him, but I remember he used to come in a coach and six to see me, when I lived at the great school. Moved at this account, but willing to examine him more strictly, she said, You are a lying boy, for that lord's son is dead. He replied, Indeed I tell the truth, I never was sick, but once when I had a fall and cut my head, and here is the mark, putting his hair aside, and my father was very angry with those who had the care of me. The woman, who kept an eating-house, to which his father sometimes came, having heard that his son and heir was dead, felt no little surprize to see the child reduced to so miserable a condition. She knew enough of the extravagance and necessities of the father, and that certain leases on which money was raised, could not be granted while this son was publicly known to be alive: and not doubting his innocent assertions, gave him not only food but clothes, and promised to write to his father.

"In the mean time his uncle came to the house, and the good woman told him what she had heard and done. He said, it was an imposition: for his nephew was dead: I mean the boy that was called my brother's son; for though his lady had a child, he was not the father. I can say nothing to such a distinction, replied the woman, but as he was born in wedlock he must be the heir, and ought to be educated in an agreeable manner.

"The uncle desired to see him, who, being new clothed, and having beautiful hair, came in with an engaging mien, and most respectful behaviour to his benefactress, as well as to the gentleman, as he appeared to be of distinction, who instead of being moved with compassion, sternly cried out, What name is this you take upon you?—I take none upon me, Sir, but what I brought into the world with me, and was always called by. Nobody will say but I am the son of the baron of A——, By whom? demanded the gentleman.—By his wife the baroness of A——, replied the other with more resolution than could be expected.—Then you are a bastard, cried the uncle, for your mother was a ——. If I was a man, you should not use my mother or me thus, whoever you are, said the child with tears in his eyes, which moved the woman of the house to intercede for milder treatment.

"The child said at last he knew the gentleman was his uncle, for he came once with his father to see him at school, but the good uncle replied, he knew nothing of it, and went out of the room, the woman followed, and entreated him to consider his nephew, and not refuse him a proper education. He promised to speak to his brother, but desired her to keep the affair private. He was indeed as good as his word, informed his brother of the condition his nephew was in, but observed further, that although some care should be taken of his education, it would be of ill consequence, on account of the leases, were he known to be alive, before the baron's decease. He therefore advised St. Omers, or some place beyond sea, where he might be trained up at a small expence. The baron readily approved this advice, and gave his brother money to reimburse the woman, and for further expences. The uncle took the conduct of the whole affair upon himself. The first step he made was to agree with the master of a ship bound for Pensylvania, for a sum of money paid down to transport a boy thither, and sell him to the fairest bidder. To palliate the villainy he told the captain, the boy was the natural son of a person of condition, but had vilely behaved, and as he deserved no regard on that score, his friends were loth to suffer disgrace by him, therefore chose to send him out of the way of temptation. Then he returns to the woman, tells her the boy was to embark forthwith for St. Omers, and takes him away with him: mean time the vessel not being ready to sail, he lodges him in a private house, at his devotion, where the boy was kept concealed till things were ready for his embarkation. Soon after the baron was taken ill and died. The worthy uncle immediately took upon him the title of baron, with the estate appendant on it: the baron's sudden death is supposed to be the cause why he made no declaration in behalf of his son, on his death-bed. Meanwhile the unhappy youth, now real baron, was kept too close a prisoner to hear one word about it. Being told by his uncle that nothing should be wanting to retrieve the time he had lost, the hopes of future accomplishments gave him new life, he went on board the ship, and was easy and gay, till a storm arising, ruffled the pleasing prospect and filled his head with all the usual terrors that attend it.

"The fears of death no doubt had such an effect on our young voyager, that though ignorant as yet of his misfortunes, he heartily wished himself on land. Alas, he little imagined the severity of his fate was yet to come!

"The violence of the storm, which had lasted three hours, being abated, a cloth was spread in the captain's cabbin, our young baron was going to place himself at the table, when one of the sailors checked him with—"Hold, youngster, do you think you are to be messmate with the captain?" This sea jest, seconded by the loud mirth of two cabbin boys who attended, a little disconcerted our unhappy young nobleman. The captain saved him the trouble of a reply by saying: "The boy will not chuse the worst company I find, were he left to himself, but he will know his distance better hereafter:" This sarcasm plunged him into a silent confusion, during which he had the mortification to see the captain dine elegantly; after which he had his allowance of salt beef and pease given him in so coarse a manner, as might have acquainted him what he had to apprehend. He began to mutter, that he thought himself ill used, and would acquaint the baron his father with it,

which naturally raising the curiosity of the sailors, the captain in his own vindication related the story as he had it from the kind uncle, by which the young baron being fully apprized of his cruel destiny, it produced so visible a despair, that the captain thought himself obliged to confine him to the hold. But he mistook the remedy; the youngster's generous spirit was not to be tamed by ill usage. A disdainful sullenness succeeded: he obstinately refused all sustenance though pressed to receive it by beating, or swallow it by force. Arguments, menaces, and stripes were equally vain. The captain saw a necessity of changing his method, for his own interest. He sent for him into his cabbin, apologized for the ill treatment he had received, as done without his warrant or privity, and assured him, when they reached the Indian continent, he would employ his good offices to place him to his liking, with other arguments to reconcile him to his captivity. But all that was urged had no effect on the young baron, till promised his case should be represented to his father. This assurance reconciled him to life, and the captain using him kindly, to fit him for the market he designed, our young exile landed well in Pennsylvania.

"Here the captain repeating his former assurances, he was sold to a rich planter in Newcastle county, called Drummond, who immediately took him home, and entered him in the number of his slaves.

"A new world now opened to him, and being set to the felling of timber, a work no way proportioned to his strength, he did it so aukwardly, that he was severely corrected. Drummond was a hard inexorable master who, like too many of the planters, consider their slaves or servants as a different species and use them accordingly. Our American planters are not famous for humanity, being often persons of no education, and having been formerly slaves themselves, they revenge the ill usage they received, on those who fall into their hands. The condition of European servants in that climate is very wretched, their work is hard, and for the most part abroad, exposed to an unwholesome air, their diet coarse, being either Poul or bread made of Indian corn, or homine or mush, which is meal of the same kind moistened with the fat of bacon; and their drink, water sweetened with a little ginger and molasses. Our young captive began to sink under his calamity, when he met with a comfortress in a female slave of near sixty, who had been perfidiously trepanned by a wicked husband, and sold to Pennsylvania. As she dressed the food for the slaves and carried it out to the field to them, she soon took notice of him, and her pity increased on hearing a story that so nearly resembled her own. She had a good education and was not unacquainted with history, so that her conversation afforded the young baron both consolation and instruction. She sometimes wrote short pieces of instructive history, on bits of paper which she left with him in the field, and to look over these he often neglected his labour, regardless of the blows, he knew he was to suffer, so eager he was to improve his mind. He regarded this slave as his mother, and was treated by her as a favourite child, but in four years she died, and left him in the deepest affliction for her loss. His master's continued ill usage, and the innate aversion he had to slavery, at last determined him to endeavour to make his escape. Yet he kept this resolution to himself, having little inclination to converse with his fellow slaves, whose manners were no way conformable to his own. However one of them who entertained the same design, observing his melancholy, broke his intention to him, and informed him that hearing a ship was ready to sail from Dover (a neighbouring port) to England, he resolved to take that opportunity and invited him to partake his flight. The young baron, after some questions, agreed to the proposal, and went early to bed, in order by day-break to put their project in execution. But what was his surprise on awaking, contrary to custom, to find the day advanced, and the family in confusion. The other slave, Jacob, had robbed his master and fled with the booty. Messengers were dispatched in pursuit of him every way. How did the young baron bless his good fortune, that had saved him from such a danger, as being an innocent accomplice in Jacob's villainy! He shuddered at the guilt he might have contracted by partaking his flight. Jacob had not gone 27 miles when he was retaken with his master's effects, and brought back to receive the punishment he deserved, after which Drummond sold him to a planter at Philadelphia, as fearing he might take his revenge for what he had suffered.

"The young baron was now seventeen, and had passed five years of the servitude, for which he was sold, when weary of the severity of his condition, in a sullen fit of despair he left the house of Drummond, resolved to suffer death, rather than be brought back. Thus armed with a hedging bill, he set out without knowing his course, and as he was active and nimble, had got some miles before he was missed. Immediate pursuit was made after him, but to no purpose. Three days he wandered in the woods, and having but little nourishment, grew faint, when he spied a river which he took for the Delawar, but was indeed the Sasquahana, which parts Pennsylvania from the Iroquois nations. He also saw a town at some distance, but not caring to venture near the shore, he lay down at the foot of a tree, when fortune brought him a present relief to plunge him in new distresses.

"It was now twilight, when he heard the trampling of horses on full gallop, advancing towards him, and lifting up his eyes from his covert, perceived two men well mounted; one of whom had a woman behind and the other a portmanteau. As these did not seem to be pursuers, his courage revived on hearing the foremost say to the woman behind him, "Come,

my dear, it is time to take some refreshment, and this is a convenient place." With that he alighted, helped her off, and his attendant fastening the horse to a tree, took some meat out of one of his bags, and spread it on the grass, with a bottle of wine, and they all sat down to the refreshment, which our young baron would willingly have partook, if he durst. However, in peeping at them, he made a noise, that alarmed the servant, who starting up saw him, and cried to his master they were betrayed, at the same time striking at him with his drawn cutlass. He kneeling protested his innocence, and after repeating his story prevailed on the master to pity his misfortunes. They now invited him to share their repast, which he thankfully accepted, after which they told him they were going to Apoquenimink to embark for Holland, and would procure him a passage with them. This happy news made him forget all he had suffered, and gave him new spirits for his journey. They remounted, and he followed on foot; but they had not gone far through the woods, when they saw by the horses and lights behind them, they were pursued. The lady gave all the signs of the utmost consternation. "It is he, it is he himself, she cried, we are lost for ever." The approach of the pursuers gave no time for deliberation. The lady jumped off, and hid herself amongst the trees. The gentleman and his servant drew, and the baron with his hedge bill, in gratitude thought himself bound to assist the weakest side, but the combat was unequal, and they were surrounded and taken prisoners. The lady, who had fainted, underwent the same fate, and in this manner they were conducted that night to a village, and the next day lodged separately in Chester gaol.

"It was here, too late, the young baron was informed that the lady was the daughter of a rich merchant, who having an inclination for a young man beneath her rank, was by her father forced to marry against her will; but still keeping company with her first lover, (the person taken with her) they agreed to rob her husband and leave the country, who having timely notice, had pursued them, and there was no doubt but they would suffer the rigour of the law.

"The noble slave trembled at this relation, he saw the hazard of associating himself with strangers, and yet in the circumstances he was in he knew not how to avoid it.

"The trial came on next morning. The lady, her lover, and servant, were condemned to die for robbery. The sentence of the young baron was respited, as he did not belong to the guilty persons, but he was remanded to prison, with orders that he should be exposed every day in the market-place to public view, and if it could be proved, that he had ever been at Chester before, he should be deemed accessary to the robbery and suffer death.

"In this suspence he remained 5 weeks, when some affairs of traffic brought Drummond, his old master, to Chester, who immediately reclaimed him as his property. Before his departure, our young baron was a melancholy spectator of the execution of the three criminals, taken with him.

"The fruit the young baron received from this attempt, was (by the laws of that country) to find the remaining two years of his servitude redoubled, and the severity of his master proportionably increased. However upon a complaint made to the justices of that province, attended with proofs of his ill usage, his master was obliged to sell him to another; but he gained little by this alteration in his condition. He bore it notwithstanding for three years with tolerable patience, but conversing with some sailors, who were returning to Europe, it awakened all his ardour for liberty, and he resolved at any rate to venture a second escape. His design proved again abortive; he was re-taken before he could get aboard, and though he had but one year to serve, he was condemned to suffer for five. This last disappointment and additional bondage quite sunk his spirits. He fell into a deep melancholy, which appeared in all his deportment; so that his new master apprehending he might lose him, began to treat him with less austerity, and recommended him to the care of his wife, who being a woman of humanity, often took him into the house, and gave him part of such provision as they had at their own table, or in his absence ordered her daughter (who was called Maria) to perform the same kind offices. This young girl soon conceived a great tenderness for the young baron, and endeavoured all the ways she possibly could to relieve his sadness, which was such as gave him no room to take notice of what otherwise he must have observed. It happened she was not the only one on whom the graceful person of our noble slave had made an impression; a young Indian maid of the Irokese nation, had distinguished him from his fellow slaves, and as she made no secret of her affection, used to express her kindness for him, by assisting him in his daily toils, telling him, if he would marry her when his time of servitude was expired, she would work so hard for him, as to save him the expence of two slaves. The young baron used all the arguments he could, to persuade her to stifle a passion to which she could hope no returns. It was on one of these occasions, that Maria, his master's daughter, surprised him sitting with this Indian maid, and jealousy awakening her love, she loaded him with reproaches, and left him without allowing him to make a reply.

"Thus did our young baron in his captivity find himself the object of a passion, he had no taste or inclination for himself, and studied as much to shun the caresses of his two mistresses, as others would have done to return them. Unluckily Maria's impatience to see him, carried her one day to a field distant from the plantation, where she knew he worked. In her way thither, she met her rival, bent on the same design. The Indian, no longer mistress

of herself flew at her like a tygress, so that it was not without some struggle she got out of her hands, and fled towards the place where the noble slave was employed. The Irokese finding her revenge disappointed, and perhaps dreading the consequences of the other's power and resentment for the assault, made directly to a river adjacent, and plunging herself in, ended at once her love and her life.

"Maria, who saw this catastrophe, was brought home to the house pale and speechless; she was put immediately to bed, and when she recovered, all she could say was to repeat the name of the Indian maid with great emotion. This, joined to the account of some slaves, who had seen all that passed between them, and who were witnesses to the Indian's fate, greatly alarmed her father and mother. James only (the noble slave) guessed the real truth of the matter; and as Maria often mentioned his name, it was concluded by her parents to send him into her room under some pretence or other, and place themselves so as to hear what passed. This stratagem had the desired success. They heard their daughter express the most violent passion, which they found was no way encouraged by their slave. As they could not but entertain a just opinion of his honesty and prudence, they resolved to take no notice of what passed; but in order to cure their daughter of her passion, it was concluded to give our young baron the liberty his late behaviour deserved. The mistress soon acquainted him with this good fortune, and he now indulged the pleasing hopes of returning to Europe, and being restored to his honour and fortune. He looked on himself as already free, when his master gave him notice he was to go with him next day to Dover: but his master, having secretly less favourable intentions, as he was very covetous, began to reflect, that five years the young baron had to serve was too much to lose; and though to his wife he pretended his intention to set him free, he secretly agreed with a planter near Chichester in Sussex county, where with the usual forms he transferred, or sold him for the term he had to serve.

"Never was astonishment equal to that of the noble slave at finding the baseness and ingratitude of Drummond. He reproached him with his breach of promise; and had not those present interposed, he had probably made him pay dear for his perfidy. His new master imagining by this conduct, that he was of a turbulent disposition, began to repent his bargain: However, as he was a generous good-natured man, he treated him mildly; so that his work was easy, and he had the privilege of a good collection of books, which was a great consolation to him. This kind usage had such an effect on his generous temper, that he resolved patiently to wait the recovery of his liberty; but unluckily his master died in three years, and the heir disposing of part of the plantation, he was sold to a new master in Newcastle county, almost within sight of Drummond's plantation. Here he was informed that Maria, his old mistress, having had a child by one of her father's white slaves, he was by the laws of the country obliged to marry her; and they were gone to settle at a distant plantation, which her father had bought for him; and what more nearly concerned him, he was told, that two brothers of Turquoise, the Indian maid, (whose despair for him had occasioned her tragical death) had vowed his destruction. As he knew the desperate and revengeful temper of that nation, he was as much on his guard as possible, but all his precaution had been fruitless, if Providence had not interposed in his favour. These Indians watched him so narrowly, that they attacked him one day in the remote part of the woods, and with a knife had certainly dispatched him, had not some persons, in search of a fugitive slave, at that instant came up and seized the assassins. He escaped with a slight wound in his hip, and the Indians being carried before a justice were sentenced to pay the surgeon for his cure, and the master for the loss of time it would take up, and to give security for their good behaviour. He continued two months ill of this wound, and neither the surgeon nor master hastened the recovery, which was against both their interests. During this indisposition a new accident involved him in fresh difficulties.

"Going out one Sunday evening for the benefit of the air, he sat him down under a hedge, which parted his master's ground from that of a neighbouring planter; after he had read here a while, he found himself drowsy and fell asleep; and when he awoke he perceived it was dark, and heard near him the voices of two persons, which raised his curiosity. His surprise increased to find by the conversation, that his mistress was forming a plot with Stephano their neighbour's slave, to rob her husband and go off with him for Europe in a ship, he had prepared for that purpose. The noble youth was struck with horror at the discovery; for the perfidious woman in outward appearance seemed to live very happily with her husband, who was fond of her to excess. He resolved to prevent the villany, at first by revealing the whole to his master; but reflecting, that a woman capable of such treachery, might have art enough to make a good natured husband believe her innocent, he resolved to try another method. He waited till the guilty pair separated, and following his mistress, hastily over-took her, and told her he was informed of all that passed. He remonstrated to her the baseness of her designed flight, and ended with conjuring her to reflect, and change her purpose; in which case he assured her, what had passed should remain with him for ever secret.

"The mistress, finding herself discovered, pretended a sincere repentance for her fault, which she promised him she would never repeat; adding such marks of kindness to him, as gave him too much cause to imagine, her unlawful passion had changed its object.

"As the young baron could not prevail with himself to gratify the passion of his mistress, she at last considered him as a dangerous person, and endeavoured to get rid of him by poison; which, though his servitude was almost expired, determined him to make his escape He luckily met with a ship that brought him to Jamaica, and in September 1740, he entered on board one of the ships of war as a common sailor; but a discovery being soon made of his birth, and several circumstances of his story remembered by some in the fleet, he was introduced to the captain, who shewed him particular regard, and the admiral, commiserating his misfortunes, not only accepted of a petition for his discharge, but soon sent him to England to prosecute his claim. When he arrived, he applied himself to a gentleman who had been an agent for the family, and it was not long before he had an opportunity of giving a strong proof of the justice of his cause.

"The woman who had nursed this unfortunate young nobleman three years, hearing of his arrival, and being desirous to see him, was introduced to another gentleman, when she said, "You are not my boy, you are a cheat." Afterwards she was brought into a room, in which were five or six gentlemen at a table, and one at a window looking out of it, and after viewing the former, said, "My boy is not here, except he be at the window," then seeing his face, she immediately cried out in great rapture, This is he, and kissed him. But being asked to give a particular circumstance which might convince others that she was not deceived, she answered, that he had a scar on his thigh; for having in his father's house seen two gentlemen learning to fence, the foils being carried away, he and his young playfellow got two swords, and went to fencing, by which he received a deep wound in the thigh. Upon examination, the scar of it was very visible."

The reader may perceive some confusion in the preceding Narrative; what degree of authenticity it possesses I pretend not to determine.

James Annesley, esq. died January 5, 1760. He was twice married; first, to a daughter of Mr. Chester, at Staines-Bridge in Middlesex; by whom he had one son and two daughters. The son, James Annesley, esq. died November 1763, S. P. and the eldest daughter is married to Charles Wheeler, esq. son of the late captain Wheeler in the Guinea trade: secondly, to a daughter of sir Thomas J' Anson of Bounds, near Tunbridge, in Kent, gentleman-porter of the Tower, by whom he had a daughter and a son, who are both dead; the son, aged about seven years, died about the beginning of 1764; and the daughter, aged about twelve, died in May 1765. *Former Edition.*

END OF VOL. XVII.

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